UNIT 1: INTRODUCTION TO LAW OF EVIDENCE

Three Kinds of Evidentiary Rules:

1. Rules of Process → How evidence can be introduced
2. Rules of Admissibility → What information ToF can consider
    - Be generous & allow for most information to go before ToF
    - R v Jarvis: Access to evidence has constitutional status in criminal trials
    - Can be restricted admissibility (ie. Limiting instructions)
        - Rules of Practical Exclusion (ie. Cant have 100 expert witnesses)
        - Rules of Subordinated Evidence (Evidence excluded under policy/principle → Solicitor/client, Charter issues)
        - Rules of Non-Evidence – Irrelevant information that distorts the truth (hearsay, collateral fact)
3. Rules of Reasoning → Weight of evidence, evaluated during admissibility & deliberation

Trends in the Law of Evidence:

1. Move to purposive approach
    - More flexibility → Ex. Hearsay rules, aboriginal evidence rules
2. Development of overarching exclusionary discretion
    - Probative vs. prejudicial → greater discretion to exclude
3. Increased admissibility

Objectives of the Law of Evidence:

1. Truth-seeking

- ***R v Noel***: The search for truth cannot come at too high a cost → CANNOT BE PURSUED UNFAIRLY
    - If jury cannot follow the limiting instruction that brother's testimony cannot be used to convict and only for credibility, it should not be admitted (LHD on dissent: Truth is essential to justice & cannot get away with murder)
    - S. 13 Accused has the right to silence and is not competent or compellable
    - If truth seeking was the sole goal, many laws of evidence would not exist → Balance this with ensuring we do not convict the innocent

2. Procedural Fairness

- Accused is entitled to a fair trial
    - INCLUDES THE RIGHT TO SILENCE
    - Defense needs only to raise a doubt (***Lifchus*** → Presence or absence of evidence)
- Until ***Stinchcomb****e*, this was impeded by the ability of the Crown not to disclose documents
    - Per ***Taylor***, defense need not disclose to Crown except for witness evidence, alibi, expert testimony
    - But may result in swamping in materials → ***Sleigh***
- Also why evidence is inadmissible if probative > prejudicial

3. Protection of Parties and Justice System Participants

- Rape shield provisions, 3rd party record provisions
- Presumption of innoncence

4. Trial Efficiency

- Collateral fact rule → Cannot call contradictory evidence on collateral facts
- General rule is to have 1 trial for multiple defendants unless they need to give evidence against each other

5. Public Confidence

- Wrongful conviction undermine this → Milgaard, Dix
    - ***R v Hart***: Admissibility of Mr. Big operations
- ***Corbett*** → Err on the side of inclusion, not exclusion
- ***Sheppard*** → Judges are required to give reasons for judgment

<u>Modern Context → Wrongful Convictions:</u>

Causes of wrongful convictions include:

1. Eye witness identification

- If the only evidence you have is eye witness identification, it is not sufficient the judge can direct an acquittal or find a non-suit

2. Problems with disclosure → Stinchcombe, Sleigh

3. Informants

- New guidelines in AB → Need to form a committee to allow for informant
- Informant must have evidence that only they would know

4. Junk Science → See R v Mohan

- Should not be able to put bizarre, untested theories before the ToF

5. Malice → R v Dix

Wrongful conviction cases: Milgaard, Hanratty, Morin, Nepoose, Parsons, Truscott

R v Hanratty: Man hung and then found innocent after death

Circumstances: Public pressure, unpopular defendant, ends justify the means, et.

Immediate causes: Eyewitnesses, junk science, disclosure, informants, false confessions

<u>Impact of the Charter:</u>

Three important sections:

1. s.24(1) → Significant remedial powers where there is a Charter breach/evidence is insufficient

2. s.24(2) → Ability to exclude evidence gained by Charter breach if it would bring admin of justice into disrepute

3. s.52 → Voids legislation inconsistent with Charter

<u>Features of the Adversary System:</u>

- Counsel are bound by code of professional ethics, determines what evidence to present
- Independent arbiter --- no prior knowledge of the case

- Evidence largely from *viva voce* evidence in public, under oath
- One party brings dispute before Court and carry burden of proving their case
- Parties themselves must gather the evidence
- Judge trier of law (and fact if no jury)
- Judge takes no active part in proceedings – left to counsel on both sides
- Counsel restricted as to the types of questions they may ask in examination in chief but cross examination much more open --- the right to confront
- Physical/"real" evidence is exhibited before the Court so that trier of fact can examine, left for their consideration at the end of the case

	Civil	**Criminal**
Parties	P and D: Allowed multiple P's and multiple D's and also, 3rd, 4th, etc. 5th parties **Pleadings:** very specific	Crown and Accused **Pleadings/Indictment:** very broad
Burden of Proof	BOP In the past, there was a sliding scale e.g. actions for criminal misconduct increases standard. *FH v. McDougall* There is only *1* standard in civil cases	Beyond a reasonable doubt (BARD) *Starr:* BARD is not certainty, but it is much closer to that than it is to BOP.
Disclosure	All parties are called to make full disclosure	Only Crown bears a disclosure burden (*Stinchcombe* 1991)*;* accused has burden only in 3 circumstances (Taylor)
Competence & Compellability	Both parties are Competent and Compellable	Accused is incompetent and non-compellable by the Crown
Prior to Trial	**Examination for discovery:** - Get 'admissions' , 'read in' from the discovery in the trial - P gets to examine the D (and VV) - Refusal to participate in a discovery results in having your pleadings struck	**Preliminary Inquiry:** Pre-trial hearing, at which transcript is generated which you can use later, e.g. if witness later changes story/recants Crown must produce "sufficient evidence" to show that there is *some* evidence on which a R jury *could* convict; then committal for trial ordered. Accused can call evidence, but need not to. –but may want to preserve it for the record (ie. in case of death, MH) s. 715 Accused must decide: 1) Whether to plead guilty 2) Whether to testify

<u>Snapshot of a Criminal Proceeding</u>:

1. Investigation
    - Right to remain silent both before and during arrest
2. Arrest and charge
3. Interim Release → Bail
4. Disclosure
    - Stinchcombe → Crown has the burden to disclose all of its documents to the defense
    - Taylor → Defense needs to disclose when:
        - 1. Accused intends to use the defense of alibi
        - 2. Expert evidence is going to be called (s.657.3(3))
            - Crown → CV and name 30 days before; report in a reasonable time before trial
            - Defense → CV and name 30 days before; report before Crown's case

- 3. When Charter relief will be sought (***Dwernychuk***)

5. Election & Plea
   - Accused has to say → Guilty or not guilty
   - Crown can decide whether to try the matter in QB or in provincial court
   - Order of accused on indictment is important for multiple party offenses – it's the order in which you put forward your evidence

6. Preliminary Inquiry → s.548
   - Only happens if your matter is tried in QB
   - **Needs to be sufficient evidence on which a properly instructed jury may convict**
   - Defense under no obligation to disclose or call evidence
   - Direct Indictment → Skips PI
   - Defense gets the opportunity to see the case before them, preserve any evidence (s.715)

7. Trial
   - Incompetency/Non-compellability of accused
   - Voir dire
   - Directed verdicts
   - Charge to Jury
   - Duty to give reasons (***R v Sheppard***)
     - Jury under no obligation to provide reasons

1. Crown goes first/2. Defense can move for acquittal/3. Defense calls evidence/4. Charge to jury/5. Deliberte

<u>Snapshot of a Civil Proceeding</u>:

- The exchange of pleadings (extensive) and joinder of issues
  - Once pleadings are filed – move into an important stage of the proceedings = **affidavit of documents** – complete disclosure is mandatory in civil – all documents that touch upon matter in dispute must be disclosed (subject to one thing)

- Parties are both mutually competent and compellable
- Examination for discovery (pre-trial) and mutual obligation to make full disclosure
  - Plaintiff gets to examine the defendant and vice versa
  - Number of important features:

  i) Opportunity to assess your opponents case – what kind of witness is this person under oath?
  ii) Chance to seek admissions from the other side
  iii) If P elects to testify at if she/he changes their evidence (even subtly) you can as the D put that prior testimony to the plaintiff and seek an explanation for the change in testimony – court can accept all or none or part of what the witness said
  iv) Can be used as a settlement tool – once discovery is complete you can reassess the case
- Vast majority of civil matters settle without going to trial
- Trial – mini-trials, judicial dispute resolution and formal trial itself

- Trial is to be held before an independent adjudicator (e.g. judge sitting alone or a jury) with no prior knowledge of the dispute. Permitted in limited circumstances to "challenges for cause" = deciding which juror is independent enough to sit on the jury
- Leave it up to the parties themselves to gather evidence

What use can be made of evidence given in discovery in subsequent proceedings?

Henry → If witness is COMPELLED to testify, it cannot be used in subsequent proceedings; if voluntary the testimony can be used

Nedulco → Since an examination for discovery is compelled, it cannot be used subsequent under Henry. But Moldaver J allows it in civil proceedings ** Rules of evidence often relaxed in civil cases

Sources of the Laws of Evidence:

Statute: generally area of common law but some areas covered by statute

Canada Evidence Act:

- s.4 competency and compellability
- s.9 rules for examination-in-chief
- ss.10/11 rules for cross-ex
- s.12 rules for cross-ex of witness re: prior Criminal Record
- s.16/16.1 competency of witnesses
- s.29 bank records
- s.30 business records

Alberta Evidence Act:

- ss.3-9 competency of witnesses
- ss. 10-12 corroborative evidence
- ss. 22-25 examination of witnesses
- s.26 admissibility of previous court proceedings
- ss. 27-41 statutes, public documents, banking records and electronic records

Evolving Common Law Rules of Evidence:

Ares v Venner: Rejects Myers v DPP and allows business records in as admissible hearsay

R v Khan: Started the principled approach to hearsay, introduced concepts of necessity and reliability

R v KGB: Allowed for the introduction of prior inconsistent statements as evidence of the crime & changed the laws of evidence FOREVER.

R v Starr: Re-affirmed *Khan* and developed a new framework for allowing in hearsay evidence. Introduced the principled approach & the idea that the traditional exceptions must yield to the principled approach

R v Oickle: If the statement is made to police, it must be video recorded (Accused need not know that they are being recorded) → No more verbal police confessions

UNIT 2: BASIC RULES OF ADMISSABILITY

Admissibility → A question of law determined by the trial judge

Five Factors Governing Admissibility:

1. Is the evidence relevant and material?
   - Does it prove or disprove a matter **AT ISSUE** between the parties?
   - Just needs to have SOME relevance → "LOGICAL RELEVANCE" (***R v Morris***)
   - Materiality → Does it relate to a matter at issue?
   - Relevancy → Does it assist in proving the matter at issue?
2. Is the evidence barred by an exclusionary rule? → Assuming relevance
3. Should evidence be excluded on the basis of a Charter breach in the manner it was obtained?
4. Is the evidence legally relevant?
   - ***R v Mohan***: Is the value of the evidence worth the costs?
   - PROBATIVE > PREJUDICIAL?
5. Do the same rules apply to defense evidence in a criminal case?
   - To exclude defense evidence: prejudicial must substantially outweigh probative
   - Obstacles to defense evidence: (1) Rape shield (2) 3rd party records (3) 3rd party records sex assault

R v Mohan:

Defense looks to introduce "junk science" evidence re: classification of sex offenders in rape of 3 girls.

Legal relevancy is a three part test:

- 1. Probative value must outweigh prejudicial effect
  - Question of law
- 2. Evidence cannot be too time consuming
- 3. Evidence cannot be ultimately misleading

R v Finta, R v Starr:

Weight:

ToF → Decides the weight that they will give to a piece of evidence

R v Morin: Individual evidence – does not have a standard of BARD attached to it (For whole of evidence @ end of case)

Credibility: How believable is the witness?

Reliability: How accurate is the evidence? (Credible witnesses can give unreliable evidence)

Direct and Circumstantial Evidence:

Direct evidence → Given by a witness from his or her own observations

Testimonial Factors of the Witness:

- Their observational skills;
- Their memory;
- Their appropriate use of language;
- Their experiential capacity; and
- Their honesty

R v Petrovic → When dealing with an unsavory witness, sharp instruction must be given to jury

R v DW → If you don't believe the accused, but still have reasonable doubt, must acquit

R v Chalice → If you don't know who to believe, tie goes to the accused

Circumstantial Evidence → Requires drawing an inference from multiple pieces of evidence that cannot directly prove the case

- **Rule in Hodge's Case:** To convict on circumstantial evidence, the evidence must not only support the theory of guilt, but not be able to support any other theory
- R v Griffin → Don't need to use Rule In Hodge's case, but most do to avoid appeal

Specific Rules (R v Oickle)

Statements made to persons in authority – in a *voir dire, Crown must proves 3 things* BARD (Oickle):

1. The statement was given **freely or voluntarily** (not induced by threats or promises)
2. The statement is a **product of an operating mind** (e.g. not drunk or injured or MH)
3. The statement is not the result of an **oppressive set of circumstances** (awake for 30 hours, badgering)

- If those things are proven the defence may attempt to exclude the statement based on a Charter breach (ie. 10(b) right to counsel) and the admission of such evidence could bring the admin of justice into disrepute → accused bears onus on BoP.
- the statement must be a result of the specific Charter breach (ie. statement was a result of the lack of counsel)
- one must be informed if jeopardy changes (attempt murder becomes murder when victim dies) – must inform you of right to counsel again.

- Also, no police trickery (to be trickery it must shock society e.g. , pretending to be priest)
- Must be a proper record of the statement (video or audio, not simply writing it down)
- Undercover officer is not a person in authority

Types of Admissibility:

1. Conditional Admissibility:

- May demonstrate the relevancy of evidence conditional on additional evidence being adduced at trial
- If no additional evidence is adduced then the jury will be given a limiting instruction to ignore the evidence

- Crown may also get evidence ruled admissible, then "put the defense on notice" → Choose only to use the evidence if needed on cross-examination, etc.

2. Limited/Restricted Admissibility:

Evidence can be admitted for one purpose, but not another

- Jury must be given a limiting instruction
- Ex. After a Corbett motion, criminal record is for the purpose of credibility, not propensity

Revisiting Evidentiary Rulings:

Decision on evidence is not static → judge can change it in the course of proceedings as other evidence unfolds → R v Underwood: rulings on Corbett motions is reversible. If accused makes themselves out to be a saint, they may be able to be crossed on criminal record

Remedy for Inadmissable Evidence:

Two remedies available:

Judge alone → Judge will disabuse their mind from the evidence

Jury → (1) Limiting instruction to disabuse mind from evidence OR (2) If evidence too prejudicial, declare a mistrial

** Mistrial also available in judge alone

Standards of Proof:

1. Legal Burden → Burden that the Crown/Plaintiff must meet to ultimately succeed

Criminal Case:

Crown must prove their case beyond a reasonable doubt (*Lifchus*, 1997 SCC)

- ***R v Lifchus:*** BARD is not an "ordinary concept", nor is it "moral certainty"; based on reason and common sense; must be based on presence or absence of evidence
- ***R v Starr*** "Not absolute certainty, but BARD falls much closer to absolute certainty than to BOP"
- Jury must be told that the standard is vitally important because it is *linked to the presumption of innocence* (***Woolmington***).

Civil Cases: proof on a balance of probabilities, or on a preponderance of the evidence

- NOT a sliding scale→*FH v McDougall* (October 3, 2008): Rothstein J: Trial Judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

2. Evidentiary Burden → Burden of adducing evidence/passing the judge

- Is there enough evidence to leave an issue to the trier of fact? Ask this at:

A. At the Close of Crown's Case:

- Once the Crown has closed their case, accused has to decide if there is enough evidence on each element to warrant the case going further (ex. Identity, jurisdiction, date, time)
- ***Shepard*** non-suit test: Is there some evidence, upon a properly constructed jury COULD convict?
    - If No - Jury: **Directed Verdict**; Judge: **Non Suit**

- *Defence usually has to make this application; in a rare occasion judge may bring it up*
- ***R v Kreiger:*** cannot have a directed conviction, only directed acquittal

B. At the Close of Entire Case

Evidentiary burden → For a defence to be left with a trier of fact, D must establish an "air of reality" to it (not onerous)

- ***R v Fontaine:*** Defence must be put into play if a properly instructed jury could R, on account of the evidence, find that the defence exists
  - *Judge should NOT weigh the evidence when deciding whether there is an Air of Reality; should assume truth of evidence, leaving issues of reliability/ credibility/ weight for the TOF*
  - Overturned Stone, which suggested that judge should look at the likelihood of the defense succeeding
- ***R v Cinous:*** There must be evidence on ***each element*** of the defence such that a properly instructed jury acting R could acquit
- ***R v Gunning***: Threshold to put defense into play – would a properly instructed jury, on the evidence, be able to find in favour of accused?
- ***R v Kong:*** If a defence passes an evidentiary burden, and puts the defence into play, the jury is obliged to consider defence and Crown must disprove defence BARD
- ***R v Thibert:*** Defence needs to have an air of reality, up for Crown to disprove BARD → Leaving it to the jury does not mean it will succeed

The Shifting Burden:

Legal Burden: In certain circumstances, the legal burden shifts to the accused.

- To prove the NCR defense (BoP)
- Care & control of motor vehicle (Establish BoP not C&C)
- Old Narcotic Act, s.8 → If Crown proves possession, accused proves BoP not for trafficking

Evidentiary Burden:

a. Tactical Shift → Accused should call evidence or else be convicted

b. Legal Shift → Burden shifts by operation of law

- ***R v Proudluck***
- Accused is guilty unless they can call "evidence to the contrary" – just raise a reasonable doubt

Common Law Discretion to Exclude:

Trial judge as finder of law has common law discretion to exclude otherwise admissible evidence. This is distinct from excluding evidence under s. 24(2) of the *Charter*.

Trial judge must weigh **probative value** vs. **prejudicial value**:

1) Probative Value:
   a. Reliability of evidence
   b. Strength of inferences to be drawn from it
2) Prejudicial Value:

a. Practicalities of presenting evidence
b. Fairness to parties or witnesses
c. Potentially distorting effect of evidence

Development of Common Law Power:

1. R v Wray → Pre-Charter (1) Evidence must be prejudicial (2) Admissibility of evidence weak (3) Probative value of evidence re: main issue is trivial

2. **R Seaboyer & Gayme** (Rejected the restrictive test in ***Wray***): Judge has a discretion to exclude if the prejudicial effect outweighs the probative value (judge holds strong discretion to exclude at CL).

3. R v Shearing: Complainant kept a ***diary*** during the time period in which she complained of sex assault from Dad; it had no references to sexual assault in it; accused got a hold of her diary because she left it when she left the home. TJ doesn't allow for cross but SCC allows it.

Ratio: ***Defence*** **evidence will be excluded only where the prejudicial effect of the evidence** ***substantially*** **outweighs its probative value (relates to s. 650 and accused's right to make full answer in defence)**

R v Harrer: Change of type of investigation / change in jeopardy requires the police to remind the accused of their rights, and right to contact lawyer

While there is a Common Law power to exclude, it has been constitutionalized in the POFJ and right to a fair trial under ss. 7 and 11(d) of the Charter → Power to exclude based on unfairness

R v Buhay: Security guards for Greyhound searched a locker and found weed; put it back and called the police; police seized the weed without warrant; evidence was excluded because there was privacy breach s.8 under the Charter. But noted in *obiter* that:

Even where there is no Charter breach, judges can exclude evidence by way of common law, where the evidence would lead to unfairness or where its prejudicial effect outweighs probative value

R v Mohan

RATIO: Cost benefit analysis→*is value of evidence worth what it costs? Logically relevant evidence be excluded if:*

- **(a) prejudicial effect outweighs probative value. Prejudicial effect: does it inflame the jury or distort the truth-seeking process?**
- **(b) takes inordinate amount of time that is not worth its value**
- **(c) misleading: is its effect on jury out of proportion to its reliability?**

Statutory Discretion to Exclude:

** Do not violate s.11(d) because judge has a common law power to exclude

Section 12, ***Canada Evidence Act***

- S. 12(1): witness may be questioned re: criminal convictions
- S. 12(1.1): if witness denies conviction or refuses to answer, opposing party may prove conviction
- S. 12(2): conviction may be proved by producing….
    - Certification containing the substance and effect only, omitting the formal part..
    - Copy of the summary conviction
    - Other officer having the custody of the records of the court in which the conviction, if on indictment, was had

R v Corbett

Does s. 12 of CEA violate s. 11(d) of *Charter* when applied to the AC who takes the stand? NO.

- S. 12(1) uses word "may" which means that TJ retains common law discretion to exclude

Test for excluding part or all of AC's criminal record:

- **(a) What is the nature of conviction(s)?**
- (i) Purpose of s. 12 is to admit AC's criminal record in order to assess his credibility, AND NOT to show propensity to commit the charged offence. Thus, do convictions relate to credibility?
    - Impaired driving → does not relate to credibility
    - Fraud/theft→does relate to credibility
- (ii) How similar is conviction to charged offence?
    - If similar, then danger that jury will use criminal record to asses propensity, and not just credibility
    - Therefore, the more similar, the more prejudicial and the more likely to exclude
    - In *Corbett*, AC was charged with murder and also had murder conviction
- **(b) Remoteness: How long ago was prior convictions?**
    - Longer prior conviction is in past, less relevant it is to credibility
    - But, if there is a long gap, what is the reason?
    - In *Corbett*, there was 25 year gap between prior conviction for murder and the offence, but that was because he was in jail.
- **(c) Has defence lawyer deliberately attacked credibility of Crown witnesses?**
    - If so, would create imbalance in trial if Crown witness portrayed as lacking credibility while AC presented as having credibility
    - In *Corbett*, defence lawyer had vigorously attacked credibility of Crown witnesses

R v Underwood

AC applied for a "Corbett Motion" prior to taking the stand

- Corbett motion is to exclude all or part of the AC's criminal record from jury because it would be too prejudicial. AC wanted TJ to provide provisional ruling before he took the stand. TJ refused to give ruling until AC took the stand, so AC declined to testify. AC then convicted

RATIO: SCC held that AC is entitled to provisional ruling before he elects to take the stand

- But if TJ grants a Corbett motion to exclude all or part of AC's criminal record, and AC then takes stand and portrays that he has no criminal record or he is of good character, TJ can revisit that ruling

Section 12: Application to Accused vs. Other Witnesses:

- Evidence re: prior convictions can only be used to assess credibility of witness
- **Crown can only cross-examine AC about the following info re: convictions:**
  - (a) What the offence was
  - (b) Date
  - (c) Where offence took place, i.e. what city, not precise location
  - (d) Penalty
- But no details about the manner, circumstances, etc… EXCEPTION: if AC himself makes his character an issue
- AC can cross examine Crown witnesses not only on (a) through (d) but also details about the offences, lifestyle, etc… in order to attack credibility

Section 715 → Criminal Code

Generally:

- Section 715: if witness testifies at preliminary inquiry but then refuses to testify at tri, or
  - (a) is dead
  - (b) became insane
  - (c) so ill that unable to travel/testify, OR
  - (d) absent from Canada

then testimony from preliminary inquiry may be admitted as evidence at trial

Potvin → **Even** if criteria met in s. 715, TJ still has common-law discretion to exclude the evidence if:

- **(a) prejudicial effect outweighs probative value**
- **(b) unfairness about how evidence obtained**

FACTORS:

- (a) Was defence given opportunity to cross-examine witness at preliminary inquiry (even if he didn't?
- (b) Did defence only engage in limited cross-examination of witness in anticipation of full cross-examination at trial while Crown withheld info that witness would not be available at trial?
- (c) Was defence not given full disclosure at preliminary inquiry & thus cross-examined witness with incomplete info?
- (d) Is this an "oath against" case: basically complainant's word against AC's word? Then complainant's preliminary inquiry testimony should not be admitted without finder of fact being able to hear complainant's testimony at trail & assess her credibility

NOTE: If Crown/AC anticipate that witness at preliminary will not be available at trial, videotape the testimony so finder of fact can assess demeanor at trial.

Sections 715.1 & 715.2, *CCC*

s. 715.1: if COMPLAINANT/WITNESS under 18 y/o when alleged offence occurred, **a video-recorded statement made within reasonable time after alleged offence is admissible at trial if COMPLAINANT/WITNESS adopts the contents of the video on the stand.**

- Unless TJ is of opinion that admitting the video would interfere with proper administration of justice

s. 715.2: if COMPLAINANT/WITNESS is able to testify but may have difficulty doing so because of mental/physical disability, a video-recorded statement made within reasonable time after alleged offence is admissible at trial if COMPLAINANT/WITNESS adopts the contents of the video on the stand.

- These sections apply regardless of alleged offence
- CO/WI can still be asked additional questions in examination-in-chief by Crown
- CO/WI can still be cross-examined re: their adopted video statement

R v LDO

INTRO: Predecessor s. 715.1 only applied to children & sexual offences. S. 715.1 challenged on basis it violate ss. 7 & 11(d) of *Charter*

RATIO: TJ retains **common law discretion to exclude all or some of video evidence otherwise admissible under s. 715.1 if prejudicial effect outweighs probative value.** Thus, s. 715.1 does not violate ss. 7 or 11(d) *Charter*

Consider:

- (a) did interviewer unduly prompt child? i.e. suggestive/leading questions
- (b) logical relevance still applies – is it relevant & material?
- (c) exclusionary rules still apply – cannot give hearsay, opinion, character evidence
- (d) s. 715.1 requires that video statement given within a "reasonable amount of time" after alleged offence→this is elastic concept & rare for judges to decide that too much time has passed

Excluding Evidence Under the Charter:

Sections of the *Charter*:

- s. 7: right to life, liberty, security of person & not to be deprived thereof except in accordance with principles of fundamental justice
- s. 8: right to be free from unreasonable search & seizure
- s. 9: right to be free from arbitrary detention
- s. 10(a): right upon arrest/detention to be informed promptly of reasons
- s. 10(b): advising person under arrest/detention that they have right to retain & instruct counsel, and giving them opportunity to exercise that right

s. 24(2): If court concludes that evidence obtained by *Charter* violation, court **shall** exclude evidence if, having regard to all circumstances, admission **could** (not would as in English test) bring administration of justice into disrepute

- Court's power to exclude under s. 24(2) only applies to government→thus only in criminal cases, or in civil cases where government is a party
- Is not discretionary→once criteria met→TJ must exclude

***R v Grant* → Test for Exclusion Under 24(2)**

1) Seriousness of Charter infringing act

- Which right was breached?
- Serious or technical?
- Urgency?
- Would the evidence have been obtained anyways?

2) Impact of breach of Charter on accused interests

- Difference between cavity search and breathalyzer
- The more invasive the more impact

3) Society's interest in adjudicating the case on its merits

- Trial fairness = overarching goal rather than distinct stage of s. 24(2)
- Is the offense serious? Is the evidence essential? Are there other remedies available?

Prior to Grant → R v Collins

1. The Collins Test

- 1. Fairness of Trial

Created evidence (confession) or physical evidence?

- 2. Seriousness of State Infringing Conduct

Minor, good faith, state of law, negligent

- 3. Effect on Admin of Justice

How serious is the crime? What do people think of justice long term?

Collins → Would bring the admin of justice into disrepute = could bring the admin of justice into disrepute

Collins carried the day until Stillman, which leads to Grant. Why?

- Trial fairness was given too much weight, and lawyers started to dump tons of stuff into that factor (Evidence would not have been found but for…) even for real evidence (Real evidence = okay is now up for challenge)
- Too many people were getting off under the Collins test

V. TYPES OF VIDEO EVIDENCE

- 1) KGB video evidence→if police take video statement from WITNESS on oath & advise him that he does not have to speak with police and the jeopardy for giving false information to police, video statement can be admitted at trial <u>if</u> WITNESS <u>recants</u>.
- 2) Video statements made to persons in authority→*Oickle* criteria
- 3) Video statement admitted under ss. 715.1 & 715.2
- 4) Providing testimony by video conferencing between provinces or internationally under ss. 714.1 – 714.8

- 5) testimony of person under 18 or who have mental/physical disability can be done by video conferencing so that they do not have to be in the courtroom with ACCUSED
    - Usually restricted to children testifying against family members
- 6) Video Evidence in ***CIVIL TRIALS:***
    - Commissioner appointed to take video evidence
    - Commission order can allow judges & parties to go to other countries to take evidence that will be videotaped

UNIT 3: CHARACTER EVIDENCE

Character Evidence:

"Any proof presented to establish personality, psychological state, attitude, general capacity of the individual to engage in a particular behavior"

Orthodox Rule: Character evidence **CANNOT** be introduced at trial.

Why? → (1) Extremely prejudicial, (2) time consuming, (3) Distracting

- Prejudicial because accuse may be convicted based on propensity to commit the offense, NOT because Crown has proven case BARD (***R v GSG***)

R v Handy – Crown cannot ease its burden by showing the accused is a bad person. Creates "moral prejudice"

"The Prohibited Inference" – Accused is more likely to commit the crime because of character.

Two Exceptions for the Rule Against Character Evidence:

1. Similar Fact Exception

2. Accused Injects Character into Trial

1. Similar Fact Evidence (SFE)

Evidence as to a specific WAY that an accused commits a crime, not as to the accused's history of committing the crime (General propensity evidence vs. specific fact evidence)

Presumptively INADMISSIBLE - the Crown must satisfy the trial judge on BoP that the probative value of the evidence outweighs its prejudicial effect → **See the Handy framework for factors to consider**

Why? → Very devastating to the defendant's case. Royal thinks you are always convicted on SFE.

"The Prohibited Inference" – Accused is more likely to commit the crime because of character.

- **Need to give a limiting instruction to the jury**

Development of the SFE Exception:

1. Makin v Makin "Baby Farming Case"

- Crown was allowed to lead evidence showing that 13 dead babies had been found on previous properties and this dead baby was unlikely to be "accidental"

- But, the evidence cannot be lead to show the accused was likely to have committed the offense ("**propensity evidence**")
- **The evidence can be lead to show: (1) If the acts were designed or accidental or (2) To rebut a defense open to the accused**

2. Straffen "The Body on the Moor"

- Mentally challenged man kills a girl in same way he admitted to killing 2 other girls
- Abnormal propensity used to establish IDENTITY → The unique method of killing

3. Smith "Brides in the Bath"

- Wife is found drowned in bath; two other wives had been drowned
- SFE admitted to rebut the defense of accident

4. Boardman "The School Master Case"

- Evidence from one sex assault used as evidence in another sex assault
  - Method of grooming boys was the exact same
- Evidence from the first count was allowed in as evidence in the 2nd count
  - As a defense lawyer, if your accused is charged with 4 crimes, you would sever the charges if you don't think the other ones will be admitted on SFE. If they will be, then don't bother.

5. B(CR)

- Daughter complains of sex assault. Allow in sex assault complaint by other daughter years earlier.

6. Jesse "Corks in Vaginas"

- Crown allowed to tender evidence that accused puts corks in vaginas, to establish IDENTITY

Current State of the Law → R v Handy:

Facts: Accused is charged with sexual assault for forced anal sex in 1996. AC's wife comes forward and says she was also forced to have anal sex. Accused goes to trial, and it looks like there is collusion between ex-wife and the complainant. TJ lets in SFE. ONCA reverses. SCC upholds ONCA.

Presumptively INADMISSIBLE - the Crown must satisfy the trial judge on BoP that the probative value of the evidence outweighs its prejudicial effect

Six Guiding Principles for SFE:

1. Propensity evidence by any other name is still propensity evidence

2. Identification of the *issue in question* is an important control

- What is the issue in question that this evidence is said to advance or refute?
- Again, the courts must be vigilant to ensure that the evidence is not used solely as **general propensity evidence (Robbed 14 houses last years → Issue is propensity vs. robbed 14 houses and flooded → Issue is identity)**

3. Identification of the Required Degrees of Similarity

- Where similar fact evidence is adduced to prove a fact in issue, in order for it to be admissible, the trial judge should evaluate the degree of similarity of the alleged acts and decide whether the objective improbability of coincidence has been established. Only then will the evidence have sufficient probative value to be admitted.
- The evidence's probative value depends on how it comes to represent a "signature" of the accused

- **This is the primary driver of probative value for similar fact evidence**
- The evidence must be conclusively linked to the accused - if there is any doubt that the past allegations of conduct are linked to the accused, then it cannot be admitted into evidence

4. Identification of Connecting Factors → Need to be logically connected to the alleged (Probative value) Pertains to the similarity of the common characteristic from previous cases with the case at bar. Factors considered:

1. Proximity in time of similar acts
2. Extent to which the other acts are similar in detail to the charged conduct
3. Number of occurrences of the similar acts
4. Circumstances surrounding or relating to the similar acts
5. Any distinctive features underlying the incidents
6. Intervening factors
7. Any other factor which would tend to support or rebut the underlying unity of the similar acts

5. Differentiating Admissible from Inadmissible Propensity Evidence

- This is a spectrum
- **At the inadmissible end:** Having a general propensity towards violence, for example, is irrelevant - it does not prove that the accused committed the specific crime, and they are not on trial for their general character
- **At the admissible end**: must be more specific, related to "calling cards," "signatures," "hallmarks," or "fingerprints"
  - The issue then is no longer pure propensity, but repeated conduct in a highly specific type of situation

6. Similar Fact evidence need not be conclusive

Remember, the judge does not deal with weight, that is for the trier of fact

- Narrow test for inclusion: if the similarities are such that, absent collusion, it would be an affront to common sense to suggest that it was the result of coincidence

ISSUE OF COLLUSION: If defense can raise an air of reality on the issue of collusion, then onus shifts to Crown to prove BoP that SFE not tainted by collusion.

What matters can form SFE?

- Matters not prosecuted can form SFE
- Can acquittals form SFE?
  - ***R v ZL*** → Acquittals can form similar fact evidence
  - Charter s.11(h) suggests these matters cannot form SFE → Double jeopardy rule
  - ***R v Arp:*** In a multi-count indictment, Crown is allowed to use evidence from one charge as evidence on the other charges (if SFE is satisfied) notwithstanding the other charges may result in acquittal → R v Bereznicki, R v Vuradin
  - ***R v Ollis:*** Prior acquittal can be used as evidence to show that the accused was put on notice (ex. The bank account was empty)

s.359 of CC: Allows the Crown to inject character evidence by way of previous burglaries in theft cases. Show that other thefts have been committed in last 12 months as proof of knowledge of stolen property in current case.

2. Accused Injects Character into Trial

The accused can choose to inject character into the case by attempting to:

A. Bolster credibility

B. Show he is not the type of person to have committed this crime

Two ways to inject character into case:

1. **Expressly** call evidence of good character
    - General reputation evidence
    - Specific acts of prior good character
    - Expert evidence (cf Mohan)
    - Cross-examination of Crown witnesses re: AC's good character
2. **Impliedly** by:
    - Presenting in opening statement that he is a person of good character
    - VICIOUSLY attacking the character of the Crown witness, leaving the impression that they are of good character and the accused is of bad character (***Scopelliti***)
        - Clear under current law that a simple attack will not bring the accused's reputation into question

R v Scopelliti:

By raising the issue of the deceased's reputation, the AC put his own character into issue.

Clear now that this is NOT the law. The character of the accused must be raised as DIRECT evidence.

R v Davidson, DeRosie, McArthur:

Where the accused does not inject his own character into the trial, **he cannot be cross-examined on past criminal convictions** or other character issues → THIS IS NOT THE SAME FOR OTHER WITNESSES, who can be called on their past convictions to challenge credibility

Cf ***Section 12 of the Evidence Act***, which allows you to attack cross accused on past criminal record

- But can ONLY ask what the charge was and what the penalty incurred was

R v Clarke:

Crown cannot lead evidence of good character on their OWN witness. This is "oath helping"

→ Cannot lead evidence that your witness is a "reformed" criminal

Crown's Responses to Injection of Character by Accused:

A) Cross-examine character witness

B) Call rebuttal reputation witnesses

C) Call rebuttal expert witnesses to show accused has propensity to commit offense

D) If AC calls evidence of good character, ***but does not testisfy*** → s.666

- S.666 allows Crown to lead evidence of AC's criminal record in reply or rebuttal
- Reminder: Rebuttal is only admissible if the evidence has truly "taken you by surprise". Cannot split your case.

E) Lead SFE → If it is admissible under Handy

F) Cross-examine AC directly on any character evidence he has provided

Character of Third Parties

Orthodox Rule: Can challenge the credibility of 3rd party witnesses to challenge credibility.

Five Principles of Attacking the Credibility of 3rd Parties:

1. Can cross-examine on a wide scope of issues
   - Prior criminal record, discredible conduct not resulting in conviction, outstanding charges, reputiation
2. Wide latitude of cross-examination extends to the complainant
   - Cf rape shield provisions
3. Can make suggestions of witness misconduct IF there is a good faith basis (***Lyttle***)
   - Cannot make reckless suggestions or knowingly false suggestions
4. Cannot call evidence to challenge witnesses answers re: credibility
   - Due to collateral fact rule
5. You MAY put AC's character into question (Scopeletti)

Exceptions:

1. Collateral fact rule → Must cross-examine on questions that speck directly to the live issues
2. Third party record rules
3. Rape shield provisions

The Rape Shield Provisions:

Prior to 1976:

The twin myths: (1) Evidence of past sexual history = more likely to consent (2) women who are sexual active are less likely of belief

→ Allowed you to enter past sexual history into evidence to **attack credibility of witness** or as **evidence to consent**

Another myth: You would report right away. If you didn't have a prior consistent statement, you weren't credible.

The 1976 Rape Shield Provisions: s.142 of the Criminal Code:

General rule: Can only call evidence of sexual activity with AC

This created issues & LESS protection than before

R v Forscythe

- Complaint was interpreted to be a compellable witness in voir dire

- Also, in common law, credibility is a collateral issue (could not contradict)
- But, rape provisions made it a material issue in the case, and could call evidence to contradict complainant's answers
- If a female is assaulted, must warn the jury it is dangerous to convict on her evidence alone. No such warning for male complainents

→ S.142 is thus repealed

The 1983 Rape Shield Provisions: s.142 of the Criminal Code:

- Allows for convictions of uncorroborated evidence
- Removed need for "recent complant"

Bill C-15: 1988:

- In 1988, Bill C-15 was introduced, dealt primarily with taking evidence from children, removes requirement in s 586 of the Criminal Code for corroborating evidence to support testimony given by children
    - This was introduced because most instances where children need to give testimony involve sexual assault allegations where they are the victims, essentially affirms that the previous rape shield provisions are extended to children who are victims of sexual assault
    - S 715.1 of the Criminal Code was also introduced, allowing evidence from children to be videotaped separately outside of the courtroom, meaning that the child did not need to give testimony in open court

        Children can also now request to give testimony in court behind a screen

        The police need to be careful how they handle videotaped evidence to ensure that they do not "put words in their mouths"

        At court, the videotape is played for the court, and the only question the Crown will ask the child is whether the previous statement they made was true
        - Cross-examination is permitted, of course
    - The constitutionality of these provisions were upheld in R v F(CC) (SCC 1997) and R v L(DO) (SCC 1993)
- In R v Seaboyer (1991) - the SCC found that the 1983 amendments were unconstitutional.
    - Majority found that prohibition against evidence regarding past sexual history was too restrictive on the accused, and prevented the accused from giving a full answer and defense as they are entitled to
    - HOWEVER, after striking down the statute, the Court created a "common law rape shield" which is less restrictive, except that it applies to the complainant's sexual history with both the accused AND others - so in some ways, the new provision was more expansive. Had to hold a voir dire to determine if the evidence was admissible in the circumstances.
- Parliament very swiftly acted to respond to R v Seaboyer
    - Adopted completely what the Majority decision had implemented - rape shield now covers the complainant's entire sexual history

    - Restricted the "honest but mistaken belief in consent defense"
    - Also, if the accused is self-represented, the Crown can make an application to appoint counsel specifically to cross-examine the complainant

        This prevents the accused from intimidating the complainant in Court
- In 1993, Parliament passed a law indicating that the Court did not need to give warnings about convicting an accused on the evidence of a child.
    - Strange section, no warnings had been given for quite some time prior to this

Section 274 Criminal Code (No Corroboration of Victim Account)

- No corroboration of victim account is required to convict for sexual assault. The provision instructs the jury and judge that corroboration is not a required, and no warning is required.
    - This includes physical evidence of damage from the sexual assault
    - Prof. Royal believes that it is dangerous to proceed on this - corroborative proof is required in every other criminal case except for sexual assaults

Section 275 Criminal Code (No Recent Complaint Required)

- The rules regarding evidence of recent complaint are abrogated. This removes the old notion that a female complainant ought to make an immediate complaint if they are sexually assaulted.

Section 276 Criminal Code (Rape Shield)

- New rape shield provision that resulted from the Seaboyer case
    - Recall that, in Seaboyer, the accused wanted to cross-examine the victim on other sexual relations to allege that injuries were sustained then
    - Crafted new common law rape shield that was codified in this section by Parliament
    - This rape shield covers a complainant's sexual behaviour with persons other than the accused AND relations with the accused
        - You must make an application to the judge and give rationale before cross-examination is permitted
    - It is impermissible to find that a person's sexual history makes them likely to have consented in the case at bar
    - Subsection 3 lists items the judge must consider
        - Subsection (h) is troubling - L'Heureux-Dube indicated that it is dangerous to give male judges untrammelled discretion to decide admissibility of sexual history evidence, and yet this subsection gives courts the ability to consider any factors they see fit
    - **The judge must give strict limiting instructions to the jury on how the evidence may be used**
    - In a criminal case, the accused enjoys a broad right of appeal, but the Crown does not - cannot appeal findings of fact

- Section 276 indicates that admissibility of evidence is a question of **law,** so the Crown does enjoy a right of appeal

- **276.** (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
  - (*a*) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
  - (*b*) is less worthy of belief.
- (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence
  - (*a*) is of specific instances of sexual activity;
  - (*b*) is relevant to an issue at trial; and
  - (*c*) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

  (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
  - (*a*) the interests of justice, including the right of the accused to make a full answer and defence;
  - (*b*) society's interest in encouraging the reporting of sexual assault offences;
  - (*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
  - (*d*) the need to remove from the fact-finding process any discriminatory belief or bias;
  - (*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
  - (*f*) the potential prejudice to the complainant's personal dignity and right of privacy;
  - (*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
  - (*h*) any other factor that the judge, provincial court judge or justice considers relevant.

  From <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-139.html#docCont>

Section 276.1 and 276.2 Criminal Code (Application to Question on Sexual History)

**** YOU NEED TO ASK TO CROSS ON SEXUAL HISTORY*****

- **This is one of the rare times where the defense is required to seek the right to cross-examine on prior sexual history in pre-trial proceedings**
- Must be in writing, provide detailed particulars of the evidence, and outline for the judge the relevance of the information
    - The judge considers the application in the absence of the jury and the public (in-camera)
    - The judge must be satisfied that the requirements listed in 276(2) regarding admissibility are fully met
- The victim is not a compellable witness at these proceedings
- The judge is required to give reasons for why they are ruling in a particular way

- **276.1** (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 276.2 to determine whether evidence is admissible under subsection 276(2).
-
- **Form and content of application**
  (2) An application referred to in subsection (1) must be made in writing and set out
    - (*a*) detailed particulars of the evidence that the accused seeks to adduce, and
    - (*b*) the relevance of that evidence to an issue at trial,
      and a copy of the application must be given to the prosecutor and to the clerk of the court.
-
- **Jury and public excluded**
  (3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

  Judge may decide to hold hearing
  (4) Where the judge, provincial court judge or justice is satisfied
    - (*a*) that the application was made in accordance with subsection (2),
    - (*b*) that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial court judge or justice may allow where the interests of justice so require, and
    - (*c*) that the evidence sought to be adduced is capable of being admissible under subsection 276(2),
      the judge, provincial court judge or justice shall grant the application and hold a hearing under section 276.2 to determine whether the evidence is admissible under subsection 276(2).

  Jury and public excluded
    - **276.2** (1) At a hearing to determine whether evidence is admissible under subsection 276(2), the jury and the public shall be excluded.

Complainant not compellable
(2) The complainant is not a compellable witness at the hearing.

Judge's determination and reasons

(3) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination, and

- (*a*) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
- (*b*) the reasons must state the factors referred to in subsection 276(3) that affected the determination; and
- (*c*) where all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

Record of reasons

(4) The reasons provided under subsection (3) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

Publication prohibited

- **276.3** (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:
  - (*a*) the contents of an application made under section 276.1;
  - (*b*) any evidence taken, the information given and the representations made at an application under section 276.1 or at a hearing under section 276.2;
  - (*c*) the decision of a judge or justice under subsection 276.1(4), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and
  - (*d*) the determination made and the reasons provided under section 276.2, unless
    - (i) that determination is that evidence is admissible, or
    - (ii) the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted.

Offence

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

- 1992, c. 38, s. 2;
- 2005, c. 32, s. 13.

Judge to instruct jury re use of evidence

276.4 Where evidence is admitted at trial pursuant to a determination made under section 276.2, the judge shall instruct the jury as to the uses that the jury may and may not make of that evidence.

Section 277 Criminal Code

- **In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.**

- Constitutionality of this section was upheld in Seaboyer

Character in Civil Cases:

Orthodox rule: Character evidence cannot be called unless it is directly in issue

- But you are allowed to call similar fact evidence
    - ***Mood Music***: Probative > prejudicial is more likely because jeopardy is lower

UNIT 4: HEARSAY

Hearsay = an utterance or action of another testified to by a witness in the present proceedings

Presumptive rule: Hearsay evidence is inadmissible (***R v Baldree, R v Khelawon***)

Defining Features (***R v Khelawon***):

A. Fact that an out of court statement is adduced to prove the truth of its contents
B. The absence of a contemporaneous opportunity to cross examine the declarant

R v Evans: hearsay is 1) out of court statement; 2) which is admitted for the truth of its contents

Four specific concerns with hearsay evidence: (Fish J in ***Baldree***)

1. Perception → Facts may be misperceived
2. Memory → Facts may be wrongly remembered
3. Narration → Facts may be narrated in an unintentionally misleading manner
4. Sincerity → Declarant may have knowingly made a false assertion

** Only way to probe these sources of error is by cross-examination

Charron J in ***Khelawon***: Without the maker of the statement in court it may be impossible to inquire into that persons perception, memory, narration or sincerity.

- "*The rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede the truth seeking function.*"

- You also want to be able to look at the DEMEANOUR of the witness

Reasons to Exclude Hearsay Evidence (Wigmore):

Hearsay evidence does not give you (1) AN OATH and (2) the opportunity to CROSS-EXAMINE

Other reasons:

1. The admission of this type of evidence can lead to **fraud**
2. Such evidence results in decisions not being based on the **best evidence (ex. Originals vs. copies)**
3. There is **no opportunity to observe the demeanor** of the declarant

4. The introduction of hearsay testimony for its truth may well **unduly lengthen the trial** proceedings
    - Right to cross examine thought to be primary tool by which to assess reliability and honesty of a witness – this is not possible if a witness is merely reciting what someone else has s

Two types of hearsay:

Admissible Hearsay	Inadmissible Hearsay
• Where the purpose or object of the hearsay is not to establish the truth of the statement or assertion but rather that fact that the statement or assertion was made	• Where the statement of assertion is submitted as proof of the truth of its content • That is: the purpose/object of the hearsay is to give the statement or assertion independent testimonial value • This type of hearsay is only admissible if it falls in one of the recognized exceptions

Above approach not entirely consistent with approach taken by the SCC in recent past

- ***Maxim (R v Christie***): hearsay is not evidence of the truth of the thing heard
- ***Teper v The Queen:*** Rule against hearsay is fundamental – it is not the best evidence and it is not given
- ***R v Evans:*** Hearsay is an out of court statement which is offered to prove the truth of its contents.
    - The hearsay rule signifies a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination

1. Admissible Hearsay

Subramanian v Public Prosecutor → Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish that truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. **Facts:** Accused is walking through jungle and has two belts of ammunition. Arrested and stands trial. Accused attempts to use defense of duress and relay the threats made by the terrorists as proof. Trial judge discards the evidence. Privy Council says it didn't matter whether the terrorist said I am going to kill you, only mattered whether the accused can be believed. He relied upon that assertion. Have to find thing was said to him and that you believed it. Statements are admissible because it is not being tendered for its truth.

R v Collins: Police officer was informed that Collins had heroin so he grabbed her. When he was testifying about what he was told, the D objected. SCC ruled this objection invalid because the important thing was what he was told about Collins, not the truth of whether Collins actually had herion.

2. Evidentiary Value of Prior Statements

Rules Reflected in Section 10 & 11 of the Canada Evidence Act:

Question: What use can the trier of fact make of statements made prior to trial?

Answer: Statements made prior to trial may have independent testimonial value depending on who the maker is and whether trial adoption takes place

(1) **Non-party witnesses** (i.e. not Plaintiff/Defendant): → **But see KGB, s.715**

- **A prior statement is not admissible to prove the truth of its contents, unless and until it is adopted by the witness whilst under oath during examination in-chief or cross-examination**
    - Ex. Show the witness a statement made to the police and then they adopt it in their testimony
- Prior statement which is unadopted by the non-party witness is o**nly admissible to challenge the credibility of that witness**, it cannot establish the truth of its contents
    - Especially for prior inconsistent statements or where witness changes their statement or claims not to remember their statement
- **Exceptions:** s.715 of CC [witnesses under 18, or mental health problems] & **KGB rule**

(2) **Rule is different for parties to the action:** Previous statements are referred to as **admissions** = well known exception to hearsay rule

- Admissions can only be tendered as evidence at the instance of your opponent
    - Either during the course of the case or used in cross-examination of the accused if he elects to testify
- In civil cases examinations for discovery called questioning: Admissions during the course of questioning become evidence at trial when read in by your opponent for the truth of its content
    - You do not have to testify for your opponent to read in your admissions
- Counsel should be careful in "reading-in" discovery evidence because in doing so you are relying upon the evidence for its truth, i.e. making it part of your case

General Rule: Prior statements made by either a party or non-party witness, are only admissible at the instance of opposing counsel (i.e. counsel who calls a witness would never want to suggest to a witness that he made a prior inconsistent statement)

- Opposing counsel would never want to lead evidence that a witness had made a prior consistent statement – this would simply have the effect of bolstering credibility BUT may want to show that the witness has been consistent

Exceptions to the General Rule Against Prior Statements:

Prior Statement can be used if they are:

(1) Recent complaint evidence (Arguably not applicable due to s.275 of CC) – non-sexual cases

(2) Evidence of Prior Identification [***Hibbert*** - Evidence of prior ID by way of dock ID is not worth very much so its important to show that she made the same ID as before] – Arbour J comments at length upon dangers of eye witness identification. Although admissible it is essentially close to being worthless.

(3) To meet a recent fabrication allegation

a. If you can lead evidence to counter the assertion on cross that your witness' statement is not a recent fabrication, but consistent with a previous statement made
b. Important to get & date stamp statements from clients ASAP

(4) Where accused is a witness, there is a general proposition that he can be asked by his counsel whether or not what he testified to is what he told the authorities (***R v Lucas***)

(5) Section 715.1 and 715.2 CC admission of videotaped statements made by witnesses under 18 or witnesses who suffer from mental or physical disability
(6) Where Crown is relying on doctrine of recent possession [if accused made statement to the police at the time he was found in possession the defense is allowed to illicit that statement at trial]
    a. There is inference that if you are caught in possession of stolen goods, you stole it unless you have an excuse. SO you can tender evidence that you gave an excuse at the time and it wont fall under the rule against prior consistent statments
(7) Statements which are said to form part of the narrative [introducing the complainants story, outing it for its truth]
    a. Royal doesn't like this → ToF wont take the limiting instruction
    b. Jury should be given a limited instruction

Summary (Per KGB):

- A prior statement not adopted by a non-party witness is only admissible to challenge the credibility of that witness and does not go before the courts as evidence of establishing the truth of its content
- Needs to be adopted by the witness in the witness box – **limiting instruction given to jury**
- A statement made prior to trial by a party to the action has a dual character:
    - May have independent testimonial value if tendered by the opponent as an admission OR
    - it may be used to challenge the credibility of the witness during cross

Rule of Prior Consistent Statements:

Orthodox rule: Not permitted to call prior consistent statements to buttress or support the credibility of the witness. There are some exceptions. The major exception is the rule with respect to eye-witness identification.

1. Prior out-of court identification evidence
2. To meet allegation of recent fabrication
3. Where AC is witness – to corroborate story (recent fabrication)
4. Admission of video tapes

Hibbert – SCC Madam Justice Arbour comments at length of the dangers of eye witness identification. Witness pointing to the accused sits in the dock – how reliable is that? She tells us that although it is admissible it is not really worthy and if it is the only evidence it is not enough to convict. This is a stranger situation where the victim does not know the accused. Admissible with some weight but the weight is so little that it can not be the basis for conviction.

- Evidence of an earlier identification made by a witness of the accused, whether it be a line-up, can be allowed to go in as evidence of support of their current testimony. To support the present identification we allow evidence of past identification – no discussion of eyewitness identification would be complete without the most infamous case of misidentification

Adolf Beck (see handout) between 1868 and 1885 Adolf Beck was living in South America. Whilst there between 1876 and 1877 William Wyatt committed a number of crimes in London. He would then ask woman to

come live with him. Some took him up on that offer and he then maintained their money and valuable belongings. Around 1885 when Beck was then living in London, and crimes like Wyatt's started happening again. One of the woman who had been defrauded saw Mr. Beck on the street and had him arrested. Beck was then subsequently identified by no fewer than 12 separate woman in separate line ups. All of these woman had been defrauded by Wyatt and only one was certain that Beck was not the man. Beck was then charged, convicted and sent to prison. Two years after his release the frauds started again, and again he was convicted of them in 1904 on the identification evidence of 4 other woman all of whom picked him out in the identification process. While Mr. Beck was in custody and awaiting sentence in connection to the crimes, the frauds began again. Wyatt was arrested, charged and convicted. Beck was set free, given free pardon, and 5 thousand pounds.
There was then a committee appointed by Parliament to determine how this miscarriage of justice could be committed. How could 12 people be so wrong. Evidence to identity, it was found, is the least to be relied upon and unless supported by other facts is an unsafe basis for the verdict of the jury. → Trial judge would be obliged to take the case away from the jury.

In a much later case Turnbull (1976 Eng Court of Appeal) – Decision follows the Beck Commission inquiry and adopt that principle – if all you have is eye witness identification made in difficult circumstances or dealing with a brief observation of the alleged perpetrator then that is not sufficient to make out the case

Mezzo - said it is still for the jury to consider, though the judge ought to warn the jury about the dangers of eye witness identification where that evidence is not supported by other evidence

Hay - judgement of J. Rothstone tells us that Mezzo is rejected and brought back to Turnbull – if all you have is an eyewitness with no supporting proof then there ought to be an acquittal
*Witnesses become more certain over time so it is absolutely critical that we write down everything that they say

Sophonow Inquiry Report

- Sophonow was convicted of murder TWICE by the evidence of two witnesses that saw him around this store at the time the young woman disappeared.
- There was not a lot of other evidence in the case
- There was further inquiry directed and it was discovered they had the wrong man and he was set free and as part of this further investigation was the dangers of wrongful conviction
- Line-up (person) is rarely seen anymore and is almost always done by photo-line up
- All of the recommendations of the investigation have been adopted by the city police

Implied Statements:

Disagreement re: whether hearsay rule bars implied assertions

(a) English Courts: Hearsay Rule Bars Implied Assertions

Wright v. Tatham (1837) HL

- Challenge to testator's will on basis that he lacked capacity
- Testator had received letters from 3 persons who were dead by time of trial
- These letters concerned business, implying that testator had capacity
- HL: these letters were not admissible as an implied assertion that M had capacity to make the will
- Followed in *Kealey* (1992) HL

(b) Canadian Courts: implied assertions are traditional exceptions to hearsay rule

Wyoschan (1930) Sask. C.A.

Woman shot while in house with AC & husband/ When police arrive, they see/hear women reach out to husband and say: "Help me, there' s a bullet in my body. Thus implied assertion that husband did not shoot her, AC did. Let in as evidence

RATIO: Implied assertions are a traditional exception to the hearsay rule.

NOTE: Possible Exam Question: would this comply with the principled approach?

- Necessity: yes, because women was dead
- Reliability: no, because implied assertion assumes that women (1) saw who shot her; or (2) did not forgive husband for shooting her

(c) Implied Assertions are not hearsay at all but real evidence:

Ly (1997) SCC

Police conduct drug raid & arrest AC. They find small amount of drugs →not enough for possession for the purpose of trafficking. But police answer AC's cell phone 10x for drug orders

Allowed in: Cell phone calls were real evidence, police officer just recounting what he heard, saw.

ROYAL: but even if you applied principled approach to phone calls, would be admitted:

- (i) necessity: yes, because drug customers cannot be located.
- (ii) reliability: yes, because there were 10 calls, all were drug orders, all were spontaneous

**** SO FOR IMPLIED ASSERTIONS, USE TH MODERN PRINCIPLE APPROACH******

The Modern Principle Approach:

If evidence does not fall into one of the traditional exceptions, ask:

1) Is there a clear **necessity** for the reception of hearsay evidence (like for example the witness is dead)
2) Is there something in the evidence that provides a **circumstantial guarantee of trustworthiness**
    - What is it about the evidence in heresay form that tells us its true
    - ***Khan*** case: Khan is a pediatric doctor, and Ms. Smith brings her daughter in to be examined by pediatrician. Later Girl makes comment which suggest doctor put penis in her mouth. When this case hits the SCC could the mother recite for the truth of its content the evidence of the little girl? When the girls clothing is examined at police station, there is seminal fluid on girls shoulder. SCC does not say anything about that being confirmatory evidence. SCC says these sorts of statements have about them an inherent stamp of reliability. A little girl would not make up this kind of story.

Old scheme: Hearsay evidence is inadmissible unless can bring yourself within one of the many exceptions that have been historically recognized categories of exceptions.

- Example: Dying declaration → belief was that a dying man would not want to meet their maker with a lie on their lips.

UNIT 5: EXCEPTIONS TO HEARSAY

Historical Background:

- Strict application of the hearsay rule often results in injustice therefore over time judges created exceptions to the hearsay rule → Categories became rigid with the passage of time:

1. ***Myers v DPP*** (HL) the majority were not prepared to extend the business records exception to the hearsay rule to take into account the modern business environment
    - This was criticized → HL decided that they would modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so

2. ***R v Salituro***: The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society
    - See also ***R v Couture***

3. ***R v Smith***: rigid exclusionary rules = "set of ossified judicially created categories"
    - Two years later SCC significantly departed from precedent in ***R v KGB***: modified the rule of evidence with respect to the evidentiary impact of non-party witness' prior statements (see page 279-285 of that case)

Professor Wigmore argued that traditional exceptions to hearsay rule arose because the dangers of hearsay were addressed by circumstances in which the statement was made

- 2 criteria underlie most of traditional hearsay exceptions:
    - 1) Necessity: where cross-examination impossible due to death, or other intervening circumstances making declarant unavailable
    - 2) Reliability: something inherent about circumstances in which statement made that give it a circumstantial possibility/guarantee of trustworthiness

Thus, for any exception to hearsay rule, must show (1) necessity & (2) reliability. This approach was adopted by the SCC in……

4. **Ares v. Venner**:
    - **ISSUE:** Can notes made by nurses be admitted for truth of their contents?
    - **REASONS:**
    - SCC followed dissent in *Myers* and held that judiciary could create new exceptions to hearsay rule
    - **Rule was judge-made & thus could be reformed to meet modern conditions—did not have to wait for Parliament to act**

- SCC accepted Professor Wigmore's analysis that existing exceptions to hearsay rule premised on 2 characteristics of necessity & reliability
- Thus where those 2 criteria met, Court can create new exception to hearsay rule
  - However, *Ares v Venner* not well-received by profession & common law hearsay rule remained static until 1990, with ***Khan* & development of principled approach to hearsay**

The Principled Approach to Hearsay:

Hearsay evidence may be admitted under an existing hearsay exception or it may be admitted on a case by case basis **according to the principals of "necessity" and "reliability"**

1. Necessity: Satisfied where it is reasonably necessary to present hearsay evidence in order to obtain the declarants version of the events

→ Is the hearsay evidence necessary to enable all relevant and reliable information to be put before the jury (This does not refer to the necessity to the case of the Crown/defense)

Key: The witness's courtroom testimony is unavailable

- ***Khan*** – by the time the case went to trial, the girl was able to testify (age 4). Since she couldn't recall it all, it was necessary to hear from her mother, but not other witnesses
- The court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the direct testimony of the declarant in a manner that preserves the rights of other parties
  - Ex. In ***Khelawon***, the witness was dead. However when he originally testifies, the Crown made no attempt to preserve his evidence. This was highly criticized by the court
- Trial judge must determine why it is necessary to receive a statement untested by cross examination
- Where the contention rests on fact that complainant would be traumatized, the Crown only need show a real possibility of psychological trauma – in most cases need expert witness to prove this (***R v Nicholas*** – witness would commit suicide if forced to testify about her sexual assault)
- In some circumstances the Crown does not need to prove necessity, it is self-evident – e.g. child clamming up on the stand (***R v F(WJ)***)

Necessity relates to a particular witnesses evidence, it does not matter that there is other evidence from other witnesses on the same point (***R v Smith***) → Necessity of the out-of court statement, not of the witness

- But you cannot admit multiple statements by 1 witness on the same point – goes against prior inconsistent statements rule
- If you want to admit multiple, need to show info or context proving it is necessary

Reliability: Refers to **threshold reliability** which is for the trial judge to determine → must ask does the hearsay statement exhibit sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement

- Different from ultimate reliability (which is for the jury to determine) [***Hawkins v Morin***]

- **Functional approach: need to look at all factors supporting reliability → Corroborating/conflicting evidence** (***Khan*** = presence of semen on girls shirt)

Khelowan → Reliability can be fulfilled by:

1. Inherent trustworthiness due to circumstances

- ***Khan***: Innocent statement made without prompting from a child with no reason to lie
- ***R v UFJ:*** Girl tells police she has sex with father and gives detailed, these details are admitted to and described by the father.

Factors:

- Spontaneously
- Naturally
- Without suggestion
- Reasonably contemporaneous with the event
- No motive to fabricate
    - Motive to fabricate or proved absence of motive heavily weighs on reliability (***Czibulka***: Lack of evidence of motive is not proof of absence of motive. Evidence is required.)
- Sound mental state
- Against the person's interest in whole or in part
- By a young person who does not know of acts alleged
- Corroborating evidence

Are there safeguards in place surrounding the making of the statement (e.g. under a duty to record statements, statement made to public officials, statement recorded, did the person know the statement would be publicized?) → Look at the relationship between the declarant and the accused, and the declarant and the receiver of the statement. Is there a reason to lie?

Khelowan & ***Couture***: Statement must have cogency that removes any real concern about truth and accuracy

2. Truth and accuracy can be adequately tested

- Are there substitutes for oath, presence and cross-examination?
    - Was the person under oath when making the statement?
    - Was person making statement audio or videotaped?
    - At time of making statement were they cross examined?
    - Is person now available to be cross examined on making the out of court statement - example ***Hawkins***: when first made statement competent witness, but then married Hawkins so incompetent, Crown allowed to introduce her prior statement despite being riddled with contradictions

History of the Principles Approach:

Timeline: Khan → KGB → Hawkins v Morin → Starr → Khelawon

R v Khan → Official acceptance of Wigmore/Modern Principle Approach

Facts: 3 ½ yr old girl left a lone with Dr., on drive home she tells Mom he put his birdie (penis) in her mouth, when to police station, found fresh semen stain on child's jacket, at trial girl not found competent to testify
Issues: Is the mother's evidence of the daughter's statement admissible?
Ratio: Statement that would otherwise be hearsay can be admitted if

(a) **Reasonable Necessity:** Crown must establish this by calling viva voce evidence (***Parrott*** 2001 SCC)
    - (e.g. incompetency of witness, death of witness, mental capacity of witness, absence from Canada, refusal to testify)

(b) **Reliability:** is there a circumstantial guarantee of trustworthiness about the hearsay evidence?
    - (must consider: timing, personality of child, intelligence & understanding of the child, absence of reason to fabricate statement)

(c) Must consider the accused's right to make full answer and defence in terms of the accused's inability to cross-examine the declarant

KGB (1993 SCC) → Affirmation of new, principled approach
Prior Inconsistent Statement will be admissible for the truth of its contents, in addition to credibility if:

A Video recorded
B Witness was warned of consequences of giving false information to police
C Witness gives statement under oath or solemn affirmation
D Witness is available at trial for cross-examination
    - (Necessity --- because no longer saying the same thing, reliability – made under oath, aware of consequences, can see demeanor --- accused can also cross-ex at trial)

Hawkins & Morin (1996 SCC) → **Difference between threshold and ultimate reliability**
Facts: Cop and biker charged with obstruction of justice, key witness on-again-off-again girlfriend of cop, at preliminary inquiry she asked to be recalled and recanted her original testimony, thus, contradictory testimony from preliminary inquiry, cop married girlfriend to prevent her from testifying
Issue: Can witness's preliminary inquiry testimony be admissible at trial?
Apply principled approach:

- Necessity: witness no longer competent or compellable as married to accused
- Reliability: Important to distinguish between THRESHOLD and ULTIMATE reliability.
    - **Threshold:** consider only the surround circumstances of out-of-court statement to determine whether there are sufficient guarantees of trustworthiness to counteract traditional hearsay dangers (question for the trier of law)
    - **Ultimate:** consider the weight and probative value of out-of-court statement (question for trier of fact)(trier of law can reject it if the prejudicial effect outweighs the probative value)
- Initial statements made in circumstances with sufficient reliability to meet threshold but ultimate reliability was little as statements were inconsistent, problematic
- ***** Didn't need to expand 715 to do away with spousal incompetency, since you had the principled approach**

Parrot- you cannot assume the issue of necessity. Has to be some evidence about it. Have to wear that evidence to make a ruling.

Reminder: Still needs to be more probative > prejudicial (Smith)

R v Starr (2000 SCC) → **All hearsay exceptions yield to the modern principle**

Facts: deceased and woman drinking in hotel with accused, late in night accused parts way, the remaining two approached by sometime girlfriend of deceased who tells her that he is proceeding to run an auto insurance scam, later found dead

Issues: Can statement of deceased to girlfriend be admitted as hearsay?

Ratio: Hearsay must be submitted to modern principled approach.

6 Step Framework:

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

*Where hearsay evidence is tendered by an accused the rules are relaxed but no abandoned – tip the reliability/necessity analysis in favor of the accused but do not abandon them

Two more things from Starr:

1. Threshold reliability → Cant look at surrounding circumstances (overruled in Khelowan)
2. BRD → Much closer to absolute certainty than BoP. Very high standard

***R v Khelawon* → Threshold reliability allows the judge to look at ALL factors, including corroborative evidence**

Re-affirmed that the trier of fact must be the one to determine the ultimate reliability of the evidence, the trial judge only determines threshold reliability to determine admissibility

History: In ***Starr*** the SCC limited the factors that the TJ could look at it assessing threshold reliability to those factors surrounding the statement itself

- All external considerations fell outside of this threshold box
- E.g. in ***Khan***, the fact that semen was found on girls sleeve could not be used to collaborate her story because not a circumstance under which the statement was made

Present: This this approach was abandoned in ***Khelawon***

- A functional approach was endorsed where all relevant factors could be assessed to determine reliability
- Reliability will be met on the basis of 2 different grounds
    - 1. Inherent Trustworthiness → Circumstances of Truth and accuracy
    - 2. Testability → Can we test the accuracy & truth

Reminder: Judge holds RESIDUAL discretion

Traditional Exceptions to the Hearsay Rule:

1. Prior Inconsistent Statements

Orthodox rule = A prior statement made by a non-party witness which remains un-adopted by that witness at trial has no evidentiary impact directly (could not be relied on for its truth) can only be used in assessing the witness' present credibility

*** This rule was swept away by **KGB [1993 SCC]***

Facts: Accused charged with murder for stabbing victim in presence of 3 other youths, police videotaped statements from these 3 witnesses, at trial these statements were not adopted so could not be used for truth of their contents. KGB acquitted b/c TJ found the video statement could not be used as they were unadopted. The SCC overruled this recognized the increasingly common practice of videotaping interviews and that concerns with respect to lack of an oath, and the inability of the trier of fact to assess demeanor of the witness when giving the earlier statement could be addressed by requiring videotaping and that an oath be administered

SCC adopted the modern principle approach:

Necessity: Not equated with unavailability, but the fact that it was important evidence as to what occurred which would otherwise be lost.

- The witness essentially holds the prior statement hostage
- **SCC confirmed the necessity criterion is upheld whenever the witness recants**

Reliability: Criteria will be met where:

(a) Video recorded

(b) Witness was warned of consequences of giving false information to police
(c) Witness gives statement under oath or solemn affirmation
(d) Witness is available at trial for cross-examination
    - Need to be able to be crossed effectively → If you recant or cant recall statement, effective cross is thwarted

If cross-examination is limited, the need for other indicia of reliability increases (& vice versa)
** RELIABILITY IS THE RATIO OF KGB

Milgaard Process to be Employed in KGB Application: (See the Milgaard Handout)

1. First you advise the Court you are making a s.9(2) application and go into *voir dire*. You show the judge the statement, reduced to writing, and the judge decides if there is inconsistency
    - Inconsistency has to be material, substantially inconsistent, and important to the case

2. If judge rules there is an inconsistency then:

A Crown must prove the truth of the statement. Crown would show witness the video statement and as them:
    - Whether or not is was their statement
    - Whether or not they adopt it

B If the witness does not adopt the video statement, then the Crown counsel can cross-examine the witness about circumstances under which the statement was given in order to show lack of reliability
    - Did police make threats or inducements prior to taking statement? Did police tell witness what to say prior to taking statement?

C Crown can call evidence to establish the reliability of video statement on BOP (e.g. calling police to show the criteria needed are met --- to show admissible non-adopted prior inconsistent statement)

D Defense can call evidence to establish evidence is not reliable
    a. Ex. Show that the witness statement was not voluntary → Police may have implicated the witness would be in trouble if they didn't make a statement

E Judge has common law discretion to exclude the video if there is something in the circumstances that taints its reliability (must be voluntary statement and not other factors which bring administration of justice into disrepute)

F If the trial judge rules video statement is admissible, Crown would:
    - Play the video before the jury
    - Cross examine their own witness **ONLY** in regards to inconsistencies between video statements and current testimony

G If the witnesses still refuses to adopt the statement, Crown can urge the jury to accept the video statement as:
    - More reliable than the witness's testimony (e.g. jury can take video statement as evidence for the truth of its contents)
    - To assess the witness' credibility

NB: Can the witness' own KGB statement be used again them? We don't ultimately know because this case settled EXAM

Royal: If the trail judge admits a KGB statement, it will be devastating evidence against the accused → You know where the evidence comes from if the girlfriend knows all the details in her original statement

- The only hope is to attack the credibility of the witness by showing inconsistency between the video statement, preliminary testimony and trial testimony

R v Youvarajah: 2010 SCC upheld the TJ decision not to permit the introduction of a prior consistent statement made by the indicted accused person who as part of his plea agreement signed a written agreed statement of facts clearly implicating the appellant y

There is an inverse relationship between reliability & necessity → when reliability increases, necessity decrease

***When admitting prior inconsistent statements for their truth on the basis of striking similarity, it is contemplated that the comparison statements are admissible**

2. Prior Out of Court Identification Statements

Dock identifications (Accused in prisoners dock and witness testifies at trial) are worthless and inherently suspect. Thus, there is an exception to the rule against PIS where the PIS is an identification of the accused.

Orthodox rule: Statements made by witnesses prior to trial which are consistent with the witnesses' testimony at trial are not admissible unless adopted by the witness under oath in examination in chief or cross-examination

- If there is an inconsistency between the two identifications, the witness needs to adopt the previous statement, even if it is inconsistent with the current appearance
  - Then you call in police officers to confirm that the person previously identified is the accused
  - Ex. ***R v Swanston:*** Accused had a moustache and shaved by the time of trial. Witness adopted previous identifications and police corroborated to earlier identification. ***Langille*** – expands to allow police to corroborate earlier descriptions given by witnesses

Eye-witness ID is problematic and leads to wrongful convictions (case of ***Adolf Beck, Sophonow***)

- ***Turnbull*** (1976 EngCA) (UK – not law in Canada) if the only evidence against the accused is an ID based on a fleeting glance or in longer exposure made in difficult circumstances then there should be a non-suite or acquittal
- ***Mezzo*** (1986 SCC) rejected Turnbull - question of weight to be given to evidence not admissibility, weight is for the trier of fact to determine
- ***Hibbert*** (2002 SCC) → **In court ID is almost worthless (when accused IDed as perpetrator for the first time), judge must caution jury that this kind of ID is highly problematic**

R v Hibbert: In court identification should still occur despite its absence of value as reliable positive id because:

a. Serves to confirm that the accused was the same man throughout the chain of events
b. Jury may be concerned if a witness was not asked to identify the accused in court and might draw an unjustified adverse inference against the Crown
c. Inability for a witness to identify the accused is entitled to some weight

- To meet the suggestion that witness identification is good the Crown can be permitted in examination in chief to lead evidence that the witness made a prior out of court identification, for example from a photographic lineup,
- Crown also permitted to call the officer who conducted the line up to give evidence as to which photograph the witness identified, how long it took them to make the ID, and what if any comments the witness made when selecting the photograph

Rule Summarized:

(1) An out of court identification made by a witness may be admitted for their truth and for credibility where that witness makes an in-court identification

(2) Out of court ID may also be admitted for their truth where the witness makes not in court ID but can testify that he/she previously gave an accurate description or made an accurate ID (***R v Swanson***)

- ***Swanson:*** Witness positively ID's the accused in photo line up and at preliminary inquiry BUT a year later cannot ID him in dock, but the victim recalled earlier identification and the Crown called the police to confirm that she had ID's the accused

(3) If there is no in court ID and the witness does not testify as to accuracy, then this is the same as if the witness has not testified (inadmissible hearsay).

a. They have to adopt the previous statement – if they don't adopt it, it goes to KGB

***NOTE** Prior identification relevance does not always require reliance on words/act → example witness A testifies she identified the assailant at the scene to officer B. Officer B then arrested the accused. Together circumstantial evidence leads to the inference that the man before them is the accused

(4) If the witness recants an earlier ID (***R v Devine***) this is dealt with by KGB b/c an ID is a form of statement

(5) If the witness does not recant but fails to recollect then ***the PRINCIPLED APPROACH*** applies

→ Since its not an PIS, you just need to look at reliability/necessity of the hearsay

3. Prior Testimony

- Testimony given at a prior proceeding if offered for its truth is hearsay (Wigmore disagreed)
- ***R v Hawkins:*** Earlier testimony is an out of court statement & current trier of fact is denied the opportunity to observe the witness give evidence
- ***Necessity:*** Unavailability of witness
- ***Relability:*** Under oath, ability to be cross-examined, etc.

Common Law Exception to Prior Testimony:

At CL, evidence given at a prior proceeding is admissible for its truth in a later proceeding provided:

(1) The witness is unavailable

(2) The parties or those claiming under them are substantially the same

(3) The material issues to which the evidence is relevant are substantially the same

(4) The person against whom the evidence is to be used had an opportunity to cross examine the witness at an earlier proceeding

- Actual cross-exam is not required, the mere opportunity is enough
- Not necessary that the issues in the 2 actions correspond, nor is it necessary that the causes of action be the same.

4 Situations

(A) Admissibility of Prior Testimony from Criminal/Civil Trial in Subsequent Civil/Criminal Trial

- ***Town of Walkerton v Erdman*** (1894 SCC)

Prior testimony is admissible if:

1) There is substantial commonality between parties and issues at play in current trial
2) The witness is unavailable to testify
3) The opposing party had the opportunity to cross-ex the witness as an earlier proceeding

(B) Admissibility of Accused's Prior Testimony at Another Person's Trial in Accused's Own Trial

- When the accused is subpoenaed to testify in someone else's trial, can that testimony be used at his own?

Noel (SCC) brother A and B charged with murder, at A's trial B testified he was the killer, at B's trial he testified that A was the killer

- Crown can use accused's testimony from trial of another only to challenge credibility but not incriminate
- Judge must give limiting instruction that accused's prior testimony can only be used to access credibility

Henry (2002 SCC) (overturned Noel)

- Accused's prior **compelled** testimony at another's trial cannot be used by the Crown for any purpose (not to challenge credibility or incriminate) (if the testimony was offered then there is no protection afforded the accused)

(C) Admissibility of Accused's Prior Testimony at Own Trial in Accused's Retrial

- When an accused testifies at his own trial, is convicted by successfully appeals and then wants to testify at his second trial what use can the Crown make of his prior testimony?

- ***Henry*** (2002 SCC): Because the accused was not compelled to testify at his first trial (did so voluntarily) the Crown can use that prior testimony to:
  (a) Challenge accused's credibility at the second trial
  (b) To incriminate the accused
- **Cannot tender that testimony as part of their evidence** (i.e. they cannot lead evidence of the accused's prior testimony by tendering the transcript --- would be a violation of s.13 Charter)
- Dubois case- convicted, appealed conviction and at 2nd trial the crown wanted to tender as part of heir case a statement they made and evidence from the first trial. First trial was before trial. 2nd trial charter was in effect s 13 in play. Tj had to decide am I going to allow the crown to make this

transcript part of the case to meet? He did. And dubois didn't testify. Also decided that it didn't matter that at first trial is not in effect but it arises at 2nd trial. However where he testifies at 2nd trial, state of law says that that evidence cn be used to challenge credibility and to incriminate.

(D) Admissibility of a Witness's testimony at preliminary inquiry in a subsequent trial

- s.715 Criminal Code : if a witness testifies at preliminary inquiry but then refuses to testify at trial or:
    - is dead
    - became insane
    - so ill that unable to travel/testify
    - absent from Canada…

➔ then the testimony from the preliminary inquiry can be used against them

- ***Potvin*** (1989 SCC): even if the criteria in s.715 are met the judge has common law discretion to exclude the evidence if:
    a) Prejudicial effect outweighs probative value
    b) There was unfairness in how the evidence was obtained
    c) Was the defense given the opportunity to cross-examine the witness at preliminary (even if he didn't)
    d) Did the defense engage only in a limited cross-examination with the anticipation of full cross-examination at trial while the Crown withheld information that the witness would not be available at trial
    e) Was the defense not given full disclosure at preliminary inquiry and thus cross-examined the witness with incomplete information
    f) Is the an "oath against an oath" situation (complainant's word against accused's') if so the complainant's preliminary testimony should not be admitted without the finder of fact being able to hear the complainant's testimony at trial and asses her credibility

*****If either side anticipates that the witness at preliminary inquiry will not be available at trial then should videotape the testimony so finder of fact can asses the witness's demeanor at trial**

Common Law Admissibility Codified under CC: s715(1)

Where at the time of trial of the accused, a person whose evidence was given at the previous trial on the same charge OR whose evidence was taken in the investigation of the charge against the accused refuses to be sworn, OR if on the facts it is proved that the person is **dead, insane, absent, ill,**

- Where proved that this evidence was taken in the presence of the accused, it may be admitted.
- The word "may" in s715 gives the TJ discretion to exclude PT if:
    a. Unfairness in manner in which evidence was obtained
        1) You didn't tell the defense you know witness will be unavailable
        2) You know they will be unavailable but it would require minimal effort to make them available (ex. They are on vacation) → Ex. You can videotape it
    b. Admission would effect fairness of trial itself

R v Potvin: → Constitutionality of s.715

Witness testifies at preliminary inquiry and then refuses to testify at trial. Under s.715(1) testimony allowed in. Defense argues they didn't cross. SCC rules it doesn't matter → They had the opportunity for a full cross at the PI **** Crucial Nature of testimony is relevant, but not determinative (R v Sophonow)**

Reminder: Even if you don't fit s.715(1), you can take the principled approach

** Henry & Nadcu → Rules on co-accused

4. Prior Convictions

Civil Trials:

Orthodox rule: Criminal convictions allowed in as evidence in civil proceedings

- **Alberta Evidence Act s.26** permits the introduction in civil proceedings of prior convictions (e.g. convicted under *Traffic Safety Act* could be admitted)
- **Section 25 of Evidence Act**: prior conviction is not conclusive, and its weight depends on particular circumstances of the case → it is evidence that could prove the D's negligence (ex. You may have plead down)
- A party to a civil proceeding may prove that the other party or a 3rd party has been convicted of a criminal offense for the purpose of est. prima facie that such a person committed the offense charged
- **An acquittal is not admissible in a subsequent civil trial to prove that the party did not commit the offense**

Criminal Trials

➔ Canada Evidence Act:

- s.12(1) witness may be questioned re: criminal convictions
- s.12(2) if witness denies conviction or refuses to answer, the opposing party may prove conviction
- s.12(3)(a) conviction may be proved by showing indictment and conviction, or summary conviction (e.g. court records) and (b)proof of identity

Under section 12, you can question on prior convictons

**** But can only be used for CREDIBILITY, but NOT propensity**

***Corbett (1988 SCC)* → How to get a criminal record EXCLUDED**

Facts: Corbett was accused of murdering a drug associate

Issue: Does s.12 of the Canada Evidence Act violate s.11(d) of the Charter when applied to the accused who takes the stand?

Ratio: s.12 uses the word "may" so judge still have common law discretion to exclude:

Test for excluding all or part of accused's criminal record:

1. **What was the nature of the convictions?**
    a) Purpose of s.12 is to admit the accused's criminal record in order to assess his credibility and not to show his propensity to commit the charged offence. Thus, do convictions relate to credibility?

- Impaired driving: does not relate to credibility
- Theft/fraud always relates to credibility

b) How similar is the conviction to the charged offence?

- If similar then there is a danger that the jury will use the criminal record to assess propensity and not just credibility
- **Therefore, the more similar, the more prejudicial and the more likely to exclude**
    - e.g. accused was charged with a murder and prior conviction of murder was on record

2. **Remoteness: how long ago was the prior convictions?**
    - The farther in the past the conviction the less relevant it is to credibility
    - If there is a long gap in the record --- what will that mean (e.g. in this case accused was in jail for 25 years)

3. **Has the defence lawyer deliberately attacked the credibility of Crown witnesses?**

- If so, would create an imbalance in trial if the Crown witness was portrayed as lacking credibility while accused presented as having credibility
- In this case the defence lawyer did vigorously attack the credibility of the Crown witness

*** "Corbett" motion: to exclude all or part of an accused's criminal record from the jury because it would be too prejudicial

Underwood (1988 SCC)

Facts: The accused applied for a "Corbett" motion prior to taking the stand, judge denied ruling before accused took the stand so accused did not, lost at trial

Ratio: The accused is entitled to the provisional ruling before he elects to take the stand but that ruling can be revisited if the accused takes the stand and portrays that he has no criminal record or is of good character

Application of s.12 to Accused v. Other Witnesses

Evidence regarding prior convictions can only be used to assess credibility of witness

- Crown can only cross-examine the accused qua witness about the following information regarding convictions:
    a) What the offence was
    b) The date of the offence
    c) Where the offence took place (i.e. what city, not precise location
    d) Penalty

BUT No details about the manner, circumstances, etc. exception: if the accused himself makes character an issue and injects it into the trial

→ The accused can cross examine Crown witnesses on (a-d) but also details about the offences, lifestyle etc. to attack credibility

5. Admission of a Party:

Admission = acts or words of a party said/done pre-trial or pre-jury offered as evidence against the party

***** KEY → The statement/action was of a PARTY to the action**

- Includes all manner of pre-trial statements or actions by the party either exculpatory, neutral, partly inculpatory, partly exculpatory or inculpatory
- They do not have to be based on personal knowledge
- Can only be tendered as evidence at insistence of your opponent (e.g. during his case, during cross-examination of maker) so **does not depend on the maker of the statement being a witness**
    - Sometimes called admissons "against interest". Not against interest when you say them, but because they are tendered by your opponent (***R v Evans*** → Innocent statements can be used)

Admissible for two reasons:

- Tendered for the proof of the truth of its contents
- To challenge credibility of that party

If the statement is a PIS, it **need not follow KBG** protocol if it is an admission

- **If the statement is to a person of authority, you need to follow confessions rule (voluntary BARD) "Mr. Big" sting operations → Presumptively inadmissible, prove probative > prejudicial**
- If to another 3rd person, presumptively an exception to the hearsay rule

Admissions may be outside of the analytical framework set out by Starr b/c in lieu of seeking independent circumstantial guarantees of trustworthiness it is sufficient that evidence is tendered against the party.

- Admissions are different then confessions → they are made to an ordinary person (confessions are made to a person of authority)

Formal vs. Informal Admissions:

- ❖ Formal admissions dispense with the need to prove a fact in issue (i.e. party is prepared to concede a particular point). Once made these admissions are binding (e.g. D admits liability but contests quantum)
    - In civil these are done via pleadings, agreed statement of facts, submissions
    - In Crim, these are done by guilty pleas OR under s.655 of the CC which allows an accused to admit any fact alleged by the Crown
- ❖ Informal admissions: not conclusive proof of an issue nor does it bind the parties, it is always open to be contradicted or explained (***R v Korski*** → Can make an admission to what was said, not that it was true)

Characteristics of Admissions:

A) Admissions need not be based on a personal knowledge
    - A party may accept what others say and if so they are deemed to have adopted those statements as their own
    - ***R v Streu***: Friend told accused the tires were stolen, so he's know they are hot
    - In this case the hearsay is not excluded because the party has chosen to rely on the hearsay, and presumably in doing so the party has satisfied themselves as the reliability of the statement

B) Admissions may be implied by conduct
    - Example accused fleeing the scene of the crime is an implied admission of guilt

- BUT in these circumstances the courts must be satisfied of inference that conduct alleged admission (Ex. ***Walmsley***: Parents helping the parents of the kid their kid shot with an arrow pay for bills is not an admission of liability, can just as easily be an act of compassion)

C) Admission by Silence

Requires that:

a. Statement made in the presence of party
b. In circumstances that the party would be expected to respond
c. Failure to respond would reasonably lead to the inference that the party adopted the statement
d. Probative value outweights prejudice

- Principal of adoption by silence does not apply where accused confronted with the allegation by a person in authority

Three Types of Admissions:

1. Admissions Admissible Against Maker

- Admissions are generally only admissible against the maker of them (therefore the confession of one co-accused is not admissible against the other co-accused) BUT (see vicarious admissions)
- If admissions are also damaging against other co-accused, and it does not meet a co-conspirators exception and jury would have difficulty with a limiting instruction then can apply for severance
    - E.g. at arrest A makes inculpatory admission about A&B, if lawyer for B thinks that statement is going to be admissible and Crown will tender it then B's lawyer should apply for severance
    - If granted Crown will elect if to proceed against A or B in this trial
    - With severance A becomes compellable & competent witness for Crown at B's trial
        - If A refuses to testify, A's prior statement could be admitted under the principaled approach

Note: If co-accused A testifies at trial, their evidence is evidence "at large" to be used against co-accused B

2. Vicarious Admissions

- When a party authorizes another to speak on their behalf, party is bound by that admission
- Example: P slips on wet floor. Usher rushes over and then say to janitor, "Where were you? I called you an hour ago about this!" → Is this a vicarious admission of the theatre's notice of the danger?
- Admission made vicariously by authorized agent may be admissible against principle

Test:

a. Proof of agency/employment (requires agent to testify)
b. Admissions of agent tendered against principal must have been made to a 3rd party within the scope of authority during subsistence of agency
    a. Unlikely an agent would make a statement against principal during employment unless it was true
    b. ** Needs to be within scope of duty (delivery boy cannot makes admissions on treasury stock)
    c. But, you do not need authority granted by employer to make such statements

3. Co-Conspirator's/Criminal Enterprise Admission

Traditional: If A testifies to murder and implicates B, A's confession is only good against A. But if A and B are tried separately, A can be a witness against B (& PIS applies, etc.)

**** If the co-conspirator themselves testifies, no need to invoke the hearsay exception**

→ So this only is used to get evidence in where the evidence is an admission made by a co-conspirator (1) where they are not a witness in the 2nd trial but (2) you want to use their admission as evidence against B

Co-conspirator exception: Statements made (1) in the course of the conspiracy (or common design [aka partnership]) AND (2) in furtherance of the conspiracy are admissible

- But the guilty plea or confession to police is not, as it is not in furtherance of the conspiracy
- But statements made after an arrest are admissible if they are in furtherance of the original plan (ie what to do with the drugs)

Requires: (*R v Carter*)

i. Must demonstrate BARD that ON ALL THE (admissible) EVIDENCE there was in fact a common intention or conspiracy or common unlawful purpose; if yes then:
   a. Confession: A confession cannot be used to prove B's guilt, but may be used as evidence of the conspiracy IF the confession itself is admissible

ii. **Threshold Problem**: **BoP ON ALL THE EVIDENCE THAT CAN BE USED AGAINST ACCUSED** – is the accused a member of the conspiracy?
   a. So A's confession could not be used here, as the orthodox rule is that A's statements cannot be used against B → Can only be used to show A was a probable member of the conspiracy

iii. **In furtherance Requirement**: Statement was made in furtherance of the common purpose

iv. IF (i) and (ii) and (iii) are found, then the hearsay exception applies and the statements of the co-conspirator can be used against the accused

v. **But, need to be convinced BARD as to the existence of the conspiracy and membership in it.** The admissibility of the hearsay does not make the conviction automatic, given the threshold requirement is BoP

(**Threshold Problem**) If conspiracy existed, then there must be independent evidence establishing that the person against whom the evidence is now being tendered to show that on the BOP he was a member of the conspiracy or common intention

(**In furtherance requirement**) If yes, then apply hearsay exception + use only statements and actions made by the co-conspirators which are in furtherance of the common intention or conspiracy can be used against the accused on the issue of his guilt BRD

Statements alleged to be made in furtherance or formation of conspiracy are not hearsay because: they are direct evidence of an agreement to commit an offense and depend on the truth of their contents

**** If the co-conspirator themselves testifies, no need to invoke the hearsay exception**

R v Koufis 1941 SCC → co-conspirators exception applies to any count where a common intention not just a conspiracy charge

R v Mapara 2005 → This exception meets the modern principled approach to the hearsay rule – but may still be vunerable under s.7?

R c Carter: Necessity & Reliability:

Necessity is based on three facts:

I. Co-accused are not compellable by the Crown
II. Undesirability of trying the alleged co-conspirators seperatly
III. Evidentiary value of contemporaneous statements made in furtherance of conspiracy

Reliability is based on:

I. TOF must be satisfied BRD that conspiracy existed
II. State must est. on a BOP that the accused was a member of the conspiracy
III. Court only to consider out of court declaration made in furtherance of conspiracy
IV. Statements made in furtherance generally made spontaneously & contemporaneously with event

6. Declarations Against Interest by Non-Parties

Where the statement is made by a non-party. If the statement is made by the party itself, it falls under admissions.

1. Declarations against pecuniary and property interest are generally allowable where:

1. Declarant is unavailable to testify
2. Statement is made against declarant's interest
3. Declarant had personal knowledge of the facts stated

Necessity → Declarant unavailable, Reliability → Admission of adverse facts

Based on fact that people do not admit statements adverse to their interests unless they are true.

- Most common → The admission of a debt
- E.g. "I owe John 100 dollars, but I am not going to pay him back"
- The statement need not fully be against declarants interest → (e.g. I owe John 100 dollars, but I am not going to pay him back because he owes me 100,000)

***** Don't need to know it will be used against you**

2. Declarations against Penal Interest (Allowed per ***O'Brien*** 1977 SCC)

Declarations against penal interest may be admitted where:

A. Declaration made in circumstances where apprehension of vulnerability to penal consequences as a result
    a. You must know the statement will be held against you → This is the opposite of property declarations
    b. Cannot just say it for the shock value without thinking it will be held against you
        (A) But this has been found to apply even where you confess to another gang member, so low bar
B. Vulnerability to penal consequences c/n be remote

C. Declaration must be considered in its totality → if upon whole tenor the weight is in favor of the declarant, it is not against his interest (this is different then typical declaration)
D. Court can consider if circumstances connect declarant to the crime or connection between accused and declarant
E. Declarant unavailable by reasons of death, insanity, out of jurisdiction, or grave illness → Not just a refusal to testify

Viewed with caution because of potential for great mischief, 3 criteria:

i. Necessity: declarant is unavailable (dead, now insane, unable to travel/testify due to illness, absent from Canada) (refusual to testify not good enough)
ii. Can only be used FOR (exculpate) accused and not against (incriminate) [***R v Lucifier***]
iii. The following do not qualify:
    - Declarant's admission was a mix of exculpatory and inculpatory elements
    - Declarant makes "guarded admission" claims to have committed the crime but seeks statutory protection (s.5(2) Canada Evidence Act or s.13 Charter)
    - S.5(2) of Canada Evidence Act

7. Dying Declarations

Can only be used in criminal proceedings

4 Criteria:

i. Deceased had a settled, hopeless expectation of almost immediate death (Subjective on facts)
ii. The statement was made about the circumstances of the death
iii. The statement would have been admissible if the deceased has been able to testify
iv. The offence involved is the homicide of the deceased

- Based on idea that person would not die with a lie on their lips (is that so relevant now?)

***Maybe not pass principle approach (Necessity? Yes, because the person is dead, Reliability? What was declarant's ability to have perceived and interpreted events accurately at time they sustained fatal injury, would it be a reliable statement from this person?)

8. Declarations Made in Course of Duty

Records, inventory counts, nurses notes, etc. → Presumed reliability since made routinely, relied on by business, and made contemptuously with events

- At CL declarations were admissible for their truth when 4 criteria were met BUT the maker had to be dead → this made no sense in the modern age
- ***Myers v DPP*** (1964 HL) (sought to prove ownership of cars through records prepared by unknown employees)
    - HL took rigid view of traditional common law exceptions to hearsay
    - Would not recognize new exception for business records
    - Held it was for parliament to legislate new exceptions
    - Dealt with a series of stolen cars
- ***Ares v Venner*** (1970 SCC)

- SCC reject majority in HL (Myers)
- Recognize new exception to hearsay → Allowed in prima facie for their truth (nurse's notes)

Now largely covered in statute: ***Canada Evidence Act***:

- Allows for admissibility of business records (a) made in usual and ordinary course of business (b) by a person under duty to record information accurately
- A person who recorded the information can sign an affidavit about accuracy of record and avoid having to testify
- Record can then be tendered for its proof- for the truth of its content
- s.29 records of financial institution (no notice requirements necessary)
- s.30 business records (s.30(7) requires Crown/Accused to give 7 days' notice)
- s.31 computer and electronic records

** If records are recorded by one employee from statements made by another, it is okay as long as they are both under a duty to record.

Alberta Evidence Act

- s.41: Banking records
- s.41.1 – 41.8 Electronic records

9. Declarations made as Res Gestae

Res gestae = Spontaneous statements → Reliability comes from the fact that there is not time to concoct them
Necessity is based on expediency → there is no other equally satisfying source of evidence.

- The unavailability of the declarant is not a pre-req, the declarant may testify and the spontaneous statement may also be admitted into evidence

A. Statements of Present Physical Condition

- Spontaneous statement of person that he is experiencing a particular physical condition: is admissible only to prove that person experiencing condition at time and its duration
  - E.g. man shoveling dirt sits down and complains of severe back pain OR if doctor touches back and he screams in pain
  - BUT statement of past pain would not be admissible e.g. I hurt my back gardening 2 days ago

B. Statements of Present Day Mental State/Present Intention

Where a person describes their state of mind (emotion, intent, motive, plan) the persons statement to that effect is admissible where the statement of mind is:

a) relevant
b) The statement is made in a natural manner
c) and not under circumstances of suspicion

Many times, the statement is admissible anyways, for the truth that it was said (admissible hearsay) → State of mind can then be inferred

- **But you cannot admit the statements for proof of intention, only that they were said**

- Example: #1: No one likes me, no one would miss me → This is admissible, b/c not tendered for its truth, can infer deceased is suicidal
- #2: I intend to kill myself → Hearsay because an explicit statement of intention + offends circumstantial evidence that she did carry out her intention

Statements of intention are not admissible to show state of mind of someone other than declarant, nor can they be used to show that persons other than the declarant acted in accordance with the declarants stated intention

- e.g. John intends to kill me → not admissible to show John's intent
- I tried to kill myself last night → Not admissible that deceased had tried to kill herself previously

R v Smith – phone calls of deceased were not admitted as evidence as only showed desire of deceased to leave the hotel, were not evidence of accused's present intention **SMITH IS THE DETROIT HIT CASE!!**

C. **Excited Utterances**

Spontaneous statement relating to startling event/condition is admissible for proof of truth of contents if made while declarant under stress of excitement caused by the event/condition

- Need not occur DURING the event, just needs to be closely connected

Test from Andrews:

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

Ex. Nicolas → The 911 tape was allowed in as a spontaneous utterance

Ratten (1971) JCPC:

Women phones operator asking excitedly for police. Phone is hung up. Husband shoots her and she dies Husband claimed he shot her while cleaning gun **ISSUE:** Is phone call admissible?

- Close & intimate connection between deceased victim's statement and the shooting which occurred shortly thereafter.
- Close in time & place, & tone of voice used by deceased, showed she was under stress of excitement caused by event/condition

Risby (1978) SCC:

Police officer arrests man and hold up bags of drugs, asking "what is this?" Man said "I don't know"
At trial, defence lawyer wanted to elicit this statement in his cross-examination of police officer
REASONS: Res gestae statement can be exculpatory as well.

NOTE: Questionable whether this complies with principled approach→in particular, reliability. Most people in this situation would utter denial and say that it is not their drugs.

R v Graham

Crown relying on doctrine of recent possession when it comes to stolen property. Accused said "i don't know it was there". **Issue:** is that issue enough to overcome the doctrine of recent possession?**Held:** no

R v Smith 1982 "the Detroit hit case

Has to do with phone call with respect to recent intention. Drug case – deceased and accused travelled to Detroit Together in a hotel – phonecalls placed from the deceased to her mother –

- 1st phone call tells mom "larry left me in a hotel in London and i need a ride home"
- 2nd call – larry still has not came back
- 3rd – larry came back, i don't need a ride home
- Soon after she is killed

Issue: Are these calls admissible for the truth of their content as statement of present intention.

Held: her references to larry can't be used, but only for her present intent

- On a traditional approach, these calls were not admissible to prove abandonment by larry – only to prove her own intent
- But with new principled approach – calls 1 and 2 satisfied the requirements, sufficiently reliable, they clearly was no reason to doubt her veracity
- Her 3rd call failed the reliability test – she was a bit of a shady woman – may have lied to her mother for some reason

R v Starr 2000 SCC – is the leading decision with respect to the present intent exception to the hearsay rule. – the statement of the deceased to his girlfriend which suggests that he was going to go with the accused was found to be unreliable by the SCC because the deceased was with another woman.

- ***Starr* is also a critical case with regards to the traditional exceptions to the hearsay rule and how it must conform to the modern principled approach.**

D. **Statements of Present Sense Impression**

- Spontaneous statement that describes event/condition while person perceiving event/condition, or immediately thereafter may be admitted for proof of truth of content
  - Theory: More accurate because less excited and more rational
- NOT YET RECOGNIZED IN CANADA – but may come into narrative

UNIT 6: OPINION EVIDENCE

Orthodox rule: Witnesses may not give opinion evidence, but testify only to facts within his knowledge, observations & experience

Two categories of admissible opinion evidence:

- **Lay witness**: offer opinions when there is no other meaningful way for them to communicate ordinary knowledge that they possess
- **Expert witness:** where trier of fact do not have special training or experience required to make relevant and worthwhile observations

** If all that is required to form an opinion is the ordinary experience of a lay person, the lay opinion evidence rule should be used

Lay Witnesses:

(1) Personally made observation (2) Common stock of knowledge

May present their relevant observations in the form of opinions where:

a. They are in a better position than the trier of fact to form the conclusion
b. Conclusion is one that persons of ordinary experience are able to make
c. The witness although not an expert, has the experiential capacity to make the conclusion
d. Opinions expressed are merely a compendious mode of stating facts that are to subtle or complicated to be narrated effectively

Lay persons cannot provide evidence outside of the common stock of knowledge → This would be considered "expert evidence"

Witnesses cannot usurp the trier of fact → The ToF can decide whether or not to believe the witness' opinion

- Judge may also consider if the witness has the relevant experiential capacity (e.g. a child could not tell how fast a car was going)

R v Graat: Police officer testified that AC was "intoxicated" → opinion is way of describing compendious series of observations, such as odor of alcohol, lack of motor coordination, slurred speech, glassy eyes. Proposition that a police officer is entitled given his experiential capacity to give evidence that in his opinion the accused is drunk (he has significant experience). This is within the common stock of knowledge we can all give that opinion

**** IMPORTANT FROM GRATT**: Is it necessary to express an opinion? Or can the witness say what happened from what was observed? → Ex. The woman had blonde hair, blue eyes, I had seen her before vs. "The woman was Aunt Sally"

The "Ultimate Issue" Rule:

RULE: You are not permitted to make broad conclusionary statements about the guilt of innocence of the accused BUT can touch on the ultimate issue if it arises in another way → Ex. "Are they NCR"

- Used to be that could not give opinion evidence that was in respect to the ultimate issue in trial
- **Graat put a rest to this**:

- Here the accused tried to use the ultimate issue rule to oppose the admission of lay opinions about his impairment. He argued that the impairment was the ultimate issue before the court & allowing opinion evidence may cause the judge to accept their opinion rather than evidence of the case
- This rule is also gone for expert witnesses BUT can be a factor in considering if their testimony will be admitted

Case: ***R v J(J-L) [2000, SCC]:*** If an experts testimony comes close to expressing an opinion on the ultimate issue, special scrutiny is required

Opinion on Questions of Domestic Law:

- No witness whether expert or lay can provide an opinion on a pure question of domestic law
    - Allowing an expert to interpret the word "appreciate" in s16 of the CC would be an error of law
- BUT can receive expert evidence about matters of foreign law

Rule Against Oath Helping:

a. Witness can provide evidence to *challenge credibility* in limited circumstances

- **R v Toohey:** Can you call evidence to challenge the credibility of a witness from an expert which will have the effect of damaging the witnesses credibility?
- ***Toohey*** case involving 4 young men charged with robbery, allegation that they assaulted a young man in a back alley. The boys' defence was one of them was in the alley making water (peeing) and a strange man bumped into him and fell on the floor and was acting bizarrely. The complainant was in such a state and said that the boys tried to rob him on the scene. A medical doctor was called to examine him at the police station who said that he was suffering from a mental health issue, was hysterical. Could that evidence be called in the defence of the 4 young man to challenge the credibility of the complainant?
    - The proposition: Yes. That sort of evidence by a properly qualified expert may be called to see if the complainant is credible

b. Witness cannot provide evidence to BOLSTER credibility

A properly qualified witness can provide general info relevant in judging credibility of a witness, but is **prevented by the rule against oath helping from expressing an opinion about whether a particular witness is telling the truth**

- Ex. R v PWA: Cannot say "I knew she was telling the truth when she disclosed the sexual abuse to me"

- Prohibits the admission of evidence adduced solely for proving the witness is truthful
- Rule d/n just apply to bolstering credibility or reliability of a witness it is ALSO offended when a witness ***offers an opinion that another witness is incredible or unreliable***
- The rule is also breached where a witness offers an opinion on how to interpret apparent reliability problems with the testimony of another witness
    - Example: ***R v Reid*** -> expert crossed the line by testifying that inconsistencies in a witnesses evidence were because she suffered from battered women's syndrome
- Rule also breached by witness bolstering own testimony via hearsay: example ***R v Ranger***: Crime scene expert violated rule by stating that she had her opinion verified by other colleagues

- Example Cases in ***R v Beland & Phillips:*** **Sole purpose of polygraph was to bolster witness credibility**
- ***R v Kyselka:*** psychiatrists suggestion that the 16 year old mental condition meant she was incapable of lying. The SCC held that this opinion should not be admitted because the purpose was to suggest that the complainant because of her mental classification was a truthful witness
- ***R v Clarke:*** Crown called a fellow prison inmate of the accused as a witness who gave evidence of inculpatory statement said by the accused. In its opening the Crown talked about the witnesses rehabilitation and commitment to god. SCC: while allowed to present witnesses in the best possible light, you cannot exceed this limit if the overriding and dominant objective was to bolster the witnesses character

Limits on the Rule Against Oath Helping;

(A) Rule not violated where testimony of witness expressing their own opinion happens to lend support to another witnesses testimony

(B) If there is utility in having a witness express opinion on credibility/reliability of another and the probative value outweighs the prejudice they may be recived
e.g. ***R v Burns***: expert based his opinion on what he was told by the witness. SCC said when expert expressed his belief in the complainant he did so not to bolster the complainant testimony BUT instead to explain the foundations for his own opinion

(C) Experts may offer opinion evidence that is **relevant** to credibility/reliability of other witnesses

- In this case the expert does not comment on the truthfulness or reliability of the witness but offers the **TOF background info outside the competence of the TOF that can aid in its own conclusions about witness credibility**
- E.g. a witness may possess psychological/physical characteristics that would diminish their credibility/reliability where those characteristics would not be apparent to the TOF

THERE IS A DIFFERENCE BETWEEN OPINION EVIDENCE ABOUT CREDIBILITY (INADMISSIBLE) & OPINION EVIDENCE RELEVANT TO CREDIBILITY (ADMISSIBLE)

- E.g. in Reid if the expert had educated the jury on the effects of battered womens syndrome this would have been ok.

Obligations of Trial Judge:

1) Where witness presents evidence relevant to credibility, the TJ must ensure that the evidence presented is confined to that purpose & that experts do not stray into offering opinions about credibility
   - Example: ***R v Llorenz***: testimony of a witness offended the rule against oath helping because he was allowed to cast that testimony in a fashion that went more to belief of complainants testimony than evaluating the TOF on the nature and characteristics of sexual assault victims
2) Direct jury on the limited use that is to be made of this kind of evidence

Expert Witnesses:

Traditionally, these rules applies ANY TIME someone testified and it required special knowledge

- Growing body of law states that the test only applied if an expert is giving an opinion (ie. The wound is life-threatening) and not it they were stating facts (ie. The wound severed the artery) → See obiter in R v KA, the case of *R v Abbey*
- But since the line between fact and opinion evidence is unclear, best to satisfy *Mohan*
    - Witnesses can still be persuaded buy expert "facts"
    - Also, Abbey is NOT LAW IN AB, just ON

Expertise vs Ordinary Knowledge:

- Expert knowledge needs to require special training or experience – cant be something that you could easily learn
- Ordinary experience does not require compliance with the *Mohan* rules
- General police knowledge also doesn't fall under the rules, but specialized police training knowledge does

Test For Admissibility (*R v Mohan*):

A. **Necessary** to establish the trier of fact (not merely helpful)
    a. **Ordinary people are unlikely to form the correct judgment without assistance**
B. **Relevance** (evidence must be logically and legally relevant)
C. **Properly qualified expert** (proposed expert must possess a sufficient degree of expertise)
D. **Absence of an exclusionary rule** that would offend admission

1. Necessary (not helpful)

- ***Mohan***: "If on the proven facts that judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary "
- **Must ask: is the opinion likely to be outside of the experience of the jury**
- Evidence is necessary if it deals with subject matters that ordinary people are:
    - Unlikely to form a correct judgment on [such as the cause of a fire]
    - Where experts provide info likely outside of the expertise of the judge or jury [e.g. scope of MLAs duties]
    - Technical nature of the info requires explanation [DNA analysis]
- **Example:** R v (DD): complainant gave compelling explanation as to why she did not tell her mom that she was assaulted which negated the need for an expert to describe how a victim of an assault may not report
- The fact that other experts are available to testify cannot undermine necessity of an experts opinion on the same matter
- Judge is gatekeeper here

R v Abbey on Necessity:

- ONCA treats necessity not as a precondition to admissibility but as a cost-benefit factor to be evaluated at the 2nd stage
- i.e. the more necessary the evidence the more likely it is to be admitted
- this is inconsistent with SCC in Mohan → there is no sliding scale of necessity

2. Logically and Legally Relevant

- **Legal Relevance:** Cost/benefit analysis; **probative > prejudicial**
  - **Probative Value:** Reliability
  - **Prejudicial Value:** Distraction, confusion, distort facts, usurp jury
- **Logical relevance** = expert evidence that has no tendency as a matter of human experience and logic to make the existence of a fact more or less likely then it would be without that evidence will be strictly inadmissible
  - ***R v Haynes:*** expert evidence about accused's dependent personality was not relevant to the material issue since it was not directed at intention or in establish an NCRMD defense.
- ***Abbey*** says move the legal relevance inquiry into the cost-benefit stage (this is not inconsistent with ***Mohan***)

3. Properly Qualified Expert

Counsel must clearly outline the claimed areas of expertise so that the judge in the voir dire can better appreciate the evidence called on issues of qualifications

- This prevents experts from expressing an opinion outside of their field
- Usually look to CV's of experts

Qualification requirement:

- Expertise need not be gotten by formal training → Can be by experience
- As long as they are more knowledgeable than the ToF, they can be considered qualified
- Deficiencies can affect weight of evidence but not admissibility unless there is a grave deficiency
  - E.g. ***R v Fisher***: Forensic DNA analyst was permitted to report random match statistics even though she was not a population geneticist because practice of assigning stats was common in her field.
- The question to ask is do they have the required expertise to offer an opinion in the relevant field
- **Expert must also be independent and impartial**

Enforcing Qualification requirement

1. In the voir dire, you need to establish the precise area of expertise

2. TJ asses if witness has sufficient qualifications to provide expert evidence. Done by assessing CV or resume → Bar is not high

3. Must ensure expert is not permitted to voice opinions outside of their expertise → Judge has to ensure expert remains within their scope - But its not an appealable error

4. Absent an Exclusionary Rule:

- ***R v Pascoe:*** evidence was excluded because there was a danger of it posing to show that the accused was the type of person to have committed this crime
- ***R v Mohan***: evidence was excluded in part because it violated the rule when expert purports to testify that an accused is not capable of committing the offense charged. Exclusionary rule avoided only if the personality profile of the perpatrator is sufficiently complete to ID distinctive psychological elements that were in all probability present and operating in the perp at the time of the offense
    - ***So you cannot say "He didn't do it because pedophiles normally do X and he didn't"***

FINAL: COST BENEFIT ANALYSIS → TJ can exclude some scope, omit parts of testimony, etc.

Weighing the Costs and Benefits:

Mohan: Costs and benefits must be weighed when considering (1) relevance and (2) necessity and (3) once the test for admissibility had been completed to decide if you want to apply exclusionary discretion

Benefits = the probative value of the evidence

Costs = relates to the distracting and time consuming nature of the testimony (***R v D(D))***

The test is applied less strictly to defense evidence

Note → Expert evidence admitted in one trial will not necessarily be admitted at the next → Look at it on a case by case basis

- **Especially where the state of learning on a specific area of science has progressed**

Benefits:

To determine must look at:

a. The cogency of the evidence
b. The importance of the issues the evidence addresses (How "live" the issue is)
c. Believability of evidence (not only re: impartiality and credentials but also quality and reliability of experts opinion) → But it is ultimately up to the trier of fact whether or not they believe the TOF

R v K(A): potential influence of expert evidence depends on how cognet the evidence is in proving that thing it is offered to prove and how live the issues are

- Influence also turns on the extent to which the opinion is based on proven facts
- *** Must meet the "threshold of reliability"
- If an expert is testifying in a familiar area, generally there is no need to conduct a reliability inquiry → tends to only occur in novel theories

Daubert v Merrell Dow Pharmaceutical:

If the opinion being offered is based in science, then you test reliability based on the scientific method of coming to the answer:

1. Hypothesis been tested?
2. Known error rates?
3. Peer review?
4. Acceptance by scientific community?

BUT, scientific validity is not a condition precedent to admissibility (e.g. the police can gain expertise through training and experience in practice of drug traffickers)

- If the opinion does not depend on principals of science must then ask: Whether experience and research permit the expert to develop a specialized knowledge that is sufficiently reliable to justify placing it before the TOF?

Per ***Abbey*** → determining experts evaluation of tattoos:

(1) Is the experts field a recognized discipline
(2) Degree of quality assurance mechanisms in place
(3) How accurate date is (was it only gathered fro the purpose of litigation?)
(4) How accurately date has been recorded
(5) Extent to which reasoning process of the expert can be explained

Factors to consider if not based in science:

1. Degree of compliance with principles and standard of relevant discipline
2. Demonstrated accuracy of information used
3. Ability of the proposed expert to explain the foundation of the opinion

Costs:

- Undue consumption of time
- Diversion of attention from real issue
- Inability of opposing party to cope with expert evidence because of a distinct resource disadvantage
- If the evidence is prejudicial in nature
- Are there procedural safeguards in place such as jury directions, cross examination, editing of evidence that can decrease the risks?

R v Abbey → restructured the Mohan test:

  - Look at preconditons of admissibility 1st
  - Balancing of costs/benefits 2nd
- NB: Abbey is not a SCC decision → DO NOT APPLY IT

Applying Mohan:

- Admissibility is determined during the voir dire
- Must give precision and scope of expert testimony and the facts it intends to prove

Bases of Expert Evidence:

1) **Primary Expert Who has direct expert involvement in the investigation**
   - A forensic pathologist who autopsies a body and gives opinion on cause of death
   - Did they make personal albeit professional observations at the time?
   - At times experts may be a witness to the facts forming the foundation of their opinion
   - Example: examining a burn before diagnosing it

- Involves testifying as to the facts and then offering an expert opinion on what the facts signify

2) **Expert who only provides a very general opinion**
    - Drug detective qualified as expert in drug trafficking can provide evidence about how traffickers operate
3) **Expert whose opinion relies on testimony observations of the complainant or accused as witness**
    - A defence expert witness can watch the entire Crown's case and then give their opinion on the basis of the testimony/observations during the proceedings
    - ***R v McLellehan*** AC gave Crown notice that they were advancing NCR defence. Crown wanted to call own expert to challenge this defence, but defence lawyer would not allow Crown expert to examine AC. Crown expert then observed AC's testimony & cross-examination, as well as defence expert's testimony & cross-examination. Crown expert then gives opinion on the basis of that testimony/observations. Here, Crown expert ended up concluding that AC was NCR
4) **Expert Whose Opinion Relies on Hypothetical Facts**
    - Experts are frequently asked to offer an opinion on a proper inference arising from the actual facts or to make an observation based on evidence presented in court
    - To do so the party calling the witness must present the expert with a hypothetical fact scenario that the reflects the facts that the party hopes to find in the TOF
    - If the TOF finds the facts contained within the hypothetical exist, the opinion can be applies
        - E.g. if providing the significance of a tattoo worn by a member of a gang but there is no evidence linking accused to a gang, the opinion is useless.
5) **Expert whose opinion relies on accuracy of complainant or accused's antecedent behaviour, opinion based on person's history without ever actually having met the person**
    - Expert opinions based in whole or in part on hearsay or inadmissible info?
- In these circumstances the opinion relies almost exclusively on the accuracy of the complainants antecedent behavior
- Example***: R v Lavallee*** → diagnosed the accused based on convos with the accused, her mother and hospital records
- Since the TOF must know the basis of the expert opinion, it is permissible for an exert witness to relate any inadmissible info that relied on
    - This info should be used by the TOF to evaluate opinion BUT not as proof of facts (i.e cannot be used as proof od the event described)

Weight given the Expert Evidence → THE ABBEY PROBLEM:

- Abbey said that before any weight can be given to the expert opinion, the facts upon which that is based must be found to exist
- Therefore while an expert can testify on hearsay information, before the TOF may rely on that opinion there must be admissible evidence that proves the hearsay info was true

- Therefore Abbey required an evidentiary foundation to accepting expert evidence

PROBLEM: This rule was taken to mean that the entire foundation for an opinion has to be confirmed by independent evidence

BUT ***R v Lavallee*** → said no: it is necessary for the facts supporting the opinion to be found to exist based on admissible evidence but it is not necessary to establish each and every fact the expert relied on. You need some admissible evidence to est. a foundation

However, the more the expert relies on the facts not proved (inadmissible evidence) the less weight the testimony should be given.

Other points:

- If an expert obtains and acts on info that is within the scope of his expertise and which does not come from a party to the litigation, the TOP is free to weight the opinion even if the info does not meet an est. hearsay exception
    - E.g. in R v BSA: the DNA expert relied in international guidelines, it was not necessary to call experts who made the guidelines
    - NB: if expert opinion is based on info from interested party, the hearsay foundation must be proved

Novel or "Junk" Science:

Novel science must

- Be essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert
- Be subjected to special scrutiny wih respect to its reliability and
- Satisfy an even stricter application of the necessity and reliability inquiries where the expert opinion approaches an ultimate issue in the case

Bastarache in JL:

Science is considered novel when:

1. When it is new

2. When you apply a recognized scientific technique to a new use

** But, may also mean new to the court, though it has been used in science for a long time

- This is the standard used, as we are looking fore reliability of use in court
- But note that science can be disproven and refused to be used in court even if it used to be widely accepted → See hypnosis

3. Where there is a realistic basis for challenging the underlying theory

Case***: R v J(JL):***

Facts: Wanted to use the doctor to say that accused was not the type of man to commit sodomy on 2 boys

Held: SCC reversed CA and said inadmissible.

- Case dealt with novel scientific evidence "junk science"

Apply the Mohan test, but when assessing probative value (reliability), ask:

1. Can the theory be tested
2. Has the theory been subject to peer review
3. Known or potential rate of error or the existence of standards
4. Is the theory or technique generally accepted in the scientific community

Applied:

- There was three problems with the evidence:
    a. Doctor could not show that the offenses could only be committed by a perp who possessed distincitive and identifiable features
    b. Difficulty in showing that standard profile had been accepted
    c. Difficulty in matching accused against profile
- Also they breached the character evidence rule – cannot be should that crime could only be committed by person with certain character traits not possessed by the accused

How to Present Expert Evidence:

1. Expert Training
    - Expert provides general information without the expert commenting on the particular case – TOF makes own conclusion
2. Expert Opinions based on personal observation
    - Most experts offer their own interpretation of the facts.
    - Expert evidence rules apply only to opinions offered and not facts personally observed unless those facts couldn't have been made without expertise
    - Ex. A burn expert can make observation about the burn they see, but can only interpret it using their own expertise
3. Expert Opinion Based on Hearsay or Inadmissible Information
    - Experts often rely on hearsay evidence
    - Like in *Lavellee* in battered womens problem – formed his opinion from statements made by woman, mother, doctor
    - But, expert is allowed to relay this information in order to establish a foundation to his opinion
    - Inadmissible info that the TOF learns about in this way is to be used solely to enable the TOF to evaluate the opinion and not as proof of facts.
    - **Abbey Rule (SCC) - While the expert can testify based on hearsay information before the trier of fact may rely on that opinion there must be admissible evidence that proves hat the hearsay information the expert relied upon in making that opinion was true**
        - ***** MUST BE AN EVIDENTIARY FOUNDATION**
        - **Lavallee → This entire opinion need not be based in fact**
        - **There just needs to be SOME admissible basis upon which the expert opinion can be formed**
        - **The less admissible evidence the opinion is based on, the TJ can direct the jury to put less weight on it**

- **But, customary info by disinterested parties (aka international guidelines) is an acceptable basis for an opinion and does not need to be corroborated by other non-hearsay evidence**

4. Expert Opinions Secured by Hypothetical Questions
   - **Remember: Before weight can be given to an expert opinion, the facts upon which the opinion is based must be found to exist**
     - Ex. If you testify in Abbey to the significance of teardrop tattoos to an urban street gang, opinion is worth nothing unless the facts prove Abbey is in an urban street gang
   - Dangerous bc expert is training TOF to interpret evidence using expert techniques but also offering the conclusion they would draw if given those facts and TOF could just adopt that
   - R v Reid- expert could have adequately educated without going so far to give opinions on significance of hypothetical questions that tracked the particular facts of the case
5. Presentation and Explanation to Jury
   - SCC has discouraged TJs from attempting to translate expert evidence into simpler language to assist jurors.
   - If expert evidence is recapped in a dangerous way a reversible error can occur

<u>Dangers of Expert Evidence (R v D(D))</u>

I. Jurors more likely to abdicate their role as a fact finder and simply attern the opinion of the expert
II. Experts are highly resistant to effective cross examination by counsel who are unfamiliar and not experts in that field
III. Experts opinion is usually derived from academic literature and out of court interview where materials are unsworn and not subject to cross examine
IV. Jurors may give it more weight than it deserves because:
   - They do not easily understand the evidence
   - The expert's credentials
   - Cloaked under mystique of science
   - Expert evidence highly resistant to effective cross-examination by counsel who are not experts in the field

<u>Cross Examination of Expert Witnesses</u>

- Lawyer who intends to contradict expert witnesses in cross-ex they must put the suggestion that you are basing the contradiction on to the expert witness so they can meet the suggestion (if your own expert contradicts the expert on the stand then you should produce your own expert's opinion (*Brown v Dunn*)
- You can cross-ex on what appears to be authoritative scholarship – if the expert admits it is authoritative you can cross-ex him on it BUT if he does not then you cannot BUT still benefit from practical impact of expert's opinion if it is indeed authoritative

Procedural Rules re: Expert Opinion Evidence

- Civil Trials:
    1. Party intending to tender expert evidence at trial must, at least 120 days before the trial, serve the other party:
        a) Statement signed by expert of proposed area of expertise, qualifications and opinion
        b) Copy of any report by the expert that the party will be relying on
    2. May also service notice that they're going to enter the report into evidence without calling the expert as a witness
    3. That report will be entered into evidence at trial unless the other party, within 60 days after service, serves a statement:
        a) Specifying which parts of the report that they do not agree with
        b) Reasons for disagreement
    4. If the other party agrees to have the expert's report entered into evidence without having to call expert himself that does not mean he's admitting the truth of that report
- Criminal Trials:
    1. See above regarding notice and disclosure of expert evidence
        - Crown must give notice re: expert evidence at least 30 days before trial and provide expert's report before trial begins
        - Defence only has to give notice re: expert evidence at start of trial and provide expert's report before Crown closes their case
- Limits to Expert Witnesses?
  Alberta Evidence Act does not limit the number of expert witnesses that can be called
  Canada Evidence Act **s.7** a party cannot call more than 5 expert witnesses without leave of the court – Royal's experience this is ignored – permission is never refused when asked

UNIT 7: PRIVLEDGE

Def'n: Court recognition that a witness may validly claim not to answer a question or provide clearly relevant information

Since privilege impedes the fact-finding mission, it is only granted in exceptional circumstances → Demands the restriction, not expansion of the principles

Four conditions to establishing privilege: (Wigmore)

→ Based on the idea that privilege serves the greater public good

1. Communications originated in confidence that they would not be disclosed
2. Element of confidentiality must be essential to the relationship between the parties
3. Relation must be one in which the opinion of community ought to be fostered
4. Injury to relationship incurred by disclosure must be greater than the benfit gained

Must always ask: Who holds the privilege **&** who can urge it upon the court

Privilege can always be waived by the one holding it

- Can be implicit or explicit waiver
- If waive part of a privilege because it is advantageous then in the interest of fairness you msut waive it all
- Implied waiver when party puts their state of mind at issue → e.g alleged acted in good faith on legal advice without disclosing that advice (in ***R v Shirose***: RCMP said did not act in an abusive way because of legal advice received. SCC found implied waier and required the disclosure of this advice)

Court has recognized privilege as a PFJ w/in s.7 of the Charter:

- Descoteaux v Mierzwinski (1983 SCC)
- Smith v Jones (1999 SCC): public safety exception
- R v Leopold
- R v McClure (2001 SCC): innocence at stake
- Brown v Benson (2002 SCC): innocence at stake
- R v Lavallee (2002 SCC); s.488.1 CC [searching of a lawyers officer]
- Maranda v Richer (2003 SCC): lawyers fees
- Federation of Law Socities v AG of Canada [anti money laundering legislation]
- R v S(RJ) [1995 SCC]

Class Privilege vs Case-by-Case Privilege: [R v Gruenke]

Class Privilege	Case by Case
When a class is recognized, the communication is prima facie inadmissible - the party seeking the admission must give a	If you cannot bring yourself into one of the recognized heads, then you have the onus of showing that a communication ought to be privileged

compelling reason as to why privilege should be set aside ○ this is a high standard because the class expects it to remain privileged **Four categories:** **a.** Soliciter-client **b.** Spousal **c.** Informant **d.** State	**Party arguing privledge must est. privilege based on 4 Wigmore Criteria:** **a.** Communication originated in confidence that it would not be disclosed **b.** Element of confidentiality essential to full and satisfactory nature of the relationship between parties **c.** Relationship ought to be seduleously foster in the opinion of the community **d.** The injury that would inure to the relationship by the disclosure must be greater than benefit gained by the correct disposal of litigation **Examples:** • **Journalist-source** • **Priest-confessor** • **Doctor-patient**

General rule: Public has the right to every person's evidence → New findings of class privilege are rare

<u>Cases: Case-by-Case Privilege:</u>

***Slavutych v Baker & University of Alberta* (1975 SCC)**

Facts: U of A prof asked to comment on another professor's potential tenure, was assured confidentiality, made very critical commentary, other prof did not get tenure, sued U of A and sought disclosure of commentary

Application: Found to meet the **Wigmore criteria**

When establishing case-by-case privilege, you need to show that it meets the WIGMORE criteria

1. Communications originated in confidence that they would not be disclosed
2. Element of confidentiality must be essential to the relationship between the parties
3. Relation must be one in which the opinion of community ought to be fostered
4. Injury to relationship incurred by disclosure must be greater than the benefit gained

→ Courts do not easily find new heads of privilege, though they are often asserted by professionals

Section 672.21 *Criminal Code* recognizes case-by-case protected statements where accused is assessed (e.g. by psychiatrist), those records will not be used against accused

- **672.21(2):** No protected statement or reference to a protected statement made by an accused is admissible in evidence without consent of the accused

Section 672.21(3)(f): Notwithstanding subsection (2), evidence of a protected statement is admissible for the purpose of challenging the credibility of an accused in any proceeding where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously;

- Embraces rule in ***R v Kuldip*** as discussed in ***R v Noel***

Loss or Waiver of Privilege

Right to claim or waive privilege lies with the holder for whom the benefit of privilege was created

Waiver can be implicit or explicit

Express: (1) Knows of the existence of privilege (2) Voluntarily evinces an intention to waive privilege

- Where is it said to be implicit, it must be grounded on both intention & considerations of fairness + consistency (But there can be no intention if fairness dictates)
    - Cannot use as a sword & a shield → Waiver of privilege to part of a communication waives privilege over all of it
- But, if you only need to waive privilege for one communication (ie. A letter) that doesn't meant hat every communication is now open for the court
- Implied waiver found where a witness "puts their state of mind at issue" → Ex. If you assert you acted in good faith upon legal advice, then the legal advice must be disclosed to prove the "good faith" state of mind (***Campbell & Shirose v The Queen***)
    - RCMP conduct reverse sting operation on advice of lawyer. To prove they did not abuse process, they have to disclose the advice they were given

CL used to treat the inadvertent disclosure of privilege as making the privilege lost (intercepted letter case in ***Rumping v DPP***)

- The modern approach is less strict due to ***Descoteaux v Mierzwinski*** → law of privilege is substantive not procedural & cannot be extinguished upon loss or theft of a document

***** Loss of privilege only hurts the holder → So always consider who owns the privilege**

1. Solicitor/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 is privileged info"

***** Key here: It is the client that holds the privilege and who can waive it, NOT the solicitor**

Privilege arises on CONTACT – need not sign a retainer

- But must be professional, not casual convo & in-house lawyers do not get privilege for business advice not related to legal matters
- The moment an unnecessary 3rd party is present, it waives privilege → Needs to be an intention for the communication to be confidential
    - But if there is a Joint interest or common interest to 2 parties to the same crime and you represent them both, anything one says is shared between them
        - Need "same self-interest" or "common goal"
- Privilege protects any type of communication – the "imparting" of information
    - Recognized first as a rule of substantive law & now considered principle of fundamental justice under s.7

- If client seeks legal advice from legal advisor (acting in that capacity) those communications are permanently protected from disclosure by client or legal advisor [but client can waive this]
    - **Protects client's identity and communications but NOT evidence** (***Murray*****;** ***Homolka***)--- can't use a law office to hide murder weapons. If a client does turn over real evidence, best way to deal with it is to hire another lawyer just to turn evidence over to police - **But any communications MADE about the weapon is privileged**
    - **Fink –** sometimes identity is privileged IF it is the reason for the communication (AKA you go to a lawyer for advice in an anonymous hit and run)
- Clients identity is protected by privilege
- Privilege survives death → Except in cases of a will where it is in the clients interests that their intentions be disclosed
- Covers not just the lawyer but everyone in the lawyer's office and everyone hired by the lawyer for the case
- If a client wishes to tell you something privileged do not allow it in the presence of 3rd parties
- Under s.189(6) CC a wire tap convo cannot be used by the court but Royal suggests to not apply share confidential info over the phone regardless

Section 488.1 of the Criminal Code:

- Struck down in R v Fink
- Allowed privilege to be lost over docs seized from a lawyers office pursuant to a search warrant if the lawyer forget to claim privledge
    - Could happen without notice or knowledge of client, the holder

Exceptions:

1) Communication in furtherance of a crime or fraud NEGATE privilege (not really an exception, negates it)
    a) Must be for the legit purpose of obtaining legal advice
    b) Comes down to client's intention – was the advice obtained in good faith, even if the result turned out to be illegal?
    c) To prove this, there needs to be an evidentiary foundation to the allegation
2) Innocence at stake exception (***Brown v Benson***): Two Part Test

→ Our system will not tolerate the conviction of the innocent

In ***R v Brown*** the SCC outlines the **McClure test**

FIRST: Does solicitor-client privilege apply?

- If no privilege then no need to consider the innocent at stake exception
- In Brown, there was some evidence that Benson had waived his privilege

SECOND:

1. Threshold test → Necessity: Could the information be obtained by ANY other source

- **Major J:** The quality of the other source is not a concern.
- **This case:** could get it from the girlfriend, though she was not as reliable as the lawyer

2. Innocence at Stake Test →

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

(2) If such a basis exists, the TJ should examine the communication to determine if whether in fact it is **likely** to raise a reasonable doubt as to guilt

*** NOTE: Best to bring a McClure app at the end of the Crowns case → judge in better position to decide if innocence is really at stake

Royal → Almost impossible to pass the McClure test. Where does the ecvidentiary basis come from?

If test is met, disclose on restricted basis → Publication ban or just to accused, not Crown

To protect the 3rd party the Court in Brown set forth a number of safeguards:

1. Judge should only order production of communications necessary to allow the accused to raise a reasonable doubt
2. Communications produced should not be turned over to the Crown – if accused decides not to use them they will never come to the Crowns attention
3. If communications used the privilege holder is protected under use immunity and derivative use immunity – but NOT transactional immunity
    a. Can't be used as substantive evidence against Benson if he is charged in the future.
    b. If disclosed material gives rise to derivative evidence, that evidence cant be admitted
    c. Cant be given transactional immunity, which would not allow him to be charged at all

3) **Public Safety Exception**

***Smith v Jones* (1999 SCC)**

Facts: Dr. examined client for lawyer, found him to be very disturbed – an imminent danger to public – lawyer refused to disclose, Dr. retained his own lawyer and urged court to lift the privilege because of public safety exception

Issue: When is privilege lifted under the public safety exception?

Ratio: The solicitor and client privilege will and must yield if:

(1) the risk is one of death/serious bodily harm

(2) the danger is imminent

(3)must be a risk of harm to an identifiable person of groups of persons

***this rule is now reflected in rules of various law societies (Chapter 7 Rule 8(c))

Lawyer must disclose confidential info when necessary to prevent a crime which is likely to result in death or bodily harm

Major J dissent → Policy says that a lawyer would never send client to psych if psych can report to police

4) **Law Society Proceedings**

- *Legal professions Act* provides that no claim of solicitor/client privilege can be advanced by a lawyer who is facing disciplinary proceedings
- If the law society is proceeding statutorily against you then you must disclose solicitor-client information
- Can also break privilege in order to defend in an action by client
- Lawyer must disclose to all such parties for whom he is acting any material confidential information required by the lawyer in the course of representation and relating to the manner – notion of shared privilege – what you learn from one client must be shared with the other co-client
- No charter protections at all – only criminal cases.
- Compellable witness.

5) Litigation Privilege

"**Soliciter-third party privledge**" → Obtained from 3rd parties (ex. Witnesses) in contemplation of client litigation

- This information is obtained by and for the lawyer during and in contemplation of litigation. It is to be distinguished from solicitor/client privilege as follows:
    - Rationale is to facilitate the adversarial process (not protect the relationship)
    - **Only in context of litigation – ends with litigation**
    - Communications need not be in confidence
    - Covers everyone involved in litigation and everything acquired, created and prepared in context of litigation --- need not even have a lawyer
    - Less important – more easily breached than solicitor-client privilege
    -

Test for determining if a document is protected by litigation privilege: (***Blank v Canada***)

Dominant Purpose Test: Document may be prepared for more than one purpose but the dominant purpose must be of obtaining legal advice in contemplation of litigation (Need not be the sole purpose)

- Not every document will be cloaked in litigation privilege
- What of copies that are public and otherwise available? Copies of lawyers brief privileged?
    - Depends- must consider whether the copying/acquiring resulted from the research or exercise of skill by a lawyer
    - Important: because these documents may disclose a litigation strategy

In addition to lit. privilege there is an **"Implied Undertaking"** in litigation that documents exchanged for discovery are not to be used for any purpose other than litigation (CIVIL)

- To overcome this, you need to show BoP that public good is greater that the values underlying the rule → privacy and efficient litigation

Lit privilege cannot be used for misconduct – can overcome privilege if you can show how prima facie that litigation privilege is being used to show misconduct

Solicitor/Client Privilege under Attack – Search Warrants at Lawyer's Offices

R v Lavallee: Man divulges details of drug operation & financials for divorce proceeding

s. 488.1 → Allowed police to search lawyer's offices, but also allowed for the default loss of privledge

Struck down. Remains in the Code, but now common law governs:

- (a) No search warrant can be issued for documents **KNOWN** to be protected by solicitor-client privilege
- (b) Police must show is no other reasonable alternative to search
- (c) If allowing law office to be searched, judge must be rigorously demanding to afford maximum protection of solicitor-client privilege
- (d) All documents in possession of lawyer must be sealed before being examined or removed from lawyer's possession, unless warrant specifies otherwise
- (e) Must take every effort to contact lawyer & client at execution of search warrant. If cannot be contacted, then other lawyer should oversee sealing and seizure of documents
- (f) Police should report to judge their efforts to contact all privilege holders. Holders must be given **reasonable opportunity** to assert claim. If they do, then it must be judicially decided, i.e. no strict time limits.
- (g) Attorney General can make submissions on issue of privilege, but cannot inspect documents beforehand.
- (h) If sealed documents found not to be privileged, can be used for investigation
- (i) If documents found to be privileged, must be returned immediately to holder of privilege—no copies can be made

Spousal Privilege: (privilege of spouse not accused)

New legislation: Spouses are both COMPETANT and COMPELLABLE witnesses for the Crown, BUT they retain spousal privilege that can be asserted on the stand → This privilege can be waived

Old legislation: Spouse is only compellable in only certain sexual offenses and any offense where the complainant was under 14 years old → Sub (2) and (4) have been removed

- But they were competent
- In the civil context though we have now section 8 amended of Alberta evidence act to protect to adult interdependent partners meaning relationships that have been well established and now protects disclosure of not only matrimonial but these people too

- Must assert the privilege in the witness box – in front of trier of fact
    - UK has abolished spousal privilege for both civil and criminal cases
- Does not apply to observations nor letters (difference between husband told wife her murdered someone and husband came home covered in blood on the night in question) [***Rumping v DPP***]
- **Exception: s.189(6) Criminal Code** communications obtained by interception that would not otherwise have been discovered remain privileged and inadmissible without the consent of the person enjoying the privilege
- **But applies to ANY communication, whether there were other people around and/or it was meant to be confidential → This is disputed by Wigmore but still law**

** Reminder → Privilege belongs to the witness, not the accused, in cases of spousal privledge

- **Section 4(3) Canada Evidence Act:** No husband/wife is compellable to disclose any communication made to him/her by his/her wife/husband during their marriage (Comes from Bill C-32)

Accused and spouse

- (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, **is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.**

Spouse of accused

- No person is **incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused**.

Communications during marriage

- 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.**
- ***** Does not protect pre-and-post marriage communications and does not succeed the dissolution of the marriage**

So, spouses are competent and compellable, but protected by PRIVLEDGE

- Although I am competent and compellable, I am entitled to withhold information on things my spouse TOLD ME
- Ex. Where I am competent and compellable, I am obliged to tell the court what my husband looked like, but I don't have to say what he told me
    - Ex. I have to say my husband came home covered in blood, but don't have to say that he told me he killed someone

- **Section 8 Alberta Evidence Act:** A spouse or an adult interdependent partner is not compellable to disclose any communication made to him or her by the other spouse of AIP during the marriage

Difference between Competence vs. Compellability vs Privilege:

- **Competence:** may this person be a witness?
- **Compellability:** can this person be forced to become a witness?
- **Privilege**: assumes that a witness is competent and compellable, and thus is now in the witness box, is the witness allowed to withhold relevant legal information from the Court while testifying?

Informant Privilege: (Identity of Informant)

Orthodox Rule: Identity of informant is protected, not the information, unless information can reveal identity

Strong head of privilege – only broken by restrictive test for innocence at stake circumstances

- If it can be broken Crown has option to stay charges which they would generally do in order to not give up informant → Crown will stay charges before giving up informant → It's THAT strong
- Informants who are identified are at serious risk of serious bodily harm

***R v Liepert* (1997 SCC) (adapted in *McClure*) – Test for breaking informant privilege**

(i) Accused must show some basis to conclude that without disclosure his innocence is at stake

(ii) If so, court may review information to determine whether information necessary to prove accused's innocence

(iii) If so, court should only reveal as much information as is essential to allow proof of innocence

(iv) Before disclosure, the Crown is given the option to stay proceedings

(v) If the Crown decides to proceed, disclose information to accused that is essential to establish innocence

*****Crown will invariably stay proceedings no matter the charge**

If successful on *Leipert* application, it is almost guaranteed that in any case Crown will stay the proceedings. Crown will always protect informants.

- Otherwise, revealing informants would potentially discourage others from giving information to the police regarding crimes. **Therefore, in some ways, this is the strongest head of privilege since informant identities are almost never revealed.**

Note that INFORMANTS are different from AGENTS - informants are ordinary people who pass information to the police, agents are undercover police officers working in the field

State Privilege: Public Interest Immunity – Common Law

Common Law:

- State can assert privilege over information that is not in "public interest" to disseminate
- E.g. cabinet documents, matters involving national security, police techniques to investigate crime

Statutory:

- **s.37/38** *Canadian Evidence Act* provides for withholding of government information
- **s.39** *Canadian Evidence Act* provides for cabinet security
    - Matters of cabinet secrecy, national security
    - Certain privileges that attach to federal government that are to be withheld on basis of state privilege
- Historically, there are items of national importance/security
- Provisions in the Evidence Act s. 37-38 which involve withholding of government information.
- Other than in anti-terrorism legislation, expanding state privilege somewhat

Quasi-Privilege: 3rd Party Records EXAM

Third party records: AC seeking access to records held not by Crown but by 3rd party which AC believes will assist his case. e.g. therapeutic records, employment records, prison records, school records

How does AC obtain 3rd party records?

- Defence lawyer has no search or seizure powers
- Defence lawyer could ask the Crown to do it, but Crown under no obligation
- But defence lawyer has power of **subpoena de ducs tecum**—court order which compels person to attend court and bring relevant records
- Once a 3rd party shows up in court with the records, must decide 3 things:
    - 1) production to the court
    - 2) disclosure to the AC, and/or the Crown
    - 3) even if production is ordered, that evidence must then be admissible

Test for production to court & to AC differs for 3rd party records in sexual assault cases and for all other criminal cases.

FIRST TEST: STITCHCOMBE

Crown has an ethical and constitutional obligation to the defence to disclose all information in its possession or control, unless the information in question is clearly irrelevant or protected by a recognized form of privilege.

- Duty to disclose is triggered by request from accused
- If they choose not to disclose, they bear the burden of satisfying the TJ that the withholding is justified on the grounds of (1) privilege or (2) irrelevance

***** BECAUSE OF STINCHCOMBE, IF THE CROWN GOES OUT SEEKING RECORDS THEMSELVES, THEY MUST WARN THE 3RD PARTY THAT IT CAN BE USED BY THE DEFENSE**

General Points on Stitchcombe:

- Threshold of relevancy for Crown disclosure is low → if info is of some use to the Defense then it should be disclosed
- The duty to disclose is triggered by request and does not require an application to the court
- This broad duty is based on 2 assumptions:

    - That the material in possession of the presecuting Crown is relevant to the accused's case
    - That this material will likely comprise the case against the accused
- NOT all info needs to be turned over: can refuse if it is irrelevant, privileged or disclosure is governed by law
- Where the Crown exercises this discretion they bear the burden of satisfying the TJ that the info is privileged or irrelevant
- Info which is CLEARLY relevant and important to the ability of the accused to raise a defense must be disclosed to the accused regardless of a potential privilege claim

Notification to 3rd Party Record Holders:

- Relevance of 3rd party records already in possession of Crown will be presumed
- Thus if Crown seeks 3rd party records, they have obligation to advise complainant that it will probably be disclosed to AC, and to obtain complainant's consent
- If complainant refuses, then an ethical Crown may advise complainant that they may not be able to go forward with prosecution

R v McNeil:

- Prior to this case the corollary duty on the police applied solely to the "fruits of the investigation"
- In McNeal the SCC extended the 1st party/Stinchcombe disclosure
- Facts: Accused sought production of all records relating to the officers misconduct. The Crown argued that this were not "fruits of the investigation" and that to secure them the defense would have to meet the O'Connor test
- Held: Where police misconduct records of officers playing a material role in the investigation are either related or could reasonably impact the case of the accused, then should be treated as 1st party information and disclosed in accordance with Stinchcombe

NB: When the defense brings up a record, its puts the Crown on notice of relevant info and the Crown has a duty to inquire and obtain the info if it is reasonably foreseeable to do so

What the duty to inquire entails (***R v Darwish):***

- An accused d/n have a constitutional R to an adequate investigation of the charges against them
- Accused d/n have a constitutional R to direct the conduct of a criminal investigation for which they are the target
- Disclosure rights d.n require police to investigate possible defenses

Whether Crown notes, etc. need to be disclosed is a grey area. Depends if it is an item of strategy or an item of fact (ie. Witness statement) → In R v Benardo, the Crown had to disclose the plea bargain made with Holmolka

Historical Outline of 3rd Party Record Production

- December 1995: *O'Connor* (SCC)

    - Majority decision (5-4 Split Court) provides common law scheme governing production of 3rd party records in all criminal cases, including sexual assault cases
    - Minority decision by L'Heureux-Dube J.: vigorous dissent that provides more onerous scheme of production of 3rd party records
- May 1997: Bill C-46
    - Parliament passes Bill C-46 to apply to production of 3rd party records in sexual assault cases **only**
    - It follows the minority judgment of L'Heureux Dube J.
- May 1999: *Mills*
    - SCC majority decides that Bill C-46 is constitutional

R v O'Connor:

Facts: Women allege historical sex assault against Roman Catholic bishop when he was a young priest. AC applied to court before trial directing Crown to obtain all complainant's therapeutic records w/o notice to complainant or the record holders. TJ granted order but Crown refused to comply. TJ stayed the proceedings not because the production issue but for unrelated disclosure issue. BCCA found no s. 7 violation by Crown's refusal to obtain the 3rd party records. Directed new trial. AC appealed to the SCC

1. Does Stinchcombe apply?

Crown has an ethical and constitutional obligation to the defence to disclose **all information in its possession or control**, unless the information in question is clearly irrelevant or protected by a recognized form of privilege.

- Duty to disclose is triggered by request from accused
- If they choose not to disclose, they bear the burden of satisfying the TJ that the withholding is justified on the grounds of (1) privledge or (2) irrelevance

If Stinchcombe, does NOT apply, move to Step 2 and into O'Connor

Procedure for O'Connor Application:

1) Accused obtains *subpoena duces tecum* and serves it on 3rd party record holder requiring them to attend court with the relevant records (**THIS DOES NOT MEAN THEY ARE PRODUCED TO THE JUDGE → Production decided per 1st stage of O'Connor**)

2) Accused brings an application showing that the records sought are likely relevant. Notice of application is given to crown, 3rd party and all other interested parties

a) Not an onerous standard to meet and once met, then the records must be handed up to the Judge for his inspection.

b) If the judge is satisfied that the information contained within the records is likely relevant to an issue in the case, then he will examine them to determine whether or not an order of production ought to be made and to whom the documents ought to be disclosed and on what terms.

***The judge is not concerned yet with admissibility – this test only asks whether there is a reasonable possibility that the information contained within the records will be logically probative to an issue in the trial.

LHD: The correct place for the application is trial, not at the prelim → But lay the foundation in prelim

3) O'Connor application is brought before the judge

4) If record holder advances a well founded claim that the targeted document is privileged then privilege will bar production unless accused can show their innocence is at stake

5) If privilege is not an issue then the judge determines if production should be compelled under the following test:

2. PRODUCTION STAGE → Should the documents brought be produced to the Court?

A. Onus on defense to establish "likely relevance"

- Likely relevance: "reasonable possibility that the information is logically probative to *an issue at trial or the competence of a witness to testify"*
    - Also applies to the credibility of the witness
- Onus is placed on the accused
    - Onus is "significant, but not onerous"
    - Stops the defense from being able to fish around in 3rd party records
- This is a very low bar → **Need not consider the S/D effects at this stage**
    - Simply a requirement to prevent the defence from engaging in "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" requests for production
- Indicators if likely relevant: **close connection between laying of charge and creation of 3rd party record, use of therapy may have influenced complainant's memory, testimonial factors of witness (perception, recollection, memory)**

Why relevant?

- They may contain information concerning the unfolding of events underlying the criminal complainant.
- The use of a therapy which influenced the complainant's memory of the alleged events. For example, in *R. v. L. (D.O.)*, [recognized the problem of contamination when she stated, in the context of the sexual abuse of children, that "the fear of contaminating required testimony has forced the delay of needed therapy and counselling"
- They may contain information that bears on the complainant's "credibility, including testimonial factors such as the quality of their perception of events at the time of the offence, and their memory since".
- LHD: Would say that there needs to be an evidentiary basis for production of therapeutic records – this evidentiary foundation needs to be laid in the preliminary inquiry (See Mills)

- If irrelevant matter ends; if relevant judge inspects documents and determines if an order of production should be made and to whom the documents ought to be disclosed and on what terms

** Concern here → Need to make the application without ever having seen the records (almost impossible)

LHD: Would consider S/D effects here too, especially in regards to privacy

- **In borderline cases, err in the side of production to the court**
    - **DISSENT:** TJ should also weigh the salutary vs. deleterious effects of production to court→must weigh AC's right to full answer & defence vs. complainant's right to privacy. Problem: how can TJ do this without seeing the records first?

3. DISCLOSURE STAGE

Judge looks at salutary and deleterious effects of making production order to the accused alone or to the accused & the Crown

- **Higher burden than 1st stage**
- Enters into a balancing of competing interests → Right to privacy vs. right to make full answer of the defense

Need to consider the following D/S factors:

1. Is the record needed for the accused to make full answer and defense?
2. Probative value of the record in question?
    - Gossip or innuendo, hearsay or opinion?
3. Nature and extent of reasonable expectation for privacy?
    - E.g. school attendance record vs. records of confidential sessions between complainant and therapist
4. Production based on discriminatory belief or bias?
5. In ordering production would the dignity of the complainant be prejudiced, compromising the security of the complainant and her privacy rights?

L'Hereux-Dube would add:

6. To what extent would production to accused have adverse effect on reporting of sexual offences and obtaining treatment?
7. What is the effect of production to accused on integrity of trial process?
    - Majority says that this is considered in the production stage

Problem: TJ must review records without a brief from defence as to what might be relevant—thus TJ may not understand what could be relevant to AC's defence

4. ADMISSION STAGE

- Is the record excluded by another rule of evidence? (IE. Hearsay?)

Royal's Issues with O'Connor:

- Prof. Royal argues that counsel should be permitted to make submissions at stage #2 to explain why the evidence needs to be produced. Often these records will contain highly critical records pertaining to the accused or complainant.
- Allowing the trial judge to view all of these records potentially "poisons" them, and could do irreparable harm to one side's case
- Prof. Royal suggests that these submissions should be made to a different judge, so that the judge who presides over the trial itself is not prejudiced by viewing all of this material

Summary:

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

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

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

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

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

B) Bill C-46 Test (sexual offenses)

Bill C-46: ss.278.1 – 278.9

- Introduced new regime for production of third party records in sexual assault cases
- ** A direct response to O'Connor & an adoption of LHD reasoning

Initial Steps (where legislation applies):

FIRST ASK: DOES THE LEGISLATION APPLY?

1. If record is listed under **s.278.1** an objectively reasonable expectation of privacy is presumed.
    - The party seeking the record has the onus of rebutting the presumption
    - Very broad: ***Shearing:*** complainants diary d/n meet the defn' of a 3rd party record because in the hands of the accused already
    - Only records that raise a legally recognized privacy concern are caught and protected

❖ Starting point is that record is inadmissible → becomes admissible if meets test **(s.278.2(1))**

- ❖ Legislation applies even if the witness has turned over the record to the prosecution/ another person **(s.278.2(2))** → negates ***Stinchcombe***
    - If the prosecution has the record, they must notify the accused but do not disclose **unless the witness waives the protection** (**s.278,2(3**))
- ❖ Legislation does not apply to records already in possession of accused (see. Shearing)

SECOND → Does it meet the test (significantly changed O'Connor)

- ❖ 1st step in O'Connor remains the same but the threshold has changed → two components must be met
    - **a.** Relevance inquiry
    - **b.** Interests of justice inquiry

Now, the application is made to the judge in front of whom the trial is tried (s.278.3(1)

- **Royal thinks this incredibly biases the judge**

Application must be (1) in writing (2) naming the person who has the record and particulars of the record (3) naming the grounds upon which the accused believes the record is relevant (s.278.3(2)-(3(b))

1. PRODUCTION STAGE

- ❖ Need to show:
- ❖ (1) Likely relevance + (2) order of production must be in interests of justice
    - Involves a balancing of a series of enumerated factors contained within the legislation
    - If judge in doubt, they ought to rule in favor of the inspecting the document

A. Likely Relevance Inquiry

- Requires that the record is likely relevant to an issue @ trial or to the competence of the witness to testify
- There must be a reasonable possibility that the info is logically probative either to material issues in the case of evidence relating to credibility & reliability of other evidence

S.278.3(4): Stipulates that any of the following assertions listed on their own **CANNOT** est. relevance

- (a) That the record exists
- (b) the record relates to counselling/therapy/treatment
- © relates to an incident which is the subject matter of the proceedings
- (d) record shows a prior inconsistent statement
    - Royal hates this the most because it is the best way to attack the credibility of the witness
- (e) record relates to credibility od witness
- (g) record relates to sexual abuse by person other than accsued
- (h) record relates to sexual activity in past

- (i) record of recent complaint

Taken literally this would block all review of records BUT

- Mills rejected this plain reading and said that s.278.3(4) does not prevent an accused from relying on the factors listed, it simply prevents reliance on "bare assertions" of the listed matters where there is no other evidence.
- The section requires the accused to be able to point to specific case evidence or info that shows the record is likely to be relevant to an issue at trial
    - This does not require the accused to show the precise manner in which the targeted document will be used BUT it does require an evidentiary basis that actually demonstrates a reasonable possibility that the document will contain relevant info

B. Interests of Justice Inquiry:

- ❖ Accused must convince the TJ that production is in the interests of justice (D/S Factors from the Disclosure Stage of O'Connor)
- ❖ S.278.5(2) lists 8 factors (5 of which come from majority in O'Connor)
    1) The extent to which the record is necessary for the accused to make full answer and defense
    2) Nature and extent of the reasonable expectation of privacy with the record
    3) Probative value of the record
    4) Whether production of the record is based on discriminatory beliefs of bias
    5) Potential prejudice to the personal dignity and right of privacy to whom the record relates
    6) Socities interest in encouraging the reporting of sexual offenses*
    7) Societies interest in encouraging the obtaining of treatment by complainants of sexual abuse*
    8) Effect of determination on the integrity of the trial process*

**** UNDER 278.5 PRODUCTION CAN BE ORDERED IF:

- Application is made in accordance with 278.3(2) – (6)
- Accused establishes relevancy
- Accused establishes interest of justice

***NOTE*: Bill C-46 thus puts this balancing exercise into first stage before TJ has even seen the record**

2. DISCLOSURE STAGE

Judge can order disclosure to accused if:

1. D/S factors are considered:
    1) The extent to which the record is necessary for the accused to make full answer and defense
    1) Nature and extent of the reasonable expectation of privacy with the record
    2) Probative value of the record
    3) Whether production of the record is based on discriminatory beliefs of bias
    4) Potential prejudice to the personal dignity and right of privacy to whom the record relates

5) Socities interest in encouraging the reporting of sexual offenses*
6) Societies interest in encouraging the obtaining of treatment by complainants of sexual abuse*
7) Effect of determination on the integrity of the trial process*

But, under 278.7(3) the judge can do anything they see fit to protect the interests of justice, including:
(1) Editing the record, (2) copying the record, (3) only letting it be viewed at court, (3) severing identifying information
2. If the record is disclosed to the accused, it must be disclosed to the prosecution
Judge must give reasons for disclosure or non, but these reasons cannot be public 278.8-9

*** The question of disclosure is one of law and can be appealed

Court in Mills responded to suggestion that 6-8 unfairly altered balance against accused by saying none of the factors listed had controlling weight

Dagenais case- there are no hierarchy of rights. Cant automatically assume one right under the charter takes precedence over the other. Need to take into account competing interests.

Where this legislation applies

s.278.1: record is any record that contains personal information for which there is a reasonable expectation of privacy
s.278.2(1): starting point of inadmissible with sexual offences, admissible if can meet the test (a, b, c deal with sexual assault cases, b is offences from 1970-1983, and c is
s.278.2(2): applies to all records in possession of any person including prosecution (negates Stinchcombe)(cf O'Connor)
s.278.2(3) if prosecution has a record must tell accused but not disclose

Making Application for Production

s.278.3(1) accused must make application to trial judge (***cf* s.11(c)** right to silence)
s.278.3(2) application not to be made to judge presiding at other proceedings --- must be at trial court
s.278.3(3) application in writing, **(a)**identifying record/record holder **(b)**show "likely relevant" (***cf*** *Mohan* – some relevance)(***cf* s.11(d)** presumption of innocence - accused must make proof)(creates presumption against production of records to accused)
s.278.3(4) insufficient reasons for likely relevance include: **(c)**record relates to subject-matter of proceedings **(d)**may disclose prior inconsistent statement **(e)**relate to credibility of witness/complainant (how could these NOT be relevant? = highly relevant)(what is left for defence lawyer?)
s.278.4(1) hearing in camera (traditionally trials held in public)
s278.5(1) judge may order records produced for judge to review if **(a)**application made as above **(b)**established likely relevance **(c)**production necessary in interests of justice

s.278.5(2) factors judge will consider to determine if production to trial judge **(a)-(e)**same as *O'Connor* **(f)**encourage reporting sexual offences (L'H-D dissent) **(g)**encouraging victims get treatment **(h)**effect on integrity of trial process (L'H-D dissent) (balancing exercise BEFORE judge has seen record --- done in a vacuum)
s.278.6(1) if judge satisfied will order production for judge to review (how will judge now what is important to defence?)

Disclosure:
s.278.7(1) if judge satisfied record likely relevant to issue at trial or witness competence to trial AND necessary to interests of justice
s.278.7(2) judge must again balance: salutary/deleterious effects of production and factors from step 1
s.278.7(3) judge can order limits to use/production of record
s.278.7(4) can also order production to Crown (some discretion)
s.278.7(5) accused cannot use records in other proceedings (e.g. civil)
s.278.7(6) if judge refuses production record kept sealed until expiration of appeals
s.278.8: judge's written reason for ordering/refusing production entered into trial record
s.278.9: publication ban ordered on that record
s.278.91: determination to order records for judge to see or accused to see (either way) is a question of law
Effect: privacy and equality rights more important than right to make full answer and defence (***cf*** *Dagenais* no right is paramount)

R v Mills **(SCC 1999):** accused charged with sexual assault
Issue: Does Bill C-46 violate ss. 7&11(d)
Ratio: Court should defer to Parliament, tread lightly in overturning legislation AND dialogue between legislatures and courts

- **Dissent:** Lamer thinks that *Stinchcombe* should be in full effect, if records are in the hands of the Crown they must be disclosed
    - ***Admits advantage given to the Crown

Five Issues Raised by the Trial Judge **(Justice Belzil in the ABQB)**:

1. Broad scope of what is considered a record, and test applies separately to each record
2. Notwithstanding O'Connor, Bill C-46 restricts the type of evidence that an accused can place before a judge, presumption against allowing these types of records. (This is different than O'Connor)
3. **This is the major concern:** At the production stage, when the judge is asked whether the records should be produced, how can he do that without first seeing the records? The judge essentially needs to guess what is contained in the records at the first stage, which requires weighing the salutary and deleterious effects.
    a. Remember, in the O'Connor regime, the judge would look at the documents first before deciding relevance and weighing pros and cons, but the judge is still the only person who could view the documents

    b. Privacy is still well protected under the O'Connor regime - what is the point of adding all these additional requirements to the first stage? Where is the privacy concern? The judge cannot weigh the salutary and deleterious effects without first seeing the documents.
4. Section 278.5(2) compels the judge to use factors that were specifically rejected by the majority in the O'Connor case.
5. Why should it be more difficult for these records to be obtained in sexual assault cases over other cases?
    a. Conflicts with Stinchcombe → See Lamer's dissent

SCC Reasons (Majority):

Primary Reason for Upholding:

There is a mutual respect between Parliament and the courts (dialogue theory)

- Para 125 - suggest that Parliament has studied this matter for a long time (since 1994), and got overtaken by O'Connor. SCC decides that deference should be shown to Parliament if the legislation can be interpreted in a constitutionally compliant manner.

- The accused has a right to make full answer and defense protected by s 7 as a principle of fundamental justice, and this conflicts with the right to privacy of the victim protected by s 8 of the Charter
    - But you need to read these rights in the context of s. 15 equality rights
        - Equality concerns inform the contextual circumstances in which the rights of full answer and defence and privacy come into play. An appreciation of myths and stereotypes in the context of sexual violence is essential to properly delineate the boundaries of full answer and defence

- The right to make full answer and defense WILL prevail over privacy rights if the evidence is necessary to raise a reasonable doubt (restatement of the "innocence at stake" principle)
    - (on a sidenote) It is rare to make this out
- Otherwise, there is a spectrum of possibilities between these two competing rights
    - Danganes – No one right prevails over the other (Royal agree with this)

Other Reasoning:

- As for the broad definition of "record" - concern that this places too much of a burden on the judge to go over each record individually - the SCC does not find this to be a compelling problem
- Addressing the privacy issue:
    - Loss of privacy only arises at disclosure stage (to the defence) with some very restricted limits imposed as well. Judge has power to impose limitations. Only the judge can see the documents at the first/production stage so there is no invasion of privacy until they make the order of disclosure
- As for the third area of concern - the SCC essentially avoids the issue. Decides that the ultimate discretion lies with the trial judge, and the judge's judgment should be trusted.

- The non-disclosure of third party records will not compromise trial fairness where such disclosure would not prejudice the accused's right to full answer and defense
- Also, the legislation accords the trial judge great latitude, and it should be assumed that the judge will apply discretion in a constitutional manner
- **IF there is doubt, then production ought to be ordered. (This is more consistent with the O'Connor decision)**

Justice Lamer's dissent

- Focuses on records in the Crown's possession that are caught by the legislation - indeed, these records could have been obtained by search warrant and still be covered, limiting disclosure requirement to the defense
- If these documents are already in the possession of the Crown, clearly they would be relevant "somehow" - therefore, their disclosure should not be limited by the waiver requirement
- Essentially, these records form part of the "case to meet" which the accused is entitled to know, and there is a PRESUMPTION of relevancy
- Simple giving of notice to the defense does not assist the accused, this gives the Crown a distinct and unfair advantage that runs afoul of s 7 and s 11(b) of the Charter

Prof. Royal does not like Mills - it is a "low point" of the Supreme Court. In practice, judges are interpreting the legislation more liberally and are disclosing more records now notwithstanding Mills.

-Equality s.15 and s.28 of Charter; “accused is not entitled to whack complainant” → The accused is not permitted to "whack the complainant" through the use of stereotypes regarding victims of sexual assault, SPECFICALLY IN THE PRELIM INQUIRY

Royal’s other concerns: *** See handout ****

Prejudicing the trial judge: only a trial judge is allowed to hear such an application; however, the records could be prejudicial to either party and poison the well for the future trial.

Splitting the trial: this application, if made during the trial, could split up the trial (jury would be told to go home for a while) (or judge would forget what witnesses said, lose the witness impact)

Defence disclosure: the affiant may potentially have to disclose some of their defence in order to attempt to get a production order.

The trend toward a lack of prelims prevent an evidentiary basis from being created for the application for production → More and more evidence

Differences Between O’Connor and Bill C-46:

1. S/D Effects are taken into account at both levels of C-46
2. Stinchcombe only applies in O’Connor cases

Broad Definition of Records

- Includes records held by the Crown, which is something *O’Connor* rejected. Thus weakens Crown’s disclosure obligations under *Stinchcombe*
- Forces defence to bring application for each type of record—cumbersome.

- *O'Connor* rejected idea that therapeutic records would rarely be relevant. Moreover, there is a difference between the likely relevance threshold for production, and the criteria for admissibility.
    - But Bill C-46 imposes a much higher threshold for ordering production to court & then to AC, and so creates presumption against production of records to the court and then the AC.
- S. 278.3(4) sets out certain grounds that are not sufficient on their own to establish that record is likely relevant, and yet some of these listed grounds would make the record highly relevant:
    - (c) Record relating to incident that is subject matter of proceedings
        - E.g. if CO had given fairly contemporaneous statement to counselor about the alleged incident, this would not be enough on its own to show relevance
    - (e) record relating to credibility of CO/WI
        - E.g. if CO had made numerous prior complaints & CO told counselor these complaints were false, this would not be enough on its own to show relevance
- *O'Connor* held that threshold at 1st stage would be "likely relevance." Bill C-46 adds the requirement that it also be in the "interests of justice"
- S. 278.5(2) requires TJ to balance salutary & deleterious effects at the 1st stage before even seeing the records
    - *O'Connor* had required this balancing analysis to be conducted at 2nd stage, after TJ has seen the records
    - Thus must do this analysis in a vacuum
- S. 278.5(2) and s. 278.7(2) requires TJ to consider factors at both the 1st and 2nd stage that *O'Connor* had rejected:
    - (f) society's interest in encouraging reporting of sex offences (from L'H-D's dissent)
    - (h) effect on integrity of trial process (from L'H-D's dissent)
    - Majority in *O'Connor* had held that there were other ways to protect these interests:
        - Close the courtroom while application made
        - Restrict publication
        - Considering treatment of relevance at the admissibility stage
    - Parliament also added one of their own:
        - (g) society's interest in encouraging Cos of sex offences to get treatment
- Approval of Bill C-46 in *Mills* (SCC) created a hierarchy of rights
    - SCC in *Mills* held that not producing therapeutic records with a high privacy interest that may also be "likely relevant" will not compromise the trial process if it does not prejudice the AC's right to full answer & defence
    - i.e. privacy & equality rights are more important than right to make full answer & defence
    - but in *Dagenais*, SCC held that *Charter* rights must be balanced and no right is paramount

Privilege Against Self-Incrimination (Formal Proceedings):

Reason for the privilege

- Accused has right to be left alone unless there is a case to meet
- Compelled answers tend to be unreliable
- Compelled interrogation has historically led to prosecution for mere thought
- The mind is a person's most private sanctum, must respect individual's autonomy and dignity

Privilege Against Self-Incrimination

1. Right to refuse to answer incriminating questions during the course of proceedings.

***** WE DO NOT HAVE THIS IN CANADA****** → Under s.5(1), you have to answer incriminating questions**

- Up to 100 years ago we would allow the accused not to answer a question because it would be incriminating
  - The Americans have it under the 5th amendment → We do not have this.
  - **But, we do have USE IMMUNITY and DEREVATIVE USE IMMUNITY**

2. Involuntary confessions are also excluded – See ***Oickle***

3. Right to silence during the course of a police investigation

The right to silence in the UK has now been done away. You are obliged to answer questions of police in a formal investigation which has to be video recorded and in the presence of your solicitor. This is not in Canada, you only have the right to speak with your lawyer over the phone. If you insist on having them present and they are available you may be able to see them

  - In UK, the change in the law that came in to being as a result of the Irish difficulties, many important civil rights were taken away

4. Right to retain and instruct counsel

Privilege Against Self-Incrimination Prior to Trial:

1. Accused has the right to silence

Tulcotte – Right to silence is important and cannot be broken by the police ignoring the silence. It was found on the farm in which 2-3 people were hacked to death. The police attended to the farm, accused had health issues and was silent throughout. He said nothing. Could an inference arise by the jury from his failure to respond to the people found on his farm hacked to death.

- **Justice says that while silence is important no inference may be drawn – he has the absolute right to be silent**

2. Accused has the right not to answer questions

Oickle – SCC decision stands for proposition that the assertion of the right to silence does not mean that the police have to stop questioning.

1. **The police do not have to stop questioning of suspect just because he is exercising the right to silence, BUT there may come a time when it becomes oppressive.**

2. Oickle also stands for proposition that a statement made by an accused must be video recorded – this is in the instance of SERIOUS criminal trials → To ensure that admissions are truthful.

- All police stations are now equipped with rooms which contain video cameras
- Statements to be admissible, must be recorded
- Before OIckle you would often see a case, even a serious one, the policeman records in his notebook what he says the accused says
- Accused person being "verballed" – no way of confirming the statement other than through the honesty of the police
- To get around that now the statements must be recorded so there is a complete record of what went on between the officer and the suspect so there can be no doubt about what he said, the way he said it and how he looked, and the manner of the police officer.

3. Charter 10(b) → Accused has the right to retain and instruct counsel before speaking to police

4. Confessions → Must be BARD (1) voluntary (2) Product of an operating mind (3) Not the product of oppressive circumstances

The right to silence is not absolute when it comes to the war against terrorism – see s.83.38 of CC which deals with compelling an individual to participate in an investigative hearing held with respect to a terrorism offence or a prospective terrorism offence suspected by the police.

- Such an individual is compellable to answer questions, however subsection 10 of s.83.38 of the CC provides the witness the same protection as s.5(2) of the *Canada Evidence Act*.
    - This is subject to the "sunset provision in s. 83.92

Canada Evidence Act:

Section 4 – Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

**** SO EVERYONE IS COMPELLABLE AND COMPETANT → You have to take the stand AND answer questions on the stand**

Section 5(1) - No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person → **YOU HAVE TO ANSWER INCRIMINATING QUESTIONS**

Section 5(2) → Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

ISSUE → YOU MUST CLAIM PROTECTION UNDER 5(2) AT THE TIME YOU TESTIFY

Protection under 5(2) only applies to incriminating statements, not other statements – AGAIN, ONLY APPLIES TO COMPELLED WITNESSES

PROTECTION AT TRIAL:

Note: There are 3 protections afforded to an accused when they testify at trial:

1. Section 11(c) of the Charter → Accused is not compellable at own trial

2. Use immunity

3. Derivative Use Immunity

1. Use Immunity:

Ratio: Use immunity is only afforded to an accused who first testified under COMPULSION

s. 13 of the Charter: Right against self-incrimination → Right not to have evidence used against you substantively in the next trial

- Arguably, s.13 makes s.5 of the CEA redundant, as you are entitled to protection under the Charter regardless as to whether you claim it or appreciate that you answers are self-incriminating
- **But s.13 ONLY APPLIES TO COMPELLED TESTIMONY!!!**

s.5 of the Canada Evidence Act: Witness cannot refuse to answer any incriminating questions, but has the right not to have such evidence used against him → NEED TO CLAIM s.5(2)

Noel: Prior testimony can only be used on cross, but if there is a danger that it will be used to incriminate, it should not be USED → **OVERRULED IN HENRY**

R v Henry:

Facts: Henry and Riley are charged with a particularly gruesome murder. There is a third person involved and that third person is unindicted, uncharged but becomes a witness. Duck taping victim to a chair, killing. Henry and Riley are jointly charged, go to trial together, both testify at trial. Both say they were intoxicated and offered to plead guilty to manslaughter. Their defence is one of intoxication. Henry gives that evidence both times, although at the second trial he says he was more intoxicated than he had said at the first trial. Riley also said he was intoxicated at the first trial and at the second trial he said he was more intoxicated AND That it was Henry and the third man who did the killing.

Issue: Can Henry's first testimony be used against him in the second trial?

s.13 only protects compelled testimony → Not available to an accused who volunteered to testify!

Two questions must be looked at:

1. Did Henry testify at the first trial?
2. Was the testimony at the first trial voluntary or compelled?

If voluntary: Testimony can be used ON CROSS for purpose of challenging credibility & incrimination

- **But, cannot be used as part of the case to meet → Cannot put the transcript into evidence**

If compelled: Protected from use for credibility and incrimination

Three Horns of the Triceratops:

An accused who is separately indicted or who obtains an order separating him from his co-accused, may find himself **"cast on the three horns of the triceratops"**

1. He runs the risk of self-incrimination/harmful disclosure in the event he testifies truthfully in the other person's trial
2. In the event he refuses to be sworn in the other person's trial, he will be cited for contempt and punished severely
3. If he lies under oath during testimony in the other person's trial, he again will be punished severely because he will be prosecuted for perjury which is an extremely serious offence

NOTE: If the accused DOES NOT TESTIFY at the 2nd trial, the previous testimony CANNOT BE USED → Cannot form a substantive part of the case

History of Use Immunity:

- **Dubois** (1985) – When testifying at the second trial the state of the law was that that evidence could be used to challenge his credibility and to incriminate if he chooses to go in the box again.
- **Mannion** (1986 SCC) – rape. Accused had a rather subtle change in testimony. Testifies in first case regarding the police looking for him, testifying he doesn't know why and thought it might have been that he acted as an informant for the police before and got nervous so he took off in Vancouver. He gets convicted. In the second trial he elects to testify again – he says the police attempted to contact me and had something to do with a rape, I got nervous and took off. It was a subtle change but was a change.
    - Can it be use to incriminate him; can it be used as a conscious of guilt?
    - Evidence that he lied, given circumstantial type evidence. Was called post-defence conduct now after the fact evidence – after the act of killing, what has the conduct of the accused been? Do they remain here? Do they attempt to bribe a witness? Get someone to help them with a fake alibi? Try to commit suicide? Obtain a passport?
    - **SCC decided (it is not wrongly decided) but stood that you could not use the prior statement to incriminate him. R v Henry found that is no longer the law**
- **Kuldip** (1990 SCC) – failure to stop for an accident (hit and run). He had testified at the first trial, was convicted, appealed and testified again at the second trial. He claimed at first trial that he had reported that matter to the police and was able to name the police officer at the station, that didn't work though. On the re-trial, said he wasn't constable Smith but was mistaken as he had learned that Smith was not on duty that day. Could he be cross-examined on the change in his testimony? Crown cross examined him, he was convicted at the second trial. Judge permitting cross-examination on the transcript of the first trial. They could not put the evidence in themselves but could use it in cross examination.
    - Court decided you could use this evidence to impeach his credibility but has no effect in terms of incrimination.
    - Look at extract (handout) – recognized subtle difference between impeachment and incrimination.
- Noel – stands for proposition that if there is any possibility that evidence is used improperly it can only be used for credibility

Derivative Use Immunity + Squashing the Subpoena:

How to get a witness on the stand → Force to testify by use of subpoena.

Questions to ask:

1. Can the subpoena be quashed?
2. If the subpoena cannot be quashed, what protection can be given to the accused?

R v SRJ

Facts: S was charged with break, enter and theft. M was charged separately with the same offence. Both were young offenders, and they were each tried separately. M was subpoenaed to testify at S's trial. M's counsel argued that forcing M to testify against S would violate his right to remain silent and not give self-incriminating evidence. At trial, the trial judge quashed the subpoena served on M and prevented him from testifying on the basis that his "right to remain silent" would be infringed if he were to provide incriminating testimony.

**** NOTE: FOUR judgements here – Iaccobucci (Majority), Sopinka, LHD, La Mer**

First up: Iaccobucci

1. The Use of the Subpeona:

Ratio: The subpoena should not be able to be quashed by the trial judge

- Need to establish a "case to meet"
- Issuing a subpoena does not engage s.7 rights → s.7 does not give an absolute right to silence, but is constitutional because of the resulting immunity given
- No power to squash the subpoena

2. Use of the Compelled Testimony:

Compelled testimony provides you with:

- **Derivative use immunity** → Whereas simple use immunity allows you to be free from your testimony being used, derivative use immunity protects you from having evidence used against you that could not have been otherwise discovered
    - **Also applies to evidence created by the accused in oral testimony**
- **"But for the compelled testimony"** → If proven on BoP that evidence could be obtained otherwise, not excluded

Lamer → Concurring – AGREES WITH EVERYONE

- Accepts the concept of derivative use immunity as per majority
- But believes TJ reserves right to squash the subpoena

Sopinka:

- Instead of allowing for derivative use immunity, adopt a principled approach to compelled testimony → Whether to squash the subpoena

1. How important is this evidence to prosecution?
    - What if B has never said anything to the police
    - But usually, you have to have good sense as to what the witness will say
    - If you don't know, its more like an examination for discovery (questioning)
    - So if you don't know what the evidence is, you don't know how important it is
2. Can the evidence be obtained by other means?
3. Can we deal with B's trial first before he is called against A?
4. How significant is this evidence vis a vis the issues in B's trial?
5. Is the evidence likely to disclose matters that will assist the crown against him?
6. Anything else, including the effect of publication

LHD:

- Also rejects derivative use immunity → A US idea that should not apply in Canada
- Parliament did not intend for derivative use immunity – difference between incriminatory and self-incriminatory evidence
- Need to balance the rights of the accused with the objectives of law enforcement → Look for "fundamental fairness"
- If the predminent purpose for subpoenaing the witness is to build or advance the case against the witness, you must quash
- Also you can use the "abuse of process" doctrine
    - High bar, difficult to obtain a ruling finding abuse of process
    - Difficult to find Crown behaviour was this excessive
- Cannot use courtroom to interrogate the witness

But there are 2 stages where you can quash the subpoena:

1. When the subpoena is issued
2. When B's trial begins and he tesfied agsinst A – bring a stay of proceedings based on abuse of process
    - But SCC says a stay should only occur in the "clearest of cases"
        - So its unrealistic in practical terms

The bar set by Sopinka is too low

In practical terms, it difficult to bring a quash or a stay

R v Nedulco: "An Unfortunate Decision"

Facts: Riding motorbike where the passenger is proceeding civilly and Mr. Nedulco is also charged with dangerous driving. He is obliged submit for questioning and he is under oath and testifies that effectively he has no memory whatsoever of how the accident happened. At the criminal trial he testifies (voluntarily) and gives a detailed account of what happened during the accident

Issue: How can the civil testimony be used?

Reasons:

CREATES AN EXCEPTION TO THE RULE IN HENRY

→ Evidence can be used solely to challenge credibility and not to incriminate

ISSUE: How can juries take this limiting instruction?

So if the evidence comes out of a civil proceeding and is NOT used to incriminate, it is allowed

Hedison – his girlfriend was found on the street killed; he was accused. The Crown had problems getting evidence sufficient to convict Hedison without his accomplice. So they were charged separately with the same charge. He was allowed to plead guilty and receive a sentence of 10 years leaving Mr. Hedison to know that he will get in the box and testify against him. The guilty man walked out of the court room and his associate pleaded guilty of manslaughter.

** NOTE: in instances where there is a clear attempt to colour the proceedings things will take a turn, remember that SRJ was not an attempt to colour the proceedings as they were both youths

PROPOSITION:

R v Willier,

The accused cannot frustrate the investigative process to delay and wait to speak with his lawyer. As long as he contacts A lawyer and receives SOME advice that is sufficient. As soon as he gets advice once that is deemed sufficient. Generally speaking, the accused will not be allowed to speak with a lawyer repeatedly

R v Sinclair: If there is a change in jeproady, you need to allow the accused to speak to a lawyer again

Theoretical Controversy w/ Henry:

EVEN IF YOU HAVE A FRIENDLY WITNESS, ALWAYS TELL THE COURT THAT THEY ARE THERE BY COMPULSION → PROTECTS THEM LATER

(1) Possibility that court misapprehended promise that s.13 is constitutional commitment to s.5 → because under s5 *all* witness having lost privilege should receive use immunity (compellable and noncompellable) BUT Henry held only compellable witnesses can receive this protection

(2) Why are those who chose to take the stand at 1st trial treated as being compelled to self-incriminate when used by Crown in subsequent proceedings where they d/n testify

(3) Why is it impermissible to use voluntary testimony in previous proceeding but not impermissible to use voluntary pre-trial confessions to police?

(4) Fear that accused will use knowledge of s.13 to say that they did it at one hearing and then not testify at a 2nd hearing knowing that the Crown cannot prove its case. Crown sometimes wants to question accused on their knowledge of s.13 in these instances

- **To solve this:** the court said this type of cross examination has low probative value considering that s.13 does not provide complete protection anyway + there is still risk of perjury to the accused.

Privilege Against Self-Incrimination at Trial (summary)

- s.11(c) accused not compellable at Crown witness
- s.13 use immunity (except in perjury proceedings)
- s.13/*R v S(RJ)* derivative use immunity (American concept)
- s.5(1) *Canada Evidence Act* / s.6(1) *Alberta Evidence Act* – (a)witness cannot be excused from answering a question if answer will tend to incriminate BUT (b) witness who testifies has right not to have incriminating evidence used against him except for perjury/contradictory evidence

McCriven: agreed to contact legal aid, spoke with duty counsel for 5 min. then followed interrogation, if wish to speak to a lawyer can have one represent. The requests denied, right to chose counsel is one facet under s.10b said SCC. In addition, while police must hold off questioning meant to facilitate obtaining counsel, if cannot obtain in reasonable time must exercise by calling another lawyer, or police can start questioning. **Accused must be reasonable diligent in pursuit of legal advice.**

Bridges: murder case, accused is arrested in Winnipeg. Clear wants to speak to a lawyer, being questioned, no duty counsel in place. Tried very lawyers in yellow pages, ultimately SCC found statement given inadmissible because 10b breach. **Obligation of state to provide service for free legal advice.**

Manu case-?//- DIDN'T KNOW WHY policy looking at him. Thought he waned to be an informant. Got convicted at 2nd trial, said now they tought they wanted to talk to him on a rape. Can it be a consciousness of guilt? When did he lie? Circumstantial evidence. After the fact conduct. Scc decided but it is now wrongly decided. Stood for prop that you cant use a prior statement to incriminate. Henry changed this.

Kuldip 1990- relatively minor charge. He had testified at first trial, was convicted, appealed and testified again. Claimed he had in fact reported manner and said he could name the police officer. At 2nd trial, changed police officers name. could he be cross examined? Convicted at 2nd trial. Made distinction which is no wrong, court decided you could use this evidence for purpose of impeaching the credibility but you cant use I to incriminate. Now we know this is wrongly decided too. Henry says we can use it for everything because he went in the box voluntarily and it was his decision. As binnie says, why shouldn't we be allowed?

CRIMINAL CODE SECTIONS RE: PRIVILEGE

Section 672.21 CCC

- **s. 672.21:** statements by AC during the course of & for purpose of assessment or treatment is directed by the Court shall be inadmissible.

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- EXCEPTION:
- **s. 672.31(3)(f):** applies ***Noel*** ratio which allows such a statement to be used to challenge credibility of AC if his testimony is inconsistent with protected statement.
- Occurs where police arrest & charge accused with crime, but order a mental assessment to determine:
    - (a) is person fit to plead?
    - (b) is person NCR?
- This section protects any statements made by accused during this treatment/assessment as privileged communications & not to be disclosed

Section 189(6) of CCC:

- **s. 189(6):** any information obtained by an electronic interception that is privileged still remains privileged & inadmissible as evidence without consent of person enjoying the privilege
    - e.g. if police wiretap intercepts privileged communication between lawyer & client or between spouses, still privileged.

LOSS or WAIVER OF PRIVILEGE

- Privilege is not absolute, and can possibly be waived by the party who holds the privilege, or lost. 5 principles:
    - 1) Holder for whom the privilege benefits has the right to claim or waive privilege
    - 2) waiver can be either explicit or implicit
    - 3) if waiver is implicit, it must be based on:
        - (a) intention
        - (b) considerations of fairness & consistency
    - 4) implied wavier will be found where witness asserts that, as a result of receiving legal advice, they took certain actions based on that advice. Court would likely find that witness has impliedly waived the privilege & communication no longer privileged (*Campbell & Shirose* 1999 (SCC))
    - 5) if privileged information is inadvertently disclosed:
        - (a) traditional common law approach: privilege is lost→*Rumping v. DPP* (1962) HL
        - (b) modern approach: law of privilege is substantive & not just procedural. Thus, inadvertent disclosure will not automatically extinguish privilege→*Descoteaux v. Mierzwinski*

Chapter 8: PUTTING THE EVIDENCE BEFORE THE COURT

I. WITNESS EVIDENCE

1) Adversarial system based upon witnesses who orally present evidence before trier of fact

2) Subpoena: mechanism that compels attendance of witness & also that witness bring relevant documents

3) If witness does not appear, court may issue warrant to compel appearance & can make finding of contempt

4) If witness refuses to testify or answer relevant questions, he can be prosecuted for disobeying lawful Court Order or cited for contempt

II. COMPETENCY & COMPELLABILITY

Competency: will the witness be allowed to testify? Two aspects:

(i) Capacity to observe, recollect & communicate

(ii) Responsibility to testify truthfully

Compellability: can this witness be forced to testify?

General Rule: every person is both competent & compellable. But various exceptions to competency & compellability at common law & statute, & because of privilege

Historically, following were **NOT** competent to testify:

1) children
2) mentally disabled
3) parties themselves
4) spouses of parties
5) infidels
6) convicts
7) persons interested in proceedings

A. Competency & Compellability of Child Witnesses

1) Common Law

- For child under 14, Court had to determine whether:
    - (a) child understood oath/affirmation—if not, then do they understand moral responsibility to speak truth?
    - (b) child able to communication evidence?

At common law, if child understood the responsibility to speak the truth, but could not understand oath, could not convict AC on uncorroborated & unsworn testimony of child. Thus was very significant, especially in child sex assault cases where it is often child's evidence standing alone.

- Common law has been changed by CEA & AEA. CEA has modern approach, but AEA still stuck with historical approach.

- S(J) ; R v R(d) - it is inherently wrong to automatically discount the evidence of a child. It should be treated carefully.

Child Competency changed by **16.1 Evidence Act**

IF A CHILD IS UNDER 14 YEARS OF AGE:

- Subsections:
  - (1) person under 14 presumed to have capacity to testify
  - (2) person under 14 shall **not** take oath/solemn affirmation
  - (3) person under 14 should only testify if able to
    - Understand questions &
    - Answer questions
  - (4) Party who challenges capacity of proposed witness under 14 has burden to show there is an issue of capacity to understand & answer questions
    - →**Unless party challenges it, it will be assumed that child has capacity**
  - (5) If court satisfied that there's an issue as to capacity of witness under 14 to understand & answer questions, it shall conduct inquiry to determine whether they are able to understand & answer questions.
    - →**Thus no inquiry into child's capacity to understand nature of oath, or nature of truth**
  - (6) Court shall require witness under 14 to promise to tell the truth
  - (7) No witness under 14 shall be asked questions re: their understanding of nature of promise to tell truth.
    - →ROYAL: **This is bizarre. Why would you have them promise to tell truth, but not ask them whether they understand that promise?**
  - (8) If witness under 14 testifies, it shall have same effect as if it were taken under oath.
    - NOTE: witness's evidence is not to be discounted because it was not taken under oath.
- **NOTE:** No corroboration requirement. Thus, abrogates common law rule that AC cannot be convicted on basis of unsworn, uncorroborated testimony of child.
- **NOTE: s. 529, CCC**: Any mandatory requirement to warn jury about convicting that AC on basis of child's evidence is now abrogated. Seems redundant given (8). May refer to TJ's discretion to comment on the evidence in his charge to jury—if so, then s. 529 is universally ignored.
- **NOTE:** these provisions based on Bill C-15→find out when Bill C-15 became law for exam:

s. 16 Canada Evidence Act came in to effect January 2006 – person under fourteen is presumed to have the capacity to testify (before this, it had to be demonstrated that the child COULD testify); under fourteen years they should not take an oath or affirm despite a provision of any act which requires this.

- (This legislation was upheld in R v S(J) by the SCC
- Mindful in this case that you have to be careful in assessing the evidence of the child – must be given the same assessment as to any other witness

- Must be mindful that the children are likely to exaggerate – they are notoriously bad as to assessing height, speed, or the time frame of events. BUT that does not mean that they are not telling the truth - just must be sensitive to these things

3) AEA, s. 19 – Civil Proceedings

- Subsections:
  - (1) in legal proceeding where child of tender years is witness & does not understand nature of oath in opinion of judge, can still receive his evidence if child is sufficiently intelligent to justify receiving evidence & understand duty of speaking the truth in opinion of judge
    - **" Child of tender years" = child under 14**
    - Test for understanding the oath (***Leonard***):
      - (a) appreciation of solemnity of occasion
      - (b) understanding of added responsibility to tell truth, over and above duty to tell truth as part of ordinary duty of normal social conduct
      - (c) understanding of what it means to tell truth in Court
      - (d) appreciation of what happens, in both practical & moral sense, when lie told in court
    - Test for whether child has sufficient intelligence to justify receiving evidence (***Marquad***):
      - Is witness capable of perceiving, remember & communicating events to court?
      - Not necessary to determine in advance that child perceived & remembers that specific events at issue in trial—not required of adult witnesses so not required of child witnesses
  - (2) no case shall be decided on this evidence unless it is corroborated by other material evidence.
    - Subsection (2) only applies if child gives unsworn testimony

***** UPHOLDS THE TRADITIONAL COMMON LAW APPROACH**

Provincial approach

- Absolutely no revisitation of the Alberta Evidence Act – so we are stuck with what it has been
- In a legal proceeding where a child of tender years if offered (under the age of 14) and the child does not in the opinion of the judge understand the nature of the know he will not be allowed to testify.
  - What is the nature of the know?
- They will be given if assessed by the judge they have (1) sufficient intelligence to justify the reception of the evidence and (2) do the understand the duty of speaking the truth (that is the moral duty)
- We do not secure a promise to tel the truth. No case is decided on the evidence of an unsworn witness unless that evidence has been corroborated with other evidence.

Two regimes:

(1) Federally
(2) Provincially

- Encompasses the old law not really changed in 75 years

Nature of an Oath – read here to determine the inquiry the judge must conduct when deciding whether the child is able to give sworn evidence

Children are particularly important in criminal investigations now because of an explosion of child abuse cases. Almost everyday children testify 417 (QB) and 447 (Prov) special rooms where the child testifies behind a wall by closed circuit television while in the same courtroom. This is a common procedure – those courts are full everyday.

- Half of the criminal litigation is sexual assault, whether on the child or someone else
- So how we may take the evidence of the child is very important as it may well be the only evidence of the crime. It is not uncommon for convictions to result where we have simply the child's testimony and no corroboration and nothing to confirm their evidence except their assertions that this happened to them.
- Remember that the child has to adopt the statement given to the police or social worker before it is applied in the courtroom

4) RESULT of CEA & AEA:

- In criminal trials, AC **can** be convicted on basis of unsworn, uncorroborated evidence of child
- In civil trials, DF **cannot** be held liable on basis of unsworn, uncorroborated evidence of child
- Thus anomalous result—more protection in civil context than criminal context
- ROYAL: **AEA** needs to be updated to match **CEA**.

Compellability: no issues with respect to compellability of children

B. Competency & Compellability of Mentally Disabled

Provincially – the legislation is completely absent here. There is no legislation speaking to this

Federally – s. 16.1

- Where the witness is fourteen years or older and the mental capacity if challenged
- Before permitting them to testify have to demonstrate does **(1) that person understand that nature of an oath and (2) communicate the evidence**
- If they are able to then they shall testify under oath
- If they are not able to understand an oath but communicate the evidence they may testify on promising to tell the truth

NB: For child witnesses → Competency is determined at time of trial not time of event (contrast w/mentally disabled)

Subsections:

- (1) if witness over 14 years of age whose mental capacity is challenged, court shall conduct inquiry to determine:
    - (a) whether witness understands nature of oath/solemn affirmation

      ***Leonard* test**
        - Must look at whether the mentally disabled person has:
            - An appreciation of the solemnity of the occasion
            - An understanding of the added responsibility to tell the truth over and above the duty to tell the truth as part of the ordinary duty of normal social conduct.
                - This requires some inquiry to be conducted by the Court to satisfy themselves that the child understands the difference between truth and falsehood and that he or she understands the general social duty to tell the truth.
            - An understanding of what it means to tell the truth in Court
            - An appreciation of what happens, in both a practical and moral sense, when a lie is told in Court.

    - (b) whether witness able to communicate evidence
        - ***Marquard* test**
            - witness capable of perceiving, remember and communicating events to court
            - **Not necessary** to determine in advance that child perceived and remembers that specific events at issue in trial – not req'd of adult witnesses so not req'd of children

ROYAL: what about child under 14 whose capacity is challenged? Would s. 16 or 16.1 apply?

- Probably s. 16--.that's the express wording of both sections

- **(2) if (a) & (b) satisfied, witness shall testify under oath/solemn affirmation**
- **(3) if (a) not satisfied but (b) is, witness may testify on promising to tell truth**
- **(4) if neither (a) nor (b) satisfied, witness shall not testify**
- **(5) if party challenging mental capacity of witness has burden of showing there is issue re: capacity of witness to testify under oath/solemn affirmation**

Parott:

- TJ excused female complainant with Down's Syndrome from testifying w/o conducting inquiry to determine mental ability
- SCC found TJ erred:
    - 1) All witnesses, including mentally disabled, presumed competent until found otherwise
    - 2) Court must conduct in inquiry if party challenges mental capacity of witness

- 3) Test: does witness's mental condition substantially negative trustworthiness of evidence? For TJ to declare that witness is incompetent on ground of mental disability, must be total incredibility in relation to subject to be testified out.
- 4) Must consider this at 2 times:
  - (a) time of event about which witness testifying
  - (b) time witness is sworn
- 5) if not, witness allowed to testify & up to jury to decide weight given to evidence

Tooney (Eng.):

- Can challenge witness's credibility by calling evidence of psychological/psychiatric history, i.e. high threshold for finding mentally challenged WI incompetent, but mental disability will also go to weight of their evidence. Adopted by ***Hawke*** (Canada)

R v Lisovic - Wife charged in husband's murder, along with her boyfriend. She went to trial while the boyfriend pled guilty. The Crown called a witness, Ms. Sinclair, who was an inmate who shared wife's cell. Sinclair wanted to testify that Lisovic had confessed to her. Sinclair had a long history of mental disorder. The defense raised the issue of whether she was competent to testify pursuant to s 6. **Justice Steer found that the witness would be found incompetent if they are THOROUGHLY untrustworthy.** Looked at in two points of time: when the events occurred, what was their mental condition then? And what about the mental condition in the witness box?

- Note that, even if you can't keep them out of the witness box, you can still use mental disorder to challenge the witness' credibility. The trier of fact can discount the evidence on that basis.
- ***Remember that the trial judge makes the final determination on whether the witness is COMPETENT to testify, and the trier of fact determines how much probative value the evidence should be accorded***

- **If mental capacity becomes a serious issue AFTER testimony has been given - it is possible to challenge the witness then, and if they are found to be incompetent, a mistrial may be declared**

Compellability: no issues with respect to compellability of mentally disabled.

Parties to Proceedings

1) Civil Trials

- **AEA s. 4(1):** parties are both competent & compellable at instance of themselves & opposing party, as are spouses of the parties (subject to s. 8 marital privilege)
- This applies even if one of parties is a criminally accused who is involved in parallel civil proceedings

2) Criminal Trials:

- 1) AC is not competent nor compellable for the Crown
- 2) AC is competent & compellable by the defense
- 3) Where there are multiple accused:

- **Co-accused #1 is competent but not compellable by co-accused #2 UNLESS THEY ARE TRIED SEPERATELY**
- If Crown needs co-accused #1's evidence to use against co-accused #2, they may indict separately or apply for severance
- If co-accused #2 needs co-accused #1's evidence, only remedy is to seek order of severance for separate trials
- **If AC tried separately, they are competent & compellable by Crown and Defence for proceedings other than their own**

S(RJ) (1995) SCC: recognizes use immunity & derivative use immunity as protection for separately indicted/severed accused who is a Crown witness

- In some cases, co-accused can have subpoena to testify in other proceedings set aside by obtaining a ruling from the Court that he is competent for the Crown.

If Crown is considering indicting separately or apply for severance, should consider the following:

- (a) Does Crown need evidence of one against the other(s)? or is there case against each AC strong enough? Will it look desperate? Dirty up my case a little?
- (b) Is this overridden by public interest in convincing all accused & in one joint trial? **Advantage in terms of resources.**
  - Cut throat defence – there is nothing better than having one accused go into the box and then another and another – usually will all get convicted
  - There is no honour amongst thieves
- (c) Is there risk of inconsistent verdicts if proceeding separately? ie AC#1 found guilty but AC#2 found not guilty. Having a guilty man walk out? Different juries/triers of fact all involved in the same allegations will work out different than you anticipate
- (d) Which of the accused would be more credible as a witness against the other? i.e. what is their criminal record, lifestyle, reputation?
  - Keep in mind when you call a witness there is a presumption that they are credible
  - There is an obligation of the Crown to call only witnesses who are credible
- (e) Which of the accused does the Crown want to convict more?
  - The organizer? The one who pulled the trigger?
  - So you may need to break a deal to convict them
- (f) Will accused refuse to be sworn or testify as witness?
  - Although made the deal and the deal has been done that person may back out
- (g) Does Crown have independent evidence that corroborates the accused's testimony? Or does it contradict the accused's testimony?
- (h) Could accused get severance anyways?
- (i) How will forced cut-throat defence work? i.e. who is the weak link amongst the accused?

        - (j) **How should various accused be listed on indictment?** This will determine in which order they put forth their respective defences. If first one or two refuse to testify, and third one testifies, his evidence is "at large." Also, those initial accused cannot change their mind afterwards & testify after the other accused have testified.
- **Those are the sorts of considerations to take account. Also even if jointly indicted may one of the accused apply for severance anyways, then can simply indict that one person separately**
- How are the accused truly listed on the indictment (the charged been laid, the charges of the Queen versus A B C D - this is not done alphabetically but have to figure out how to charge them on the order they appear on the indictment) (i.e. are you first and you have to worry about what B C and D have to say)

If AC#1 is considering applying for severance, two dangers:

- (1) AC #2 is now a competent & compellable witness for the Crown
- (2) AC#1 is now a competent & compellable witness for the Crown in AC#2's trial →consider what Wigmore called the "three horns of triceratops"
    - (i) runs risk of self-incrimination if he testifies truthfully
    - (ii) if he refuses to be sworn, may be cited for contempt of court
    - (iii) if he lies, may be prosecuted for perjury

- If the criminally accused person who is involved in parallel civil proceedings will have no immunity from testifying in those civil proceedings. There is also no general rule that civil proceedings are to be stayed pending the resolution of the criminal matters although this can be done either by agreement or on application to the civil Court. – such orders are difficult to obtain.

The three horns of the triceratops:

1. Accused runs the risk of self-incrimination/harmful disclosure in the event he testifies truthfully
2. In the event the refuses to be sworn, he will be cited for contempt and punished severly
3. If he lies, he again will be punished severely because he will be prosecuted for perjury which is an extremely serious offence.

D. Spouses of the Parties

OLD RULES →

Civil

- **s.4(2)** *Alberta Evidence Act* spouses and AIPs are competent & compellable by any of the parties
- **s.8** spouse or AIP is not compellable to disclose any communications made to them by partner during marriage of AIP

Criminal

- Only **married** spouses are incompetent and non-compellable for the Crown (CL relationships not recognized)
    - If divorced by time of trial, no longer "spouse" and thus competent and compellable for the Crown (Royal: witness ex-spouse can still assert spousal privilege over communications made during the marriage)
    - If married before trial, or even between preliminary & trial is a "spouse" & incapable of testifying about matters both before and during the marriage (***Hawkins & Morin***)(preliminary evidence was admissible under modern principled approach)
    - ***R v Salituro (SCC):*** spouses who are irreconcilably separated may now be considered both competent and likely compellable for the Crown

- The court is not prepared to take away this category, say it's a matter for parliament

General Rule: s.4(3) *CEA* spouse is not competent or compellable by Crown (can be by accused) but need not disclose any communications received from spouse (privilege --- must be asserted)

- **Exceptions** spouse competent and compellable if accused charged with:
    - Where offence involves life, liberty, health of spouse then he/she compellable by Crown (e.g. spousal abuse)(**s.4(5)**)
    - **s.4(2)** *Canada Evidence Act* one of listed offences (primarily sexual offences) EXAM
    - **s.4(4)** *CEA* where victim is under age of fourteen

<u>Policy:</u>

- Prosecuting marital harmony
- Repugnance of compelling one spouse to help in condemnation of accused
- Other reasons no longer considered valid (single person, identical interests)

General Rule defense: Spouses always competent (s.4(1)) BUT not always compellable

- Example: if have multiple co-accused, the wife of one accused may be competent to testify on behalf of another, but they would not be compellable at their instance → therefore may need to apply for severance
    - ***R v Koestar*** (1989 ABCA): Spouse of an accused, is both competent and compellable for the defesne

***R v Couture* 2007 SCC:** *wife had given statements to police, neither under oath, disclosed the husband had, prior to their marriage, kill two women --- during period of estrangement but by the time of trial they were back together*

Ratio: Court declined revisiting topic --- matter for parliament. Would not admit evidence under principles approach to hearsay as can't do indirectly what is not permitted directly.

***R v Salituro* 1991 SCC:** *accused charged with fraud against his wife, the two were irreconcilably separated, wife wanted to testify and did*
Issue: Is wife, irreconcilably separated and not within a statutory exception, competent and compellable for Crown?
Royal: she did fall into an exception – she was a victim and offence involved her person/liberty/security
Ratio: Courts can make small incremental changes. Policy reasons exist to protect and existing relationship --- no longer the case on these facts. *Voir dire* to be held to see, on BOP (*Jeffrey*), if spouses irreconcilably separated.
4 situations:

- spouses irreconcilable/spouse willing to testify: competent/likely compellable
- spouses irreconcilable/spouse unwilling: competence/compellability undecided
- spouses merely separated/spouse willing: not competent/not compellable
- spouses merely separated/spouse not willing: not competent/not compellable

Privilege: if found competent and compellable spouse can still assert privilege over any communications within marriage but not observations

- premarital/post maritial statements not protected & receiver is the privilege holder

Examination in Chief

Before EIC occurs, witnesses are asked to leave the courtroom. Witnesses who stay in the courtroom are (i) not allowed to testify in civil trials or (ii) given less weight in civil trials

Generally → Open ended questions in EIC, leading questions in cross

9(2) is unique Federal Legislation → No provincial counterpart

9(2) – Allows the Crown to Cross-Examine their own witness on a PIS if they are not adverse

Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

**** BUT YOU HAVE TO GO INTO VOIR DIRE ON THIS**
→ This section is dangerous and how Milgaard was convicted
Now, 9(2) is devastating with the era of KGB and video recorded statements

How to 9(2) YOUR OWN Witness:

- (1) Advise the court you now wish to make an application (it is YOUR witness)
  - Has no application to oral statements – must be recorded

  (2) the court should direct the jury to retire
- (3)upon the jury leaving the courtroom, counsel calling the witness should advise the judge of the particulars of the application
  - the inconsistent and the areas on which they seek to cross examine the witness
- (4)judge will read the statement or listen to it and determine if there is an inconsistency
  - if none – the application is over
  - it has to be on a SUBSTANTIAL statement and INCONSISTENT (a little wavering will not be sufficient)
- (5)If a finding, counsel will call the witness down to prove that is a statement of the witness
  - The witness may deny making the statement, and then may have to call the police who took the statement to prove it
- (6)If they admit, counsel for opposing party may be allowed to cross examine
  - There may be circumstances which imply that the statement was involuntary
- (7)The judge will decide whether to permit cross examination
  - If permitted, it is devastating evidence – it is effectively over – in all practical sense
  - The jury may choose to adopt the KGB statement – it now has testimonial value depending on how the jury adopts the testimony of the case.

***** THIS BASICALLY LETS YOU OVERWRITE YOUR WITNESS TESTIMONY WITH THE PIS**

Canada Evidence Act ss 9(1) → New wording same as s.25 of AEA

ISSUE: THERE ARE A SERIES OF DRAFTING ERRORS IN THIS SECTION

Allows you to cross examine adverse witnesses

- **9.** (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, **but if the witness, in the opinion of the court, proves adverse,** the party may contradict him by other evidence, **or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony**, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

CORRECTED VERSION of s 9(1) → **SCC AFFIRMED IN HAYNES**

- A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but, the party may contradict him by other evidence AND if the witness, in the opinion of the Court, proves adverse, by leave of the Court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before such last mentioned proof can be given,

the circumstances of the supposed statement are sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

Under the new wording:

1. A party producing a witness cannot impeach his by calling evidence of bad character
2. But a party may challenge him with other evidence
3. AND if the witness proves adverse, then by leave of the Court the party may introduce a prior inconsistent statement

But under the original wording, the witness didn't need to be adverse for the calling party to call a PIS during examination in chief

B. Questioning

- Open-ended questions rather than leading questions. Evidence should come spontaneously from witness, so when question contains the factual proposition and witness simply adopts that proposition in their answer, their evidence has little value
- Leading questions if introductory or non-contentious matters
- Because of open-ended questions, calling party has less control over content of answers. Thus, should brief witness to ensure all areas are covered & well organized

Leading Questions

- What colour of the hat was he wearing – had not heard evidence that he was wearing a hat
- What weapon did he use to kill the person

They are acceptable SOMETIMES in the court i.e.

- You are constable smith and were on duty and in uniform on duty. Is all that correct?
    - This is appropriate as an opening questioning, placing status on the time, etc
- When questioning a youthful witness, some leading is permissible.
- Pages 418-419 of textbook

Leading questions to matters that are controversial should be objected to by your opponent. The trial judge also has an obligation to interject. General rule, is that they should sit quietly and make rulings from time to time when asked to do so but there are times when the judge ought to speak themselves to stop leading questions because they can:

- Effect the weight of the evidence
    - Little, if any, weight should be given to answers of leading questions
    - Evidence should come naturally from the witness and now out of a series of projected questions

Skillful examination in chief is very difficult. All of the questions defence lawyers ask are usually out of cross-examination. Rarely putting witnesses in the witness box, but when/if you do you find yourself into collapsing into reading the witness (usually not properly prepared, witness box is a traumatic place for people).

Rose (ONCA)(2001) – extreme example of improper leading questions in drug case

- Crown made a deal with the witness.
- Not a cooperative witness despite the deal

- Lobbed a series of leading questions which ought not to have been permitted
- Objection initially which was overruled

Williams – Deals with notion of evidence which has been induced by a series of leading questions to be given little, if any, weight.

Refreshing Witness' Memory

What about a forgetful witness?

- Someone who is honest but does not remember what we believed they would say based on the pre-trial review, etc.
- Would have to brief before trial
    - There is nothing wrong with briefing witness before the trial
    - It is quite common
- Refreshing memory before trial
    - A witness is entitled to refresh their memory but have to be careful because they will be cross-examined and the first question will be "can you tell me what you looked at before trial"
    - Have to make sure that you as the examiner cannot show the statements of other witnesses but must be something that came from the witness themselves i.e. series of comments recorded in the state of questioning
- Refreshing memory of witness during the course of the trial
- Admitting a past memory as original evidence when attempting to refresh the witnesses memory is unsuccessful
    - Record itself that becomes evidence in the trial – will be marked as an Exhibit.
- Distinguish 2 concepts from Prof Wigmore:
    - Present Memory revived: have memory of these events but need to refer to something to remind me of that memory (address, time)
    - Past recollection recorded which are reliable and can act as a substitute for the witnesses evidence
        - REMEMBER; dealing with a witness you have called, may be a hostile witness/unfaithful
- Prior to trial, all manner of statements/video recordings/etc –cannot, on ethical grounds, use statements of other witness/peoples attached to the case because that would destroy the credibility of the witness
    - REMEBER: post-Stinchcombe era . Everything that the witness looked at must be disclosed
- Issue of pre-trial hypnosis to revive memory
    - There was some authority in 2007 in a case called *Trochym?* Which allowed that. But no longer, you cannot lead evidence based on this.
- During the trial:
    - Witness failing to come up with things; they are having trouble with their memory – not an unfavourable or hostile witness
    - (1) repeat the question, rephrase, come back to it later
        - Witness must be asked before you can put to them via statement, must ask for leave of the court to look at the documents

        - Did you testify at prelim inquiry?
        - Would it help you to have reference to that statement? In recovering your memory? Are you having difficulty with your memory?
            - At that point it is perfectly permissible to allow them to read over their statement in the witness box BUT they are not allowed to simply read it outloud into the record.
- Classic example of present memory revived are the notes of a police officer
    - Policeman record in their notebooks: times, addresses, shift, temperature, etc
    - All with a view of being able to refer to these notes during the testimony and these are disclosed to the defence – these are to provide details, he remembers the general investigation but in terms of specifics he will need to refer to those notes for his testimony BUT first there will be foundational questions before he can refer to his notices:
        - The notes were made at the time of the investigation or shortly thereafter?
        - There have been no additions or deletions to the notes since they have been created?
            - Anything like this will not permit them to look at their notes
        - Must elicit from the policeman that he requires his notes to refer to in order to fill in his general memory
            - Not allowed to simply read them into the record.
    - This is not past recollection but present memory revived – policeman retain the notes, subject to questioning by defence lawyer and examination to ensure no deletions, etc. But they are not themselves evidence.
- High speed chase – driving with son and calling out licence plate and son (in the car too) writes it down on his hand, then transcribes it on paper – is this evidence that can be relied upon?
    - Was there authentication – did the son repeat it/ double check the licence plate and confirm it.
    - Will the piece of paper that it is written down on become evidence?
- There are number of factors that are strictly applied to past recollection recorded;
    - (1) must show the information was reliably recorded in some fashion
    - (2) when it was made, you must be able to show the witnesses memory was sufficiently fresh and vivid at the time
    - (3) at the time, knew it was true (i.e. son read it back to me and double checked) (circular process)
        - Of critical importance because these requirements are strictly applied because they act as a substitute if the witness is unable to tell us
    - (4) the original record is to be entered (not a copy)
        - Document itself is admissible for the truth of its content and marked as an Exhibit

To main methods of "refreshing" witness's memory:

1) **Present memory revived**
2) **Past recollection recorded**

1. Present Memory Revived

GOAL**:**

To allow witness to refer to something that will refresh the memory, but not contaminate that memory

- Witness usually gives evidence based on their present memory of incident while in witness box
- This present, revived memory becomes the record containing the evidence
- Court cannot control what witness does before trial refresh memory, but can control what witness is shown while in witness box

FOLLOWING REQUIREMENTS:

- **(i) Necessity:** witness needs to have memory refreshed.
    - e.g. officer, do you require those notes to refresh your memory?
    - NOTE: witness cannot just read document—it is only to refresh memory
- **(ii) Authenticity:** e.g. officer, did you make these notes in connection with this investigation, in your own handwriting? Witness generally not allowed to refresh memory using document created by another
- **(iii) Contemporaneity:** e.g. at or near time of incident? Witness generally not allowed to refresh memory using document created by himself but not contemporaneously.
- **(iv)** Any deletions or alterations to those notes since you made them?
- **(v)** Notes do not become evidence/exhibits, but are producible to other side as part of disclosure & also while witness consults them.

Counsel examining in chief is not able to simply hand the witness a document in an attempt to refresh the witness' memory – it must be a NEED of the witness to review the document to refresh his memory. Therefore, counsel needs to lay the foundation for permission for the witness to review the document

The court has discretion as to what to allow the witness to refer to during the giving of testimony. The goal is to allow the witness to refer to something that will genuinely refresh the memory, yet not contaminate it with something that isn't actually the witness' memory and ensure that cross-examination is effective to test those concerns.

The witness should not simply read from the document. It is an *aide memoire* and should be removed after the witness has reviewed it and ought NOT become an exhibit in the proceedings.

REFRESHING MEMORY FROM PRIOR PRELIMINARY TESTIMONY:

- **S. 10(2) CEA:** Witness can refer to transcripts of prior preliminary testimony to refresh their memory
- This transcript is recorded by court reporter who certifies transcript to be accurate
- Witness does not certify it himself
- Requirement of contemporaneity is relaxed because this was sworn testimony

CHALLENGING THIS EVIDENCE: based in witness's testimonial factors

- Ability to observe, recall, relate
- Current bias

2. Past Recollection Recorded

- Exceptional procedure: if witness does not have present memory & it cannot be revived, then calling party may have to rely on "past recollection recorded." The document then becomes the record containing the evidence – **strict requirements with respect to it**

***Fliss*: SCC applied Wigmore criteria for "past recollection recorded":**

- (a) Past recollection recorded in some reliable way
- (b) At time, was sufficiently fresh & vivid to be probably accurate
- (c) Witness must be able to now assert that record accurately represented his knowledge & recollection at time—witness "knew it to be true at the time"
- (d) Original record itself must be used if procurable

**When the witness reads the Past Recollection Recorded from the document thereby incorporating it into the testimony and it satisfies the requirements for Past Recollection Recorded, it would be marked as an exhibit.

In practice, Courts are not always clear in the distinction between the two and sometimes Present Recollection Recorded will be merged with Present Memory Revived so that both are operative.

Challenging this evidence not rooted in witness's testimonial factors, but factors existing at time of recording:

- (a) Ability to observe
- (b) Ability to remember when note was made
- (c) Ability to accurately relate it at the time—emotional/sober/under pressure
- (d) Any bias then

3. Mixing of "Present Memory Revived" with "Past Recollection Recorded"

- Example: police officer may quickly review notes so as to refresh memory of event. But sometimes info on specific point (e.g. address) may not be in present memory, or "present memory revived." Thus, it is "past recollection recorded" – from the notes. But, notes not entered as exhibit. Rather, witness reads "past recollection recorded" from the notes, incorporating it into testimony.

***Fliss* (2002) SCC:**

FACTS:

- Police conduct Mr. Big undercover operation to get suspect to confess to murder
- Police recorded conversations between suspect & u/c officers with judicial authorization
- Next day, u/c officer would review transcript & make corrections based on his memory of conversation
- TJ found the recordings breached s. 7 and excluded it under s. 24(2)

- Crown called u/c officer who testified as to “present recollection” of conversations
- Officer allowed to “refresh his memory” from excluded transcript
- Defence applied for exclusion of officer’s testimony on basis it was “inextricably bound up” with transcript
- Officer not only refreshed his memory, but basically read in the 30+ pages of transcript

REASONS:

1) Present Memory Revived

- (a) Officer entitled to refresh his memory by any means, whether or not the stimulus itself constituted admissible evidence. Thus, even though recorded conversations ruled inadmissible, officer still able to refresh his memory using the records.
    - **ROYAL:** disagrees with this, Court of Appeal judged called this “legal alchemy” i.e. means of getting in inadmissible evidence
- (b) Stimulus may be hearsay or even mostly inaccurate
- (c) **That is because his recollection**, not the stimulus, becomes evidence.
    - Here, officer went far beyond refreshing memory & basically read in transcript of recorded conversation.

Thus must, consider…

2) Past Recollection Recorded—Application of Wigmore Criteria:

- (a) Past recollection recorded in some reliable way
- (b) At time, was sufficiently fresh & vivid to be probably accurate
- (c) Witness must be able to now assert that record accurately represented his knowledge & recollection at time – witness “knew it to be true at the time” --.this criteria NOT met: recall on the day of review from the transcript was only partial
- (d) Original record itself must be used if procurable

RESULT: officer’s testimony is admissible

In ***Fliss, ibid***, he was suspected in a homicide and police set up a big brother operation around him. Police obtained an authorization to intercept their communications with him and those conversations were transcribed. The day after a conversation, the officer involved would review the transcript and make corrections or additions based on his memory of the conversations the day before. He testified at trial that when he reviewed the transcript he “could recall parts of it and put corrections in it that may have been inaudible on the tape” At trial, Defence got the tape excluded by way of s.8 of the Charter and it didn’t meet the balancing section under s.24(2).

- The Crown called the officer to whom the accused had made the confession who was allowed to testify as to his present recollection of the conversation. He was allowed to “refresh his memory” from the excluded tape. Officer was basically reciting the transcript’s contents. His “memory” of the conversation went on 34 single spaced pages.
- The majority concluded that the trial judge properly allowed the witness to give *viva voce* evidence given that he had a recollection of the gist of the conversation.

- But the majority said that even though the officer was entitled to refresh his memory by any means that would rekindle his recollection whether or not the stimulus itself constituted admissible evidence. That is because it is his recollection, not the stimulus that becomes evidence. The officer's recollection and not the stimulus is what is admissible.
- **But he went far beyond refreshing his memory and purported to directly quote the speakers at a level of detain that suggested encyclopedic recall including pauses and punctuations. This clearly was not stimulated memory, but could only have come into evidence under the Past Recollection Recorded doctrine, thus the examination of Wigmore's criteria for admissibility.**
    - The third criteria was not met. What got into evidence at the trial included parts of the conversation that were not verified on the day after during the review of the transcript.
- ***The majority found that the testimony ought not to have been excluded and found that no substantial miscarriage of justice had occurred.

This case allows the witness to refresh his memory from unconstitutionally obtained evidence.

R v Alldred 2007 OJ provides a useful review of the law.

***R v Gradinetti* SCC 2005 –** an undercover police officer is not a person in authority.

With the use of transcripts and depositions to refresh memory – it is accepted that this can be done without proof of contemporaneity and without proof from the witness that the reporter accurately recorded their evidence (their own authentication)

D. Rules Regarding Examination-in-Chief

Section 25 AEA & **Section 9, CEA** contain 3 rules for examination-in-chief. **Section 25 AEA** is correctly drafted but **section 9 CEA** contains drafting errors copied from *Lord Dedman's Act*.

Those rules are:

- Cannot impeach your own witness's credit by giving general evidence of their bad character
- But you can contradict your own witness by calling other evidence
- If witness is adverse & the TJ makes that declaration, you can ask the TJ for leave to lead evidence of a prior inconsistent statement. Must first:
    - Mention to witness the circumstances of the prior statement
    - Ask witness whether they made that prior statement

Two objectives:

- To challenge his credibility
- **To have WI adopt the statement. If he adopts the statement, it is admissible for the proof of its truth. If he does not, then it can only be used to challenge their credibility.**

E. Impeaching Credibility of Your Own Witness

4 main ways of attacking the credibility of your own witness in your examination-in-chief

1) Unfavourable/Adverse Witness

Unfavourable/adverse witness: witness who appears favourable to examiner, but their testimony is inconsistent with a prior statement

Cassibo: Witness is not hostile, but making statements inconsistent with prior testimony

- **Section 9(1) CEA & ss. 25(2) & 25(3) AEA:** allows examiner to provide proof of prior inconsistent statement:
    - Examiner can rely solely on the prior inconsistent statement itself to prove adversity
    - But cannot resort to **s. 25(2) of AEA** for impeaching credit of own witness
    - Interests of party & his lawyer are indivisible
    - A party cannot be "adverse" to himself within meaning of s. 25(2)

Witness must be declared adverse by the judge

2) Hostile Witness

- **Hostile witness:** witness who displays such a hostile animus towards the examiner that Court can safely find that he is testifying without desire to tell truth
- Court can then give leave for examiner to cross-examine witness "at large"
    - CAN CROSS ON ANYTHING, NOT JUST A PIS
- Can then use all the tools available in cross-examination
    - Ability to ask leading questions
    - **Resort to CEA, ss. 10 and 11**

3) **CEA, s. 9(2) Application**

- Does not require declaration of adversity
- Can cross-examine on a prior inconsistent statement in writing, reduced to writing, or audio-video recorded
- Cross-examination only on the inconsistencies in the statement

**** CANNOT BE A PRIOR VERBAL STATEMENT TO USE 9(2) → KBG Statement/Milgaard Process**

4) KGB Witness

- Is the strongest tool for impeaching own witness because jury can choose between witness' testimony (where he recants what he said to police) or the KGB statement in deciding which represents the true version

F. Drafting Errors in ss. 9(1) & 9(2) Can. Evid. Act.

s. 9(1):

- A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, **the** party may contradict him by other evidence, **or**, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given, the circumstances of the suspected statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.
- **COMMENTARY:**
    - There are 2 drafting errors in ss. 9(1):
        - "the" should be "such"
        - "or" should be "and"
    - **Prior statement may be an oral or written statement**
    - There is a dispute in case law regarding whether "adverse" means "hostile" or not
        - "hostile": witness is not hostile just because he gives testimony unfavourable to the party who called him. **Is only hostile if he has an antagonistic state of mind against the party who called him, causing him to testify unfairly & with no desire to tell truth**
        - Majority in *Hanes*: "adverse" does not mean "hostile"
        - Minority in *Hanes*: "adverse" does mean "hostile"
        - Authority in Alta.: *Marceniuk* [1923] Alta S.C. [equivalent to C.A. today]; "adverse" means "hostile"
    - If "adverse" does mean "hostile," then s. 9(1) permits cross-examination. If it does not then, s. 9(1) does not permit cross-examination
    - Court can consider cross-examination under s. 9(2) in deciding adversity under s. 9(1)
    - Court can consider prior statement, written, oral, in deciding adversity (***Cassibo***)
    - Follow the ***Milgaard*** procedure for s. 9(1) procedure
    - **If there is a positive ruling as to adversity, then statement can be put to witness**
    - **If the witness denies making the statement, can call independent evidence to prove that such a statement was made**
- **RESULT**: s. 9(1) is a method of impeaching one's own witness other than via cross-examination

s. 9(2):

- Where the party producing a witness alleges that the witness made other times a statement in writing, reduced to writing, or recorded on audio or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse
- **COMMENTARY:**
    - Only applies to statements in writing, reduced to writing, or recorded
    - There is no requirement for court to declare witness to be adverse. Must only be inconsistency between prior written statement and witness' present testimony
    - Follow the ***Milgaard*** procedure for s. 9(2) procedure

- Cross-examination only as to the **INCONSISTENCIES** in the statement
- Court can then consider this cross-examination on the statement in deciding whether or not the witness is adverse under s. 9(1)

**** DOESN'T NEED TO BE A FULL KGB STATEMENT**

Section 9(1) & 9(2) call for separate, specific applications by counsel

9(1) vs. 9(2) are different applications

9(1) – Method of Impeachment, other than Cross Examination	9(2)
Drafting errors ('the'/'such') ('or'/'and')	
Prior statement is oral or written or video	Prior statement is in writing, tape recorded (*not oral)*
Must FIND Adversity o Not favourable? o Court can look to 9(2) examination to decide whether adverse (*Cassibo)* o The only evidence of adversity could come from the statement itself	NO need to find adversity o All that is needed is that there is a substantial inconsistency between the prior statement and present testimony
	Cross-examination is allowed, but only on the statement
Procedure – Milgaard	Procedure – Milgaard
If Adversity is found, **statement can be put to witness** (If W denies making statement, independent evidence can be called to prove it >> the statement will go to credibility – not truth) – unless it is a KGB – then it can go in for proof	Does not provide for proof of inconsistent statements – but, *Cassibo* said that such proof can be main if a party is given leave to C-E and the witness denies the statement

Use of Previous Inconsistent Statement

- o If a prior inconsistent statement has the indicia of reliability as per KGB, it can be admitted for its truth
- o If it is NOT reliable as per KGB,
    1. If the witness accepts the statement as true, it becomes the witness's evidence
    2. If he does not adopted, the non-KGB statement cannot go in for its truth, but can be used to weaken credibility (need to go though 9(1) application)

IV. CROSS-EXAMINATION

- S. 10 and s. 11 Canada Evidence Act
- S. 10 - audio/video recorded statements
- S. 11 – oral statements
- Provincial counterparts:
    - S. 22; 23

A. General Features

1) Party has right to cross-examine all witnesses who are adverse in interest to that party

- Witnesses called by opposing party
- Witnesses called by co-accused or co-defendant
- Co-accused's are deemed to be adverse in interest (***Vanderbeek & Albright***): if co-accused decides to testify, his evidence is "at large" – can be used for & against himself & both for & against co-accused.
- Witnesses that party has called, & whom court declares to be hostile to that same party.

2) Four goals of cross-examination:

Preliminary question: is cross-examination even necessary?

- *(1)* ***Elicit Evidence re: substantive issues that is helpful to you or harmful to opponent****:*
    - Note: get helpful evidence from WI first before you "harm" them
- *(2)* ***Challenge Credibility of witness or disqualify of their evidence by focusing on testimonial factors***
    - Decide whether you are dealing with an honest but mistaken witness, or the dishonest witness
    - For honest but forgetful witness, challenge testimonial factors of perception, memory, communication
    - For dishonest witness, challenge testimonial factors integrity & reliability
- *(3)* ***Elicit evidence which challenges credibility of testimony previously or about to be given***
- *(4)* ***Focus court's attention on those issues in dispute that require close examination***
    - Cross-examination for the jury & not the client
    - Best cross-examination is brief & to the point
    - Control the witness

3) Limits to Cross-Examination: scope of cross-examination is very broad

- **S. 650(3) CCC:** AC at close of Crown's case entitled to make full answer & defence
- Interpreted to mean full right to cross-examine
- But there are following limits:
    - **(a) Must be Relevant to:**
        - (i) substantive issue;
        - (ii) credibility;
        - (iii) testimonial factor of integrity→is witness worthy of belief, truthful, person of integrity?
    - **(b) Cross-Examination of accused must not relate to character of accused who decides to testify, unless accused has injected issue of character into case**
        - Exception: **s. 12, CEA**: accused can be cross-examined by Crown re: their criminal record, unless accused successfully obtains a ***Corbett*** ruling
    - **(c) cannot invite inadmissible evidence**, i.e. must correspond to rules of evidence— character, hearsay, opinion
    - **(d) Cannot be repetitious, insulting, vexatious, but must be polite**
    - **(e) any suggestions must have some good faith basis (*Lyttle*)**
        - Cannot make reckless suggestions w/o any basis
        - Cannot make suggestions you know to be false

4) Duty to Cross-Examine:

Browne v. Dunn: If party intends to suggest in their case that a witness called by opponent was either lying or mistaken about even they are testifying about, that party must in cross-examination put that suggestion to the witness so that they can meet it

- If party fails to do that, then finder of fact may draw inference that you accepted that witness' evidence
- ***Palmer v. Palmer***: this rule may not apply where:
  - Witness has clear notice as to opponent's contrary position
  - Witness's evidence is incredible/fanciful
  - Evidence is somewhat indelicate e.g. involves child
  - Time constraints

5) Cross-Examination as to Previous Statements Made in Writing or Recorded

- **(a) Section 10:**
  - Party can cross-examine witness as to previous statements made in writing or recorded w/o showing it to the witness
  - But if intended to contradict the witness, party must call witness' attention to those parts of statement that are to be used for that purpose
  - Judge may require production of statement
- **(b) Section 11:**
  - If witness cross-examined as to prior inconsistent statement & does not admit to making it, then party can present proof that witness made it

S. 10 and 11 Federal Evidence Act; Provincial Counterparts s 22 and 23

- Will see the term "relative" used in all of these sections. Substitute for that term "Relevant".
- This provision also incorporate the rule in *Brown v Dunn* in case of critical importance, it incorporates the duty to cross-examine. Will see in s. 10 and s.11 that if you intend to cross-examine on a prior inconsistent statement, you must first before being able to lead evidence of the prior inconsistent statement, have first put the statement to the witness and seek their adoption of the statement or denial. This is simply a reflection of the rule in *Brown v Dunn*: assume there is a sexual assault case and the complainant is testify about vicious conduct. She is then cross-examined on the issue of identity. We then close the Crown's case adn the accused testifies and does not say he is not the man but says she consented. The implications in these circumstances is the defence lawyer knew about the rule in *Brown v Dunn* and thought he would say that he is not the man, and he is now saying he does not consent. So the implication is that the accused made this up on the spot. In a blantant enough case *Dyck* in which that very set of circumstances occurred and the trial judge told them to completely reject the evidence of the accused. She is entitled to have the set of circumstances put to her so she could deny it.

Palmer v Palmer: says on occasion may be able to disparte from the cross-examination i.e. if something is so crazy that no one will buy it.

Royal: something should be put in a general way in order to avoid any difficulty of the rule in *Brown v Dunn*

In the US the right to cross-examine is not very broad it is limited to issues raised by the prosecution.

A very broad right to cross examine: *Seaboy v Gain; Maitel; Burbjr (*recently decided in our CA, the accused was forclosed from cross-examining a woman who had previously falsely accused someone else of setting a fire) – they reinforced the right to cross-examine rather broadly.

Remedy is perjury – which isn't worth much but may be a small comfort to your client if your client is convicted.
MacNeil Material: All police are listed as potential witness – in this case SCC were very firm about the very broad right to cross-examine.

6) Collateral Fact Rule:

You can cross-examine WI on collateral matters, but you cannot contradict the answers you obtain in response to collateral matters, i.e. you are stuck with the WI's answer. However, the unsophisticated WI will be unaware of this, & will be concerned about the possibility of perjury charges

- *Phipsin* Test : English writer in 19th century, tried to define a collateral fact, can only cross-examine on collateral matters: things that are not relevant to any susbstantive issue in the case.
- Wigmore def: in cross-examination on matters that can effect the testimonial factors of the witness

AG v. Hitchcock (1847) Eng.

FACTS: Defence lawyer cross-examined a Crown witness, and asked him whether he had previously been **offered** a bribe for his testimony. Witness denied this

ISSUE: Can lawyer call contradictory evidence showing that witness had been offered a bribe?

DECISION: No.

REASONS:

- Offer a bribe is a collateral issue
- Acceptance of a bribe is a substantive issue—could call contradictory evidence to show witness had been offered a bribe.

RESULT: *Hitchcock* case has resulted in two approaches re: collateral fact:

(1) Pollock/Wigmore test: **If the only basis for presenting the evidence is that it contradicts the opponent's witness, it is inadmissible.** If it assists jury in some other way, it is admissible, including facts relevant to a material issue & facts relevant to a witness's credibility. Thus, **Pollock/Wigmore test would allow evidence that, while not relevant to substantive issue, goes to the witness' testimonial factors.**

(2) Phipson test: Collateral fact is any fact which is irrelevant to any substantive issue. Contradictory evidence going to credibility is prohibited unless it falls within certain exceptions:

- (i) bias, interest, corruption
- (ii) previous convictions – **s. 12, CEA**: if WI denies the criminal record, can contradict them by calling evidence of their criminal record
- (iii) evidence of reputation for untruthfulness: if you suggest to WI that he has general reputation for untruthfulness & he denies it, can call evidence as to their general reputation for (un)truthfulness in the community.
  STEPS:
    - (a) do you know reputation of WI as to truth & veracity in community?
      If so, go to (b)
    - (b) is that reputation good or bad?
      If bad, go to (c)
    - (c) from that reputation, would you believe the witness on oath?
  - (iv) expert evidence on problems that could affect reliability of WI's evidence
    - *Tooney*: can call expert opinion evidence of the WI's mental condition that affects his credibility

Reasons for Collateral Fact Rule:

- (a) trial efficiency
- (b) confuses jury as to what substantive issues in trial are
- (c) may unfairly surprise the witness, who is not prepared to answer questions about collateral matters

Is this a person who has given a prior inconsistent statement, or a person who has lead a life of crime and dishonesty (an unsavoury witness). But there is a prior inconsistent statement here and in the prelim inquiry they gave evidence inconsistent with the police and the examination in chief.
How do you open your cross-examination: Mr. Smith, would you describe yourself as a truthful person? Then savage them with all the questions of prior inconsistent statemenst. Then go back to the first person, would you now describe yourself as a truthful person?

If it is the accused who is testifying he is protected from that sort of cross-examination unless he put his character into issue. Do not allow the Crown to cross-examination anyone beyond the criminal record, but only offence, date, penalty (nothing about circumstances).

There are limits on the broad right to cross examine:

- Repetitious cross-examination
  - Judge has the authority to limit a repetitious cross-examination
  - Some is allowed, but at one point the judge will tell you to get on with it.
- Vivacious cross-examination
  - Yelling match
- Insulting cross-examination

    - The witness is entitled to common courtesy
- Rules of Evidence also apply to cross-examination
    - Ie. Character evidence, etc

Judges are rare to interrupt, objections taken by opponent, to bring order to the courtroom but silence is the general rule, subject to the limits touched on above. Because the trial judge does not know the case as well as the defence lawyer – where the defence is going, or the circumstances, assuming there is a goal in mind (the defence has a goal in mind to get across)

The judge ought not to break cross-examination until the defence invites them

- Sometimes the cross-examination there are a number of breaks throughout and just near the end the defence lawyer is just about to blow this out of the water
    - Instead the defence lawyer can say that they want to wait until they are done and they will invite the court to take a break. Do not want to give the witness the benefit of a 15 minutes break. The sequence is important and the judge would hopefully understand that
    - When a break is taken it is important that the judge turns tot he witness and warns them not to speak with anyone during the break about their evidence. DO NOT talk about the case
        - That sort of LIMITING INSTRUCTION is critical
        - Might ask that the lawyer reminds him or her about the consequences of this
    - During the break it would be improper for the examiner of the witness to speak to the witness during the break

B. Impeaching Your Opponent's Witness

Ten methods of impeaching opponent's witness:

- 1) Proving Witness made an inconsistent prior statement on a relevant (non-collateral) issue:
    - (a) prior statement will be ideally provable—i.e. in writing or recorded
    - (b) if witness does not adopt the prior inconsistent statement, it cannot be admitted for its truth
      EXCEPTION: KGB application. But it can still be used to assess credibility of witness
        - If WI has no explanation for the inconsistency, this will be devastating→
          Francois: unexplained inconsistencies between prior statements & current testimony can completely impeach a witness
        - If WI does have an explanation for the inconsistency, the jury may or may not accept it
- 2) On cross-examination, can obtain an admission from witness they have made a prior inconsistent statement, even if regarding a collateral matter. But if witness does not admit to making the prior statement regarding a collateral matter, you are stuck with that evidence and cannot offer independent proof
- 3) Demonstrating that witness has prior criminal record – **s. 12, *CEA***
    - (a) **CEA, s. 12:**witness can be questioned about his criminal record, including the accused

- (b) ***Corbett***: SCC: where the witness is the accused, TJ has common law discretion to withhold his criminal record. TJ must consider 4 factors:
    - (i) Nature of previous conviction – is it relevant to issue of accused's credibility?
    - (ii) How similar is prior conviction(s) to charge?
    - (iii) How long ago was conviction?
    - (iv) would excluding accused's criminal record create an unfair imbalance in trial? e.g. where defence has vigorously attacked credibility of Crown witnesses who have criminal records
- (c) ***Underwood***: procedure for ***Corbett*** motion:
    - (i) application for ***Corbett*** motion must be made at close of Crown's case & before accused enters witness box
    - (ii) But if accused gets ***Corbett*** motion, must be careful not to overplay their hand because the ruling can be revisited by court. e.g. if here is a false impression left with jury.

- 4) Demonstrating that witness should not be believed because of unsavoury past (e.g. past criminal acts which have not resulted in conviction). This does not apply to the accused as a witness, unless he has injected issue of his character into trial (*Davison, Desrosiers & MacArthur*)
    - Showing that they have never really done anything that is credible
- 5) Cross-Examination re: witness' testimonial factors:
    - (a) perception, memory, communication, experience
    - (b) honest, integrity, reliability
- 6) Calling Evidence to show that witness is biased or corrupt
    - **Examples:**
        - WI has received a bribe
        - WI is in corrupt relationship with opposing party
        - WI has been suborned: persuaded/threatened to give false testimony
    - This evidence is admissible independently of the witness, but you must first put that suggestion to the WI so that they can answer it
    - If WI admits the bias/corruption, then there is nothing to contradict & you cannot call subsequent evidence
    - If WI denies it, then you can call subsequent evidence to contradict it
- 7) Demonstrating that witness has bad reputation for truthfulness/sincerity
    - Prison homicide case – 4 people proved to kill the inmate (*Collins*) – 4 accused in Edmonton prison with a lot of people outside. All of the sudden at noon there was no one there. Mr. Nobleman taken away by the four accused, someone else takes the deceased and grabs him and 2 others stab him. Out of the site of the prison guard.
        - In the course of the trial, one of the Crown witnesses (inmate with significant criminal history) this witness had a bad reputation for sincerity. He was in prison, covered in tattoos, long criminal history – did we need a jail guard called to demonstrate his level of sincerity

        - The accused were acquitted
    - This evidence used to just be called to reflect on the community
        - But this is no longer recognized because we no longer live in small communities.
            - Built the reputation on where we are, where we go to school, go to work, etc – no longer just where we live
- 8) Calling evidence as to witness's physical or psychological condition which adversely affects weight to be given to their evidence (***Tooney***)(H*awke)*
    - Not incompetent (cannot meet this high of threshold)
    - Now allow the opponent to call into evidence the reliability/credibility of this sort of evidence
    - This may effect their credibility (it may not, but it is worth)
- 9) Attacking absent hearsay declarant by adapting methods #1 through #8.
    - Assume we get hearsay evidence into the record, BUT surely the defence should have available to them, with some modifications, all other methods of attacking or impeaching the evidence had the absent hearsay evidence actually been there
        - i.e. they had a criminal record, made a prior inconsistent statement
        - so with some modification approach these methods should be available to impeach the absent hearsay declarant
    - Judge needs to be very sympathetic to that situation.
- 10) **Evidence of children: will** take different approach from #1 through #8.
    - Children will generally not have criminal record or unsavoury past
    - Can challenge on basis of
        - Prior inconsistent statements
        - Testimonial factors
        - Lack of corroborative physical evidence
    - Many of these methods are not available for children.
    - With respect to the approach: keep in mind *WD* – corroboration, supportive, independent proof
    - Child says they are sexually assaulted, the child is examined quickly by nurse, nothing is found at all.
        - In 90% of cases where even a young child is vaginally penetrated by a male penis there is no evidence found at all (i.e. tearing, rupturing, evidence of significant bruising) so it is not unlikely but it is important
    - Child evidence is incredibly difficult with the evidence of children, you should not attempt to intimidate a child – you should sit back on the chair and try to get the evidence relaxed. You are not there to prove the evidence of your child, but to raise a reasonable doubt and if *WD* cannot help you, if there is absolutely no supportive proof to either the Crown's case or defence's case –what reasonable judge will convict.

METHODS OF IMPEACHMENT

Collateral Fact Rule:

1840 Decision – leading case in collateral facts *Peacock*

- Court attempting to prove he is bringing liquor into the country without paying duty on it.
- Brought in a witness, Mr. Spooner and was asked did you tell Mr. Cook that the excise officer attempted to bribe you.
    - Mr. Spooner denies the allegations put to him.
- The issue then arises, could Cook be called to contradict Mr. Spooner
- The Trial judge (Pollock) refused to admit the evidence as being collateral
- Appeal: TJ decision upheld (but amongst the judges sitting on the appeal was the TJ)
- This case defined what the collateral fact is (Pollock: if it is connected to a substantial issue in your case, then you can contradict the witness on the case, or at least so far connected that a contradiction would arise to the testimony of the witness, then it would not be collateral and you may call contradictory proof)
- This is clearly collateral – it has nothing to do with the case or the credibility of Mr. Spooner because he rejected the bribe.
- There are three reasons for the collateral fact rule:
    - (1) the efficiency of trials (we do not have sufficient time to allow this sort of evidence)
    - (2) confuses the trier of fact (what is this case about?)
    - (3) creates undue prejudice to the witness (the witness is not there to defend their entire life

Krauss (SCC)(1986)– Charged with murder. He is questioned by police and he harasses them for having questioned him for a long period of time. All of his interviews are recorded and were clearly voluntary

- The Crown goes through a Wadere on these statements and have them inadmissible
- The Crown cross-examines them on the statements he made about the police
- Subsequently, the Crown in reply evidence put these statements to him. And he denies it. Can the Crown in rebuttal now call evidence from the detective and others involved in the questioning of this man and put it into evidence to serious contradict the evidence
- SCC: This has nothing to do with the substantive issue of the case: Is he the killer? Of course it would be critical with respect to his credibility but you cannot contradict in reply or in rebuttal or even in your own case, this evidence
    - Took a narrow view as to what is a collateral fact: If it is not substantially connected to the case
    - Not admissible.
- *This is the only time the SCC has dealt with this collateral fact issue.
- Krauss case is the only case to deal with the more restrictive case directly (Phipsin test, as opposed to the wider test)

The next method, what is the major reason why accused people do not elect to testify?

- S. 12 CEA; s. 24 Prov counterpart
    - The witness may cross-examine on his or her prior criminal history

- This goes directly to credibility (and ONLY to credibility)
- Mr. *Corbett* – killed before, convicted of murder, comes back into society and kills again – would not want the jury to know that he is a killer. He brings an application to have that fact hidden from the jury – this evidence was admitted, ruled admissible, and he still elected to testify.
    - Judge gave limiting instruction: only admissible to credibility
- This is a major method of impeaching your opponents witness – you are limited if you are the Crown to do with this. But if you are on the defence it is heyday time. The record may reflect only 1 % of their criminality. Criminals do not usually get caught all of the time.
- *Corbett* Case recognizes there is a discretion to withhold the record:
    - are the crimes similar?
    - How long ago?
    - Will they really go to the issue of credibility?

Underwood: Underwood wanted excluded as series of charges for firearms – and this conviction was related to a handgun. But he wanted them thrown out. He did not want the jury to know about the firearms offences, the judge ruled against him and he told the judge well then I am not testifying. So they overturned the conviction and went to a new trial

- So you are entitled to know BEFORE you get in the witness box.

V. RE-EXAMINATION & REBUTTABL/REPLY EVIDENCE

1) Re-Examination:

- **Follows cross-examination of your witness**
- Cannot raise new matters or repeat old matters, but can re-examine witness to deal with matters raised in cross-examination for first time and need further explanation by witness

2) Reply/Rebuttal Evidence:

- **Follows close of defense case**
- Crown/Plaintiff require leave of court to call further evidence to deal with matters which were raised in defence case for first time
- This does involve calling of new evidence
- But cannot “split” your case by withholding evidence in preparation for reply/rebuttal – all relevant evidence should be led during case-in-chief, and none should be held back for reply/rebuttal
- Needs to stem from something that genuinely took you by surprise

VI. REAL EVIDENCE

- **Real evidence:** tangible items exhibited to judge or jury
    - i.e. firearm in homicide, knife in attack
- May be directly linked to occurrence (e.g. murder weapon) or may be demonstrative evidence (e.g. visual aids)

- The handing of exhibits by the police are extremely important for continuity and authentication of the item
- In homicide case, police tie off the entire scene. Nowadays they do a video walkthrough of the scene to show us the scene as it appeared before anything was moved/touched
    - Then have 2 significant officers involved: (1) Exhibit man – they are responsible for removing exhibits; (2)Photo man – the person who takes photos of exhibits at the time they are found and subsequently take further pictures later/autopsy
        - All with a view of establishing that the crime scene was not interfered with - continuity has been established and the collection of exhibits has been appropriated
        - Chain of evidence is important –because if the chain is broken at some point it will create a serious problem – this is all with a view of establishing continuity and the authentication of the item
    - When it is first handled in the trial – Mark it as exhibit A for identification, and then will be marked as a whole exhibit later when the guy who seized it was able to demonstrate all subsequent handlings from the crime scene
- TJ must be satisfied there is sufficient basis to support identification/authentication, continuity & integrity of exhibit
    - (a) **Identification/authentication**: if first witness cannot authenticate it, then should be marked as "exhibit" and not "full exhibit" until it is properly authenticated by calling several witnesses
    - (b) *Continuity*: evidence re: continuity chain, i.e. who handled it
        - *NOTE*: **s. 540(7) CCC:** justice (provincial court judge) may receive as evidence any information that would not otherwise be admissible, but that justice considers credible or trustworthy in circumstances of case, including statement made by witness in writing or otherwise recorded
        - New & obscure CCC section
        - ROYAL: Contemplates continuity or chain evidence—i.e. no need to call all police officers who have handled exhibit
    - (c) **Integrity**: evidence has not been substantially altered/interfered with since seizure
- Can be excluded where potential for prejudice outweighs probative value—in particular, photograph & video evidence
- Video evidence: court itself essentially becomes witness
    - Trier of fact can compare video image of suspect with accused to decide if they are same
- Best evidence rule re: documents
    - Should receive originals & not copies unless good explanation & can show that it is true copy of original
    - Remember: notice provisions in **CEA & AEA**

VII. VIDEO EVIDENCE

Two significant cases that talk about this

Leaney and Rollenson v The Queen (AB)

- Frank and his companion and criminal counterpart – they are well known to the city police for 20 years they have been committing various thefts/burglaries
- Break into drug store late one night and captured on video but they are both wearing masks (cannot see their facts); but their body language are such that at least 3 senior officers are able to identify them
    - They are witnesses at the trial and the video is played with them on it – and they say that they have no doubt those are the accused – not only is that evidence admissible, but the judge himself (was a lay magistrate and policeman himself) he said having sat on the trial for 8 days and having the prisoners brought in that he does not need the evidence, but that he could tell the distinctive movements
- The SCC said that it was fine that he could do that

Nikeolobsy – The Judge watched the video that was played, no independent evidence but the video was very high quality and was like watching it unfold

- The judge says that in the absence of anyone identifying, I can identify
- SCC said provided the quality of the video was high, she is entitled to come to their own conclusion
- **Royal: That is very informative – if that is all you have, that could be enough. The judge is put in the position of becoming a witness.**

VIII. JUDIICAL NOTICE

Court may dispense with calling of proof (evidence) by taking judicial notice of particular fact:

- 1) Notorious facts: so well-known that not subject to dispute, e.g. at 8 p.m. in January, it will be dark in Edmonton. Aka “everybody knows rules
    - Must be careful about taking of judicial notice where it may be dispositive of the case.
    - It is rare that it will be taken on a central issue of the case
    - Examples of notorious facts: ***Yuell*** – trial judge had taken judicial notice that the couple under surveillance (divorce action with adultery alleged as ground for divorce), that the couple could not have had sexual intercourse on the cab of a car – they were seen to drop out of sight for some time before the emergence occurred – is that evidence that you could infer that sexual relations occurred
        - Judge took judicial notice that this could not have happened
        - CA: suppose that the two persons could not have sex with such inconveniences is not an appropriate inference
    - ***Livermore*** (1995, SCC); Major, J in a charge of sexual assault said that the alleged sexual assault took place in bucket seat of sports car and the circumstances were such that some cooperation or consent was necessary for the event to have occurred.
    - There are cases of cultural matters being taken judicial notice of: *R v SW* – trial judge with sexual assault case and had to assess credibility of female complainant

        - CA overturned the conviction – compelling cultural disinclination referred to the fact in the way that she was Canadian there was no evidence of such cultural disinclination
    - ONCA, 2007 *R v E(T)* – young viral male charged with having sexual relations non-consensually with female complainant – in evidence he said that while engaging in sexual consensual relations, his condom fell off as he lost his erection
        - Trial judge accepted complainants testimony that it was forced non-consensual case and rejected the accused taking judicial notice that a viral young man would not lose his erection
    - ***Williams*** 1998- **deals with issue of racial discrimination and whether it is appropriate to take judicial notice of widespread racial prejudice in a community**
        - Black accused was charged with murder and was concerned with respect to the jury pool called for jury duty – there were very few black people
        - Case decided that judicial notice can be taken without any evidence being called of widespread racial prejudice in a certain region (of the Toronto region)
        - Acts as a precedent for courts to take similar judicial notice
        - Contrasted with: *Spence* (later case) – with more specific type of racial prejudice. Victim was East-Indian store owner and accused was black man. Defence wanted judicial notice that racial prejudice was evident and the direction sought was the jury should be warned of this. SCC said not on the facts of this particular case.
            - This does not step back from Williams (which dealt with the selection of the jury)
    - ***Zundell*** case, ONCA
        - Zundell was racist, anti-Jewish, published and circulated a pamphlet questioning whether 6 million people really died in the Holocaust – he was charged with spreading false news (allegation was that he knew it was false – and they had to prove that)
        - **Issue:** was the holocaust something about which judicial notice should be taken? That there was a planned killing of Jewish people by the Germans in the Second World War?
        - ONCA held that judicial notice could not be taken for the Holocaust and there was much evidence to prove the Holocaust had a whoel series of expert witnesses, etc that there was a planned scheme to kill the Jewish people in Europe
        - They were concerned that if judicial notice was taken, it would ruin any defence and thus they should not take judicial notice of something that is clearly depositive
        - There is wide belief that this was wrong and judicial notice would be taken – but as we get close to the central issue of the case, courts are reluctant to apply the Notorious facts of the judicial notice doctrine.
- 2) Facts capable of immediate & accurate verification. E.g. by reference to source such as dictionary or atlas or historical text. “Anyone can find out rule”
    - Statutes of Parliament, Provincial legislation
    - S. 32 AB Evidence Act
    - S. 17-18 Canada Evidence Act
        - Statutory matters and matters that find themselves into the Gazette

- Laws of foreign jurisdiction are not – there needs to be evidence called
- Municipal by-laws must be proven they are not taken with judicial notice.

- 3) Facts of federal & provincial statutes & regulations

Distinguish between two kinds of facts:

- 4) **Legislative facts:** relating to legislative intention behind statutory provisions
  - SCC has taken judicial notice of such legislative facts in ***Lavallee***, ***Moge***
  - Lavalee – battered wife syndrome
    - Relied upon a great deal of evidence that the woman would not have put up with this kind of abuse had she not suffered from battered wife syndrome
  - *Stagnita* – constitutional challenge which prohibited conversation in public of providing or procuring services of a prostitute
    - Legislation brought in to restrict that as a public nuisance – it was a restriction on freedom of expression but was saved by s. 1 using Oakes proportionality test
      - The Government faced with this litigation filed 15000 pages of material in terms of articles, reports, etc dealing with the problem
      - The legislative facts created the record in this case.
    - Stagnita was charged with the new provision and she was fined 100$ - SCC saw this case as the same time as the Manitoba Reference (same deal), the court sat as 9 and there were piles of records argued about reasonable limits
      - The legislation is upheld. Until recently, the legislation is no longer?
  - *Brandice Brief* – judge in SCC
    - Appellate lawyer – and filed a Brandice Brief – collection of reports, articles, etc. none of which contested in the court room but the sheer weight of the material convinced the court that sufficient notice should be given to this material
    - When he went to SCC he relied heavily on this material especially for constitutional litigation
  - *Moge v Moge* – Madam Justice L'Heureux Dube: general economic impact of divorce on women is a phenomenal existence which cannot reasonable be questioned and should be afforded judicial notice
    - Judicial notice of a family proceeding on a woman
  - *Willick* – stepped back from this principle but not much and judicial notice may still be taken in those circumstances

5) **Adjudicative Facts:** who, what, when, where, why of lawsuit

- e.g. *Williams*: SCC took judicial notice of widespread racial prejudice as characteristic of particular. Other judges in subsequent cases can then rely on that finding as precedent
- But TJ has discretion of whether or not to take judicial notice of particular fact.
  - e.g. *Zundel*: ONCA reluctant to allow Crown to rely on judicial notice of Holocaust because would prejudice AC's defence.

- 6) Charter litigation involving s. 1 “reasonable limits clause”: often relies on research materials (social science reports, studies, parliamentary reports). Courts here often embark on own research, taking judicial notice of facts that are often wrong.
- 7) **Scientific Fact** – i.e. the normal gestation period of a female.

Effects of Taking Judicial Notice

- Modern view that it is conclusive of the fact itself and determinative of the particular issue
    - If it is central to the case then it may be a situation that the court is not willing to take judicial notice
- You cannot take judicial notice of something within personal notice
    - Is the trial judge entitled to use their personal knowledge of the intersection at which an accident occurred? No they cannot.
- It is important, but never central to the case.

VIII. EVIDENCE OF CHILDREN

Bill C-15 amended CCC provisions in 1988, re: how children provide evidence:

- **Exclusion of public when child testifies** (public bans – including banning of the public where a child testifies)
- Allowing support person while child testifies (someone to sit with them as they give evidence)
- Allowing child to testify outside of courtroom or behind screen (by video)
- Not permitting self-represented accused to cross-examine child (if un-represented, the court has the power to appoint counsel for that purpose and that purpose alone)
- Publication bans
- **Allowing child to adopt prior video-tape statement provided that tape made within reasonable time after alleged offence – s. 715.1 (KGB)**
- And amendments to s. 16 of CEA:

CEA, s. 16:

- No longer corroboration requirement for evidence of unsworn children

Bill C-2: Legislation which permits closing of courtrooms, support persons provided for significant publication bans, for new offences of voyaerism, child pornography, redrafting of s. 16.1 of CEA – no longer an oath or solemn affirmation, they testify on a promise to tell the truth but cannot make an inquiry that they know what a promise to tell the truth is

Concluding Remarks

- In cross-examination leading questions are permissible but assuming it is a criminal case where a co-accused has elected to testify and they are friendly to your client -- should be given very little weight, will not help you very much
    - Be sensitive to who the witness is

- Control of the witness is critical
    - Don't let them make speeches
    - Make sure they answer the questions
- A short cross-examination pointed, directed – is much more effective than a scanned cross-examiantion
    - Ex: *Thibeit* – cross-examined the accused over three days and the accused got better and better as a witness – completely allowed the witness to control the cross-examination
- It is completely critical that you know your material inside and out. Assume you have a 300 page transcript and there are inconsistencies between that evidence and the evidence in trial and you don't have all day to find them you have to know where in the transcript the inconsistencies are.
- Should put on the record how long it takes a witness to answer a question
    - The transcript does not give you any idea of the time duration from the question to the answer.
    - Could be critical upon appeal
    - And in preliminary inquiry you want to be able to put that to the trial
        - Can you not answer the question?
        - Do you know want to answer the question?
- Finish, if you can, on a positive note
    - Do not ask too many questions
    - Witnesses for the most part are not stupid and at some point the pin will drop and they will realize what you are getting at
    - Don't be greedy, know when to stop – when you stop your friend has a right to re-examination: examination; cross-examination; and then matters have arisen in cross-examination that take the examiner in surprise. So you have the ability to explain matters to your witness issues that had arisen in cross-examination
    - Contrasted with rebuttal evidence or reply evidence: arises when you have the Crown's case and the defence case and something in the defence evidence takes the Crown by surprise and there is some evidence to call in reply or rebuttal. Have to outline what the evidence is and why you could not have anticipated this. Have to explain to the judge that you are not just calling evidence that you intended to hide.
- We have come a long way – it used to be that you could not charge someone if it depended on the evidence of a child

UNIT 9: CREDIBILITY OF YOUR WITNESS

I. INTRODUCTION

Circumstance in which you are calling a witness and have to identify if the witness is hostile to the question (to you) – remember that you have put up this witness and it is essential they have credible, reliable evidence to give. But there was times at which the witness is hostile which is clear from their language or body language which points to the fact that they have no intent of telling the truth. i.e. this happens when someone is under subpoena, clear that the person is hostile if he refuses to be sworn. If he does not take solemn affirmation or oath he will not testify. This is not unusual in criminal investigations where witnesses lives could be at stake if they appear as a Crown witness. If they appear to be hostile they can ask for a "declaration of hostility" – the judge will make a decision (it is discretionary). If a declaration of hostility is made, your opponent has no room to play at all (it is your witness). The Declaration gives you the right to cross-examine this witness at large (on anything that is relevant to the case, as you would a witness by your opponent). This is contrasted with s. 9(2) procedure where an inconsistent statement is proven and the judge holds a hearing allowing the cross-examination to be allowed. That cross-examination is not at large, only on the issues that are found to be inconsistent.

As adverse witness in s. 9(1) is deemed unfavourable to the examiner. There is no outward hostility. The trier of fact does not understand that they are in possession of a statement of the witness which is inconsistent with what they are now saying and seek a declaration of adversity. If that finding is made, and the only evidence of adversity is the statement itself, the courts say you can use that evidence to seek a declaration of adversity. Then what follows is not cross-examination but to put the statement to the witness and suggest they made it. If they deny it you then have the ability in your own case to prove it.

Before the enactment of s. 9(2), s. 9 of Federal Evidence Act stood alone. So s. 9(1) stood as s. 9 in its entirety. But a case by the name of *Hanes* decided in ONCA.

- The court had to wrestle with what the term "adverse" meant (dealing with the provincial counterpart)
- Majority held that it means unfavourable; the minority said that it means hostile.
- Case: serious motor vehicle accident, the driver was drunk and this was a breach of statutory condition on policy, and though insurance could pay out they could come after him to seek repayment. In the course of investigation, three young men (friends of the accused) all gave statements in writing which suggested the amount of drinking that was going on, suggesting that he was drunk.
    - They gave no kind of hostility they were doing their best in the witness box, but they were lying
    - Can they lead evidence of the statements to contradict them
    - The majority held that it did not mean hostile, but meant something substantially less – unfavourable. If they were hostile which gave you right to cross-examination at large then you wouldn't need the section and you could use s. 11-12 of the Federal Evidence Act

- SCC: Justice Cartwright held the term adverse means hostile – he was the only judge to comment on this
    - The case was decided on altogether different issue -the standard in civil case where criminal misconduct is being alleged.
- ** proper interpretation of s. 9(1) and 9(2); use of KGB

Party which calls witness is implying that the witness is credible. However, witness often "fails to come up to proof" – i.e. do not perform as expected by party that has called them because:

(a) Witness nervous or forgetful, or
(b) Witness is adverse or hostile

If witness "fails to come up to proof", then you may have to significantly impeach credibility of your own witness before you turn them over for what may be a friendly cross-examination

II. THE RULES WITH RESPECT TO EXAMINATION-IN-CHIEF

Section 25 AEA & **Section 9, CEA** contain 3 rules for examination-in-chief. **Section 25 AEA** is correctly drafted but **section 9 CEA** contains drafting errors copied from *Lord Dedman's Act*. Those rules are:

- Cannot impeach your own witness's credit by giving general evidence of their bad character
- But you can contradict your own witness by calling other
- If witness is adverse & the TJ makes that declaration, you can ask the TJ for leave to lead evidence of a prior inconsistent statement. Must first:
    - Mention to witness the circumstances of the prior statement
    - Ask witness whether they made that prior statement

Two objectives:

- Prohibiting the asking of leading questions; and
- Declaring that the witness found by the Court to be hostile to the examiner may, with leave of the Court, be cross-examined at large by the counsel who called them

III. CREDIBILITY OF YOUR WITNESS

Party calling a witness is implying that witness is credible. Witness' credibility is assumed until such time that it is challenged by your opponent. Thus, party calling a witness cannot bolster his credibility prior to impeachment. Party calling the witness can offer some biographical introduction, but cannot go too far and engage in "oath helping" (***Clarke***)

After impeachment, party calling that witness can bolster their credibility, or "rehabilitate" the witness. Accused can call evidence of his good character. **Will generally do so for two purposes:**

1) To convince trier of fact that AC does not have character/propensity to commit this crime
2) To convince trier of fact that AC has credibility

IV. RULE AGAINST PRIOR INCONSISTENT STATEMENTS

General RULE:

Witnesses cannot give evidence of prior consistent statements—evidence should not be made more credible simply because it has been repeated on prior occasions

The trial judge can decide whether this is genuine or if they are lying that they do not remember their prior statement.

Under s. 9(1) prior statements can take any form (oral, written) and there is no restrictions as under s 9(2). S. 9(2) clearly permits cross-examination, restricted to the inconsistencies discussed in Wadere. But in 9(1) it does not permit cross-examination, but permits putting to the witness a leading question "I put it to you that on this date you said…" If the witness denies it you are then permitted to call the contradictory proof in the subsequent part of your case. ** This was a unique feature of s. 9(1) in the third branch. Traditionally, up until *Hanes* in 1963 every single case that dealt with the term adverse, interpreted it to mean hostile and it was not until *Hanes* where the appeal court split 2-1 held that it meant and unfavourable witness.

Price v Manning – simply taken that the use of the word adverse does just mean hostile. So the law is sticky

Marcenruk – AB case – without any discussion on the topic it is given that they use the word adverse but it really means hostile.
Subsequent case in NB Court of Appeal *Wyman* simply says that adverse means hostil

Hanes comes in and changes that over night. The ONCA was a well-thought of CA and Chief Justice Porter is very persuasive as to the modern interpretation of adverse meaning an entirely different thing that simply hostile.

- S. 9(2) is the new section that permits cross-examination of prior inconsistent statements determined in a Wadere.
    - Given broad discretion whether or not in the circumstances they will permit cross-examination
    - Assume the statement was given in some form of duress. They are a witness to the crime, or gave a confession statement, or perhaps an accomplice. There may be behavior by the police which seriously calls into question the appropriateness of permitting cross-examination.
    - Milgard Inquiry Report –in the course of the report he is very critical of the process used in Milgaard.
        - In Ch. 7 of the report there are a series of findings and recommendations
        - Very critical of the trial judge and finds it was very clear that the way the evidence was illicited that it was so damaging to Milgaard that it lead to his conviction
    - The last three or two lines of s. 9(2) are important – without having to prove the witness is adverse leave may be granted to cross-examine the witness of the statement (inconsistent statement) and the court can use the cross-examination to determine if the witness is adverse

- The judge is thus entitled to consider that evidence on the issue of adversity under s. 9(1) so you could then bring a motion under s. 9(1) or demonstrate adversity and allow you to prove an oral statement
- This is a bizarre provision and royal says he has never seen this done in practice.
- An oral statement is difficult to prove and a recorded statement is much more simple – you can actually see the witness make the statement
- So the last couple of lines are there to be given some meaning.

Oath helping: evidence improperly called – when you put up your witness there is an assumption they are credible and there has been no impeachment by your opponent and they have not been attacked in cross-examination and you will not be able to oath held and demonstrate that they are truthful, etc
Clark case in 1981 – oath-helping on an informant witness. Called a man with 18 prior convictions (violence, dishonesty) and called him under John Doe synonym (false name) protecting him from others who may not like he is an information

- He testified Mr. Clark (in his 40s with no record) who was charged with stabbing and killing a domestic worker (AB)
- He was held on remand (before the Remand Centre was built) in Sask and the two were in the same unit.
- Sickening examination in chief – goes on for pages. It is quite permissible to introduce the witness and set out some basic facts, but the lawyer went into his criminal record, how he was rehabilited, etc.
- Judge stated that the witnesses rarely testified with motives that were not selfish.
- Improper oath-helping, trying to create a misimpression about who this person is

This follows an earlier case from Ontario *Kaysika*

Remember *Courture Case* (RvC) one of the claims of the case was that the woman had made a series of prior consistent statement. Judge says that is not evidence, the fact she repeated it 10 times. The simple repeating of the statement does nothing in assisting to credibility

EXCEPTIONS to this rule

1. Recent Fabrication

If opposing party in cross-examination of witness makes allegation of recent fabrication, calling party can produce a prior statement to rebut this. Ideally, will be in writing & dated & signed by witness.

- If an allegation of recent fabrication is made you have the right in reexamination that they made a prior consistent statement to rebut this
- Have to await impeachment of your witness that they just made this up on the spot then you are capable of producing a prior consistent statement

2. Recent Complaint – s. 275 (CCC)

s. 275 (CCC) supposed to abrogate this, but still seems to persist in prosecution of sex offences

- The fact of the complaint is routinely heard, but in any criminal case the fact you made a complaint is admissible. Reported it quickly to the police? Not the contents o the complaint but the FACT of the complaint

3. Declarations Forming Part of a Hearsay Statement Which are Consistent with the Witness' Present Testimony

These statements are admissible to:

(a) bolster credibility of witness

(b) constitute stand-alone evidence→court has applied ***Starr*** analysis & found that is has circumstantial guarantee of trustworthiness

In a prior identification issue, where witness in witness box points to the accused, we know that evidence is not worth terribly much. Assuming this is a stranger case (i.e. bank robber, in the street at night). It is permissible but not given much weight (little probative value). So we allow witness to give evidence of prior consistent statement (I did not just identify him today, I identified him 9 months ago in a police photo line up)

- entitled to give that statement and actual showing of the line up recorded can be seen know. This could be very effective for the Crown or for the offence.
- Suppose a woman was sexually assaulted seriously, the emotional response of the woman was important. We need to see response of the witness and what she says "That IS him, that could be him, that might be him)
- It is hearsay but it is admissible as evidence to buttress what the accused is saying

What happens if the witness picks out the accused photo in the line up and the witness is unable to identify the accused in the court room.

- The person is not here. Not that they can't recognize him.
- Witness does not say they cannot identify them.
- Judge has relied in the past to convict on the photo line up
- No suggestion there had been any attempt by the accused to change his appearance
- Nor was there any suggestion at all that the witness had been paid off.
- CA reversed trial judge. Because it is the evidence in court which is important and cannot be ignored as well as the evidence of prior identification. If you actually refuted and said no he is not.

4. The Doctrine of Recent Possession

- if accused is found in possession of recently stolen property & fails to provide an innocent explanation which might reasonably be true, trier of fact can draw inference that accused was knowingly in possession of stolen property or had committed theft of that property
- but AC can rebut this inference at trial by showing he made a prior statement that is consistent with his testimony which provides innocent explanation
- there is a permissive presumption that the judge/jury is entitled to draw an inference that possession of recently stolen goods, unexplained, gives rise to inference that was either a thief

- if give an explanation – that explanation (if it might reasonable be true) can overcome the doctrine of recent possession and the Crown cannot reply on that doctrine but must find other evidence
- the jury don't have to believe it but as long as it is a reasonable explanation
- unless they reject it in its entirety – then it is not overcome

5. Statements on Arrest / Detention

Generally speaking statements made on arrest or detention are not permissible – what he has said can only be used against him. I am a person in authority and I am obliged to tell you you have the right to remain silence. However whatever you do say will be written down and may be used in evidence **against you** in court. Do you understand?

- The understanding that it may be used in evidence. So when you talk to a person in custody you tell them they you understand you don't have to talk
- And that whatever you do say I cannot lead in the evidence only the Crown can
- This is not the opportunity for you to tell your side of the story
- UNLESS this circumstance arises:

Lucas (1962) SCC: may be authority that accused who chooses to testify at his own trial can also testify that his evidence is consistent with what he told police on arrest

Lucas was one of the last men hung in Canada. Lucas provided a statement to police on arrest which was exculpatory for the most part. The Crown did not use that statement and had it ruled inadmissible for part of their case, nor did they use it in cross-examination because Lucas gave the exact same story. But would he be able to tell what I told you today is exactly what I told the police two years ago.

SCC says it was permissible for him to give evidence in his own case that what he told the jury today was what he told the jury a year ago.

But you have to be entirely sure that it is consistent (substantially consistent).

Grisby is a weird case. Case where policeman tell him to get out of the car and pulls out a bag of weed (pre-Charter case) and the accused said he didn't know what it was. Every criminal will say that but this sort of utterance would be admissible for the truth of its content for the trier of fact to rely upon.

6. Statements Made as "Part of the Narrative"

- Where the prior consistent statement is part of the background/narrative of the story
- This statement does not go in for proof of its truth, but only to provide a comprehensible account of the story.
- Odd development that the Crown rely upon with some regularity
- It is part of the narrative and understands the context of the case for the jury. – the Crown will say it is not going in for the truth of the content but as to how the case unfolded

7. Evidence of Children/People with Disabilities

- S. 715.1 and 715.2 – evidence of children/people with disabilities can be taken out of the court room and will be consistent with what they will say or anticipate what they will say

Kasibo, ONCA 1982 – incest case (father and daughters) – it is essential to have evidence that they are both the children of the same father. Crown was obliged to call the mother, and in this kind of case she was clearly on the position of the accused. She was not supportive of the Crown case. They claimed that they had complained to their mother in the past, Mom does not respond to this and there is no involvement with the police

- A few years later the girls make a complaint to the police – they start an investigation and ask whether the daughter has ever complained to her. She confirms this in an oral statement
- The police simply record what she has to say in their notebooks (this is pre-KGB) so there is not even a written statement from the mother
- At the trial, the Crown attempted to lead this evidence of what the mother said as recent complaint evidence
- Mother is called on recent complaint Wadere to determine whether or not there has been a recent complaint
- The mother testifies and abandons her earlier position claiming they never complained to her ever
- The Crown abandoned the Wadere and the case itself goes into the full trial mode
- This is a judge alone trial – and in this case evidence called in the Wadere will appear – so there is an application from the Crown to have the evidence proper apply from the Wadere – there was consent to this
- Rather foolishly in trial proper the Crown has to call the evidence just to lead evidence that she is the mother of the two girls and he is the father (the first element of incest)
    - But then it was suggested to her that they did not complain to her and she accepted this
    - So the Crown reexamined her after having this oral statement out there. Crown argues that she is an adverse witness and thus should be entitled to put policeman's evidence to her.
    - Then there is another Wadere to determine whether to permit this to occur under s. 9(1)
    - Defence conceded that she was adverse
    - Part of the problem is the trial judge interpreted adverse to mean hostile. Argument on appeal was that in finding adversity under 9(1) can you take into account the oral statement itself.
    - Remember that at trial, the defence by agreement had conceded to adversity.
    - Argument is that the statement itself is not sufficient to find adversity.
    - CA said that you can take into account the statement itself and it can be written or oral under s 9(1). They discussed the use of the term hostile in this case and citing the *Hanes* case interpret it to be unfavourable not hostile.
    - S. 9(1) and 9(2) are independent of one another – separate inquiries and s. 9(2) does not limit (1).
        - 9(2) Is limited to written/recorded statements, but 9(1) is not limited and oral statements are permissible as well
    - It is permissible here for the Crown to call contradictory proof – he was convicted and that was upheld

Mackenroy and Brouce SCC

- Homicide case in which 2 young men (13-14) are going to kill one of their drug associates as they had come out to the police
- A young 17 year old is a claimed eye witness but has difficulties in terms of credibility (young drug dealer, reluctant to testify)
- And Kathy St. Germaine – young woman (reluctant witness) called because she has provided a statement in writing
- The killing occurs 16 Fed 1975, she gives this statement to the police on 26 Feb =- she acknowledge that Mackenroy killed the deceased (shot him through the neck with a bolt from a cross bow). Dump the body on the side of a mountain.
- The trial is held quickly in Sept/Oct 1975 – 7 month gap between killing, giving of statement and the trial
- Examination of the woman:
    - Clearly reluctant/unhappy
    - Essentially claims to have no memory
    - Judge ultimately ruled that she was lying that she did not remember – it was clearly an inconsistent statement that she had given before that he had confessed to her that he killed someone and she kept saying that she did not remember
    - So she never adopted the statement but the jury heard it all
    - But the judge gave a limiting instruction – you cannot use it to find that Howie had confessed to her but that it only goes to her credibility
- CA in BC and SCC confirmed conviction – followed Milgaard 7 step process, gave limiting instruction, there was corrobative evidence that they killed this man
- In this case, SCC affirmed the Milgaard process and one of the judges sitting (sat 7), Justice Estey (Sask) foreshadows KGB. All of the nonsense about traditional rule – it is time to revisit it – the trier of fact should be able to chose reclaimation of I don't remember and the recorded statement. Why cannot we give substance to the testimonial as direct evidence. The other members of the court were not willing to do that
- You can see in this case, as in Milgaard (who was innocent) – you can see the impact of this sort of cross-examination permitted under s. 92 particularly when sitting with a jury. Why they elected trial by jury is unclear.
    - Trained judge would have to direct herself or himself to completely disabuse their mind of inadmissible evidence and only use it in respect to assessing. Now with KGB things have come full circle because it is without question the most effective manner of challenging the credibility of the witness
    - KGB creates a situation in which the Crown will not really care what the witness says because they want to go through a 9(2) application, to play the tape for the jury because that sort of evidence is absolutely compelling
- NOTE: they came to Edmonton institution and stayed there for about 10 years and then married parole officer – he is not back in Vancouver.

Hanes 1963 – decided adverse is not equivalent to hostile

- ONCA – Justice Porter gives three reasons why adverse should mean something altogether different than hostile
    - (1) if the legislature had meant for the term hostile to be in the legislation they would have said so. Use the term adverse for a reason.
    - (2) surely the trier of fact, when assessing or deciding the credibility of a witness, should be made aware of such a statement. Is it not important that the trier of fact be alerted to the situation of prior inconsistent statements? Is it not a fact?
    - (3) if in fact the term adverse means hostile, section would not be necessary at all. If there was a declaration of hostility the legislation allows you to cross examine the witness at large (from CEA and their provincial counterparts) you are allowed to put prior inconsistent statements to the witness
- Thus is does not mean hostile merely unfavourable.

V. ATTACKING THE CREDIBILITY OF YOUR WITNESS

1. The Hostile Witness

- **Hostile witness:** witness who displays such a hostile animus towards the examiner that Court can safely find that he is testifying without desire to tell truth
- Court can then give leave for examiner to cross-examine witness “at large”
- Can then use all the tools available in cross-examination
    - Ability to ask leading questions
    - **Resort to CEA, ss. 10 and 11**

2. The Unfavourable/Adverse Witness

- **Unfavourable/adverse witness:** witness who appears favourable to examiner, but their testimony is inconsistent with a prior statement
- **Section 9(1) CEA & ss. 25(2) & 25(3) AEA:** allows examiner to provide proof of prior inconsistent statement:
    - Examiner can rely solely on the prior inconsistent statement itself to prove adversity
    - But cannot resort to **s. 25(2) of AEA** for impeaching credit of own witness
    - Interests of party & his lawyer are indivisible
    - A party cannot be “adverse” to himself within meaning of s. 25(2)

3. Section 9(2) of the Canada Evidence Act, Common Referred to as the 9(2) Application

- Does not require declaration of adversity
- Can cross-examine on a prior inconsistent statement in writing, reduced to writing, or audio-video recorded

- Cross-examination only on the statement

4. The K.G.B. Witness

Is the strongest tool for impeaching own witness because jury can choose between witness' testimony (where he recants what he said to police) or the KGB statement in deciding which represents the true version

NOTE: at the end of the unit he has provided a summary of commentary with respect to s. 9(1) and 9(2)

- Be alive to drafting errors
- May be oral, written, or recorded in some fashion
- What does the term adverse mean: unfavourable? Hostile
- Does the section permit any cross examination? It does if the term means hostile, but otherwise it does not. It permits you to put the statement to the witness if they admit it that's fine if not it allows you to bring forth the statement
- The procedure to be followed under 9(1) is analogous to that under th eMilgaard process.
- If there is a positive ruling to adversity then the statement can be put to the witness, if they deny it then independent evidence can be called to demonstrate that the statement was made
    - Impeachment of own witness but important method
    - Not the same as 9(2) when it came in it is a powerful tool in the hands of Crown counsel.
- Under 9(2) five things
    - No requirement of witness being declared adverse but a prior inconsistent statement whether written or recorded in some fashion
    - Procedure to follow is Milgaard
        - To inconsistencies only – not to cross-examine at large
        - Only those areas the statement is inconsistent with what they said so far
    - Court may consider whether they are adverse under (1) after this (only applies to statements in writing or recorded in some fashion) not oral statements.