Evidence can 2021 howery

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## Introduction to evidence

### What is evidence?/ Types of evidence

* Something that tends to prove or disprove a fact in issue
* Can be testimony, physical item, documents, etc
* Lil crim review: remember the crown has to prove identity, MR, AR beyond a reasonable doubt.
* Evidence can also help prove a defence, or a cause of action in civil law
* **Witnesses: attend court and give viva voce evidence under oath or affirmation**
* **Real evidence: things put into court through witnesses who can explain them**
* **Documents: papers put into court through witnesses who can explain them**
* **Demonstrative evidence: demonstrations, re-creations of what happened**
* **Judicial notice: judge can find a fact to exist essentially based on common experience/knowledge**
* **Agreement/admission: if both sides agree to admit it, they don’t need to call evidence to approve them**

### Sources of the rules of evidence

* **Common law, Canada evidence act, alberta evidence act, Charter principles, ethical principles**

## The common law

* Common law is the traditional origin of evidence rules, and in general judges have asserted that they may have sway over rules of evidence to confirm to their sense of justice (particular Justice McLachlin in r v Seaboyer)
* Tension over whether judges and lawyers should be making evidence rules or parliament should be making evidence rules
* The SCC appears to support the judge-route in *R v Binaris*, “of an assessor with judicial training and experience that must be brought to bear on the exercise of reviewing the evidence upon which an allegedly unreasonable conviction rests. That, in turn, requires the reviewing judge to import his or her knowledge of the law and the expertise of the courts, gained through the judicial process over the years”

## Canada Evidence Act

* **Applies to all matters where parliament has jurisdiction: so all criminal proceedings**
* **S 40—incorporated laws of evidence in force in the province where evidence is taken, subject to CEA/other fed legislation** 
  + **So Alberta evidence act applies unless it contradicts CEA/fed**
* **There is also the Federal interpretation act (fed)**
* **Governs the incompetency and compellability of witnesses (ss 3, 4, and 6)**
* **Testimonial compulsion (s 5)**
* **The number of experts that can be called (s. 7)**
* **Handwriting analysis (s. 8)**
* **The impeachment process of one’s own witness (ss. 9 to 11)**
* **Examination and proof as to previous convictions (s. 12)**
* **The administration of oaths, affirmations, and promises to tell the truth (ss 13 to 16)**
* **The admissibility of business records (s. 30)**
* **And public interest privilege (ss. 37 and 38)**

### Alberta evidence act

* Applies to all things the Alberta legislation makes an offence
* i.e. provincial arbitrations, inquiries, prosecutions (provincial not criminal offences, i.e. traffic tickets), proceedings, etc whether in court or not)
* example, all COVID tickets will be under this evidence act
* **Applies to fill in the gaps in the CEA, see s. 40 of CEA**
* **Doesn’t exclude common law or other rules of evidence, s 62**
  + Its not meant to be completely comprehensive, it is supplementary

### The Charter

* **S. 7 (life liberty and security of the person) and 10 impose limits on the ability of the police to gather evidence (statements and real evidence) and when those limits are crossed s. 24(2) excludes the evidence where its admission would bring the admin of justice into disrepute**
* Section 7 imposes an obligation on the police and Crown to disclose all relevant evidence to the defence as well as an obligation to take all reasonable steps to ensure that relevant evidence is not lost or destroyed.
* S 7 also enshrines the right against self-incrimination and right to remain silent
* Section 7 imposes an obligation on third parties such as co-accused, informers, complainants, and Crown witnesses to produce information in some cases where innocence is at stake, and other times where full answer and defense trumps a competing right such as privacy or privilege
* Section 7 prohibits the Crown from compelling an accused to testify at a separate proceedings (i.e., a co-accused’s trial) where the purpose of the compulsion is to gather evidence against the accused.
* Section 7 prohibits the Crown or trial judge, generally speaking, from adversely commenting on the accused’s failure to speak to the police upon arrest or from the failure to testify.
* Section 7 imposes a constitutional obligation on the trial judge to act as a gatekeeper to ensure that the admission and potential exclusion of evidence does not have an unfair impact on the accused’s trial. 30 As Justice Lamer held in R. v. Albright: 31
* Section 7 provides a constitutional right of the accused to cross-examine witnesses for the prosecution. 32 However, that right does not extend to cross-examination that is abusive or unwarranted, particularly in the context of sexual assault complainants. 33
* Section 11(d) provides constitutional recognition that an accused is presumed innocent and that the Crown must prove its case beyond a reasonable doubt. 34 The section now governs the availability of various reverse onuses and mandatory
* presumptions contained in the Criminal Code. 35

### ethical rules on evidence

* there are various ethical duties that are a potential source of evidence notwithstanding that courts have held them traditionally as not carrying the force of law, nevertheless they should be followed (THESE RULES ARE NOT BINDING BUT ARE DEEPLY PERSUASIVE)
  + i.e. the ethical duty of confidentiality, this has influenced the scope of right against disclosure of privileged communications
  + ethical duty to provide competent representation, this includes a duty to investigate (Is there better evidence out there?)
  + ethical duty to disclose a client’s intention to commit an offence that jeopardizes the public safety
  + ethical duty on the defence to disclose physical evidence of a crime that has come into their possession
  + ethical limits on the extent on which the defence can call evidence or cross-x witnesses where the client admits their guilt to the defence lawyer, good faith basis to question witnesses, you cant ask qs you know the answer to secretly
  + some provinces have an ethical obligation on defence counsel to disclose clients completed perjury or other misrepresentations in court
* *R v Lyttle* is the first case in which the SCC relied on ethical principles in developing a rule of evidence: issue was whether a lawyer can put a suggestion to a witness in cross-x that she could not or did not wish to prove the suggestions, **ok as long as there is good faith basis**
* Cowles v Balac: a trial judge has no discretion to exclude relevant evidence simply because it may have been obtained in violation of the Rules of Professional Conduct

## The criminal trial

* Textbook essentially states that adversarial system is the best for truth finding
* Purpose of trial
  + Qualified search for truth
  + Balance truth seeking v fairness
* Canada followed British 18th and 19th century evidence laws up until around 20 years ago, historically didn’t care how evidence was gathered
* Now evidence gathering is protected by the common law and the charter
* **Six major themes in the SCC’s approach to evidence**
  + Ensuring fairness in the evidence gathering process
  + Bestowing constitutional status to the organizing principles of the adversarial process
  + The development of a principled approach to admissibility
  + Cleansing the law of evidence of stereotypes
  + A recognition of the relevance of social context
  + Protecting against wrongful convictions
* **Ensuring fairness/Gathering evidence**
  + S. 24 has remedies for charter violation
  + Because of the Charter, the manner in which evidence is collected is now a relevant factor to be considered by trial judges in deciding whether or not to admit evidence
  + Seminal case*: R v Harrer*: TJs have common law discretion to exclude evidence when its admission would render the trial unfair bc of the manner in which it was obtained (common law)
  + Novel science is subject to strict scrutiny per R v Mohan
  + Propensity evidence also shouldn’t be routinely admitted: Binnie in R v Handy
* **The Charter and SCC have bestowed constitutional status on a number of organizing principles of the criminal trial including**
  + The adversarial process
  + The right to impartial trier of fact (judge or jury)
  + Solicitor client privilege
  + The right to effective assistance of counsel
  + Zealous advocacy
  + The right to make full answer and defence
  + The right to control the conduct of one’s defence (whether or not to testify etc)
  + The principle against self incrimination
  + Presumption of innocence
* **General approach of the courts now is to admit all relevant and probative evidence and allow the trier of fact to weigh it (L’Heureux Dube)**
* **The SCC’s principled approach is:** is the probative value of the evidence in the particular circumstances sufficient to override an identifiable prejudicial effect? And would the admission of the evidence render the trial unfair?
* **Cleansing the law of gender and age stereotypes**
  + Think the restrictions on sexual history evidence, now children can testify from behind a screen with a counselor present, these were all impossible until relatively recently
  + Sexual offences
    - Corroboration requirement
    - Delayed reporting inferences
    - Other sexual acts
  + Children’s evidence
    - Now use common sense, not adult scrutiny
    - Can testify behind a screen, with support
    - Can admit certain video recorded statements
  + System still grapples with racial bias, but some racial components of interpreting/admitting evidence
  + Example of Gladue reports
* Corbett applications: when the crown can cross-x the accused on their prior record
* **Wrongful convictions**
  + The Canadian law of ev is still working to prevent wrongful convictions, one big road block to this is strict interpretation of evidence rules to exclude defence evidence
  + New rules have been added to prevent wrongful convictions
  + Relaxation of rules of evidence for exculpatory defence evidence
    - Removing prejudice against AC’s evidence
    - Not exemption from rules of evidence, just relaxing as necessary to prevent wrongful conviction
* **Onuses and burdens of proof** 
  + Evidentiary onus on AC to counter crown’s case
  + Raise air of reality to specific defence
  + In a civil trial ultimate onus on plaintiff to prove case on BOP
  + Evidentiary onuses on defendants to rebut P’s case (civil)

# General principles of admissability

## Relevance

* **Relevance is the fundamental rule of admissibility, if no relevance not admissible**
* **NO EXCEPTIONS**
* Onus is on the party calling the evidence, but generally not an issue bc both parties will agree its relevant
* Most cases this is clear, not an issue
* **What is relevance?**
  + Evidence is relevant if it tends to make a fact in issue more or less likely to be true
  + Unequivocal does not mean irrelevant, evidence can have more than one interpretation and still be relevant
  + **Even if relevant, it can be excluded if prejudicial effect is too high**
  + i.e. Underwood🡪 3rd party suspect disposing of his fun, getting upset when asked about the murder, etc, more than one interpretation but could be interpreted as third party suspect being guilty so admissible
  + Ferris🡪 police overhears AC saying they killed someone on the phone to their father, doesn’t hear surrounding convo, i.e. “they think I killed David” not enough context for anyone to get anything meaningful from that statement
* **Low threshold so TOL doesn’t eclipse role of TOF, admissibility is not the same as weight**
* Fact to establish with evidence must be material
  + materiality=legal concept, what is legally required to make this case? Relevance is a more common understanding concept

## Probative value vs. prejudicial effect

* Over time there has been more generous balancing of probative value vs prejudicial effect
* **RULE: evidence can be excluded if its prejudicial effect outweighs its probative value**
* However, for the defence, evidence can only be excluded if its prejudicial effect substantially outweighs its probative value: this is an example of relaxation of the rules for defence to avoid wrongful convictions
* **Is this an exclusionary rule or a rule of legal relevance?**
* **R v Seaboyer (SCC 1991):** struck down old s. 276 “rape shield” provisions, re evidence of CO’s other sexual conduct, AC and CO were drinking in a bar, led to a charge of SA, Crown called evidence of bruising on CO, AC wanted to cross-ex CO about whether other sexual conduct could have caused the bruises crown “blamed on AC”
  + This was when the rape shield provisions outlawed all sexual activity evidence
  + 276 was struck down because it was too broad, because rape myths could be stopped by a more narrow provision
  + Gayme was a case heard in the same challenge, alleged sexual assault occurred at school of 15 yo CO and 18 yo AC, Ac argued honest mistaken belief in consent, CO was aggressor, wanted to call evidence of prior and subsequent sexual conduct of CO
* Remember from 1L: probative value is the extent to which it makes a fact in issue more or less likely to be true, legally relevant but HOW relevant
* prejudicial effect is how evidence arouses emotions of prejudice, hostility or sympathy, creating a distracting a side issue, use undue time, unfair surprise to the other wise, usurps function of the jury (often re experts)
* How do we assess this? Identify the “issue in question”, identify the strength of the inference from evidence to fact in issue, assess the reliability of the evidence (was the person not wearing their glasses? Are they reliable? Etc)
* Identifying the issue in question: what fact is the evidence trying to prove/disprove? Onus is on person calling the evidence.
* MUST assess by comparing to the issues in question. What must be proved/disproved in this trial? i.e. that AC killed someone etc
* Party must clearly articulate what they’re seeking to use it to prove

## Instruments of real evidence

**Real evidence is tangible evidence that can be itself observed by the trier of fact, typically an actual thing that can be observed that inferences can be drawn from, must be authenticated by a witness**

I.e. Murder weapon, surveillance video of incident, photographs of the scene, etc

Duty to preserve real evidence: Crown/police has duty to preserve and collect real evidence. But to get remedy for non-preservation defence must show reasonable possibility that it made a difference

Defence has a duty not to keep or hide real evidence, destroying evidence of a crime can be obstructing justice.

### Authentication

**Proving what the real evidence is/why it is relevant or admissible**

Burden on party calling the evidence to establish that the real evidence is what is purports to be, that it is “authentic”

* Generally not a high bar
* Has to be what it is claimed to be and not altered or changed

Other issues are relevant to weight not admissibility:

* Ultimate integrity
* Continuity
* Non contamination
* Accuracy

**TEST: must have some evidence that the real evidence is relevant, accurately represents the facts (threshold level), not tendered to mislead, verified on oath by a person capable to do so**

**I.e. a photo can be verified by a photographer, person present when taken in or out of the photo, person qualified to state that the rep is accurate, expert witness**

### *R v Nikolovski*

**Holding:** Trier of fact can look at a video and identify the accused without other witnesses saying who the accused Is based, clarity, quality, time of observation of accused, all to weight, if the video is only evidence of Identification, must warn jury to carefully consider it quality/clarity, etc to prove BARD

**This also applies to audio recordings**

Unclear videos: witness can ID accused in video if special knowledge of the accused (i.e. someone very close to the accused like a sibling or partner), witness must know accused better than the TOF, if not no ID

### Computer or internet created evidence

**CCTV is real evidence, social media evidence is often admitted without proving metadata, messages and screenshots okay**

### Discretion to exclude

**TJ has ultimate discretion to exclude evidence**

**Routes to exclusion**

*Charter* 24(2) 🡪 E.g. gun seized from AC’s house without warrant/grounds

prejudicial > probative 🡪 E.g. graphic photographs, especially if causation etc. is admitted, these can be overly prejudicial, But Crown isn’t bound by defence admissions, Usually edited for amount rather than excluded completed (e.g. put in one photo of each relevant part rather than the 10 taken, etc).

specific exclusionary rule🡪 will get more into later in the course

S. 605(1) of the CC – can authorize release of exhibit for testing,

**Admission can require editing of prejudicial information🡪** Often necessary for AC’s interview, Bad character, Suggestions/questions by police

### The witness/accused as real evidence

Witness describes perpetrator, TOF can look at AC to see if s/he matches description TOF can compare AC’s appearance to video, photograph, etc.

IF AC testifies s/he can be asked to reveal a covered/not visible body part if relevant

E.g. to show tattoo that W testified about seeing, etc., NOT if AC doesn’t testify

### assessing real evidence

* TOF can draw inferences and impressions from real evidence
  + Can compare real evidence to other evidence called
  + Can use real evidence to corroborate/refute W testimony
* Often provide transcripts of video/audio recordings – but recording itself is the evidence transcript just to assist
* TOF can examine properly admitted exhibits

# Documentary evidence

**Document is anything with writing, including electronic documents, baking records, print outs, emails, computer discs, etc**

* Admissability of documents depends on the intended purpose, originals rules only apply if using document for its truth (you want the original version of the document), hearsay rules apply to documents
* Document in possession doctrine: document was in actual/constructive possession of the accused, then can use the document as original evidence to draw inferences re knowledge or intent, if Accused acted/relied on document can use it for Proof of the truth of its contents, hearsay exception

Canada Evidence Act has a lot of ways to admit documents🡪 but does not preclude resorting to the common law, the leg isn’t exclusive

* S. 36 CEA🡪 expressly allows CL rules to continue
* CEA often has specific notice periods, but the common law may not**, see R v Tatomir, can use common law even w/o requisite CEA notice!**

## How to prove a document

* **Must be authenticated🡪 it is what it purports to be**
  + Admitted is one way to get authenticated
  + Calling creator of document, person who made copy or witnessed document being written, handwriting expert, TOF Comparing handwriting with known sample
  + S.8 CEA🡪 TOF can compare writing with known sample
  + Circumstantial evidence re: genuineness🡪 letters in reply to earlier correspondences, older documents (30+) years (“ancient”)
* Historically it had to be an original document, now the original is preferred and its absence should be explained, but copies are acceptable
  + Must prove copy is true copy of the original (less difficult now with photocopiers, etc)
  + CEA deals with various diff types of copies

## Notice

* S. 28 of the CEA notice requirements to introduce copy of document identified in ss. 23-27 CEA
  + Reasonable time is generally a minimum of 7 days per 28(2)
* Generally check statute relied upon for admissibility to determine specific notice requirements
* Why does notice matter? Lets other side know the CTM burden, plan if they need to make applications or call other evidence, simplifies production of evidence, reduces time/cost as everyone is prepared

## Public documents

* Public dox🡪 “a document that is made for the purposes of the public making use of it and being able to refer to it”
  + E.g. government documents, statutory instruments
  + Authenticated then governed by hearsay exception: Document made by public official, Made in discharge of public duty/function, Made with intention to serve as permanent record, Available for public inspection
* S. 24 *CEA* – admissible as certified copy, don’t need to authenticate signature of certifier
* S. 25 *CEA* – certified copy for public books or documents not otherwise covered – rarely used today
* S. 26 *CEA* – government books – ordinarily kept in office and made in usual/ordinary course of business (like business records for government)
* S. 31 *CEA* – print from a photographic film of government for purpose of creating govt record, original thing photographed destroyed
* **S. 19 *CEA* – prove statute w/ copy from Queen’s Printer**

## Judicial Documents

* S. 23 *CEA* – evidence of any proceeding or record whatever of 🡪 Court seal or certified copy, don’t have to authenticate seal
* Can prove court records other ways: Common law – produce original or under court seal, no notice req’t, S. 24(a) *CEA* – certified copies are public documents, get an admission (if its something that is kept in the court record, often both sides can agree the court record is accurate)

## Business records

* Records kept in routine operation of business are considered reliable because the business requires them to be accurate to run properly
* **Exception to hearsay at common law – records prepared in ordinary course of business**
* **S. 30(1) *CEA* – business records admissible for POTOC (proof of the truth of their contents) if:** Record is original**,** Made contemporaneously with event recorded**,** Made in normal course of business**,** By person with duty to do/record thing sought to be proved, andPerson has no motive to misrepresent
* **What is a business record?**
  + “business” – any business, profession, trade, calling, manufacture, undertaking of any kind for profit or otherwise, and government departments, courts/tribunals, any other body/authority performing function of govt
  + “record” – the whole or part of any book, document, paper, card, tape or other thing on which information is written, recorded, stored or reproduced
  + Includes hospital records
* **30(3) CEA🡪 authentication of business records** 
  + Don’t have to call every person who made part of the record or even people with personal knowledge
  + Typically call custodian of record or someone who can speak to the circumstances in which the record is prepared, Testify to why the record is made, show it is ordinary course of business and relied upon, Or can prove by affidavit (s. 30(6) *CEA*)
  + 30(3) *CEA* – copy admissible where not reasonably practicable to produce the record IF (1) explain why original not available, (2) person who copied attests to its authenticity/source
    - ½ must be by affidavit or certificate for foreign documents
  + 30(7) – 7 day notice requirement to use section 30 of CEA, 30(10) – records that are excluded, (a)(i) – made in course of investigation or inquiry (i.e. police reports) are excluded from the CEA

## *Ares v Venner* [1970] scr 608

* **Common law rules still applies, this is especially useful when missed 7-day notice**
* RATIO: 26      Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record, should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in Court and available to be called as witnesses if the respondent had so wished.

### Banking records

* S. 29 *CEA* – copy of an entry in any book or record kept in a financial institution can be admissible: 29(5) prohibition against calling bankers unless court orders
  + Original teller’s record compiled into broader bank ledger – doesn’t make a difference that one is put into the other, all still record
* Alternatives🡪 Can also use s. 31 *CEA* – banking prints (but then have to make admissible, this just authenticates prints)
  + May be business records under s. 30 *CEA*, Principled exception to hearsay rule, S. 30 *CEA* computer records
* S29(2) *CEA* – authentication 🡪 Ordinary book of financial institution, Made in ordinary course of business, Book/record in control of institution, True copy (using an affidavit is the easiest way to get that done)

### Electronic evidence

* (relatively new portion of the CEA) S. 31.8 *CEA* electronic documents defined– basically info stored/recorded on computer system, go through normal types of authentication
* Ss. 31.1-31.8 *CEA* deal with electronic documents
* Authentication🡪 Prove document is what it purports to be, Best evidence is to prove
  + Prove the integrity of the electronic document system itself (s. 31.3 *CEA*)🡪 Operating properly or improper didn’t affect integrity, Recorded/stored by adverse party or, Recorded/stored in usual course of business by non-party, Prove print out has been acted/relied on
* Electronic signatures (s. 31.4) also dealt w/ by CEA
* Provable by affidavit s. 31.6

# Instruments of evidence in admissions and judicial notice

### Admissions

* Parties can admit basically any fact
* BUT? 🡪Why would you admit things bad to your case? Evidence might look worse than statement of fact, Avoid wasting time, Show TOF how reasonable you are, Focus on actual issues, Helpful in sentencing if spare some witnesses testifying
* TJ discretion to refuse to allow party to call evidence on topic where proof was admitted
* TJ can’t fault AC for not admitting things – AC can require crown to strictly prove everything
* TJ needs to instruct jury depending on type of admissions and what impact they have on jury deliberations/fact finding

### How do you admit evidence?

* **Examples: Agreed statement of fact, Reading in prior testimony, Putting in witness statements, Apply evidence in voir dire to trial proper (if no jury)**
* Formal admissions🡪 S. 655 – agreed statement of fact, Guilty pleas,cannot be contradicted etc
  + Cannot be contradicted by the AC w/o leave to withdraw admission
* Informal admissions🡪 May not be conclusive, May be contradicted/explained by other evidence, E.g. admit that if called witness X would say Y
* Can call evidence to say not Y
* Dangerous to person wanting to rely on Y, because TJ can’t assess Y’s credibility well without seeing Y – but Y may be unavailable

### When are admissions binding?

* **If you’ve made an admission that s binding, its hard to change but you can through🡪**
* **Withdrawing admission🡪 Easy to change by parties’ consent, if No consent – TJ must give permission, unlikely unless cogent evidence of mistake/misunderstanding**
  + Cant be taken back bc of failed strategic decision, regret, etc.
* **Survivorship**
  + Usually clarify admitting only for purpose of X (e.g. this trial, preliminary inquiry but will argue at trial, etc)
  + Then the admission cant be used in a different argument or setting
  + If making admissions good practice to specify for what purpose/hearing you are admitting the evidence
* Guilty plea is technically an admission🡪 Presumed valid, Generally crown can tender evidence of AC’s guilty plea in another proceeding (if relevant etc.)

### Admitting the law

* Generally can’t admit “law”, can admit mixed law and fact, like that conduct fell within a certain legal standard
  + E.g. admit that D’s actions were negligent
  + E.g. can admit that AC’s statement was voluntary
  + Can be withdrawn at any time, not like other pieces of ev

# Judicial notice

* Exception to general requirement of proof by evidence
* Vague concept based on common sense, necessary for trials to function reasonably
* **Informal judicial notice** 🡪 Can’t use personal knowledge of AC/people involved in trial, Can use common sense, knowledge, and experience as a human, E.g. interpreting human relations, social conduct, reasoning, etc. , Jury diversity enhances deliberation – reflects community
* Risk – what “everyone knows” can be wrong (e.g. racism)
* Express judicial notice🡪 Facts that are uncontroversial or beyond reasonable dispute, Strict threshold because not tested in normal ways

## Formal judicial notice test

* **Judicial notice can be taken if the adjudicative fact is: So notoriously true as to not be the subject of reasonable dispute (Notorious = community would consistently find X to be true, Known by reasonably informed/intelligent persons of adulthood) OR Capable of immediate and accurate demonstration by resort to sources of indisputable accuracy easily accessible to people in the situation of members of the court (Sources used to be books, now can include electronic, E.g. dictionary definitions, calendars, stats can )**
  + Stricter construction for facts helping decide guilt/innocence
  + Closer the fact approaches the issue in the case, the stricter compliance required
* Need to provide notice that you are going to rely on judicial notice🡪 Allows parties to consider, provide additional info, respond/argue
* **Once accepted as judicial notice can be Definitely proven/irrebuttable, or Disputable but prima facie evidence subject to disproof**

**Examples of judicial notice subjects🡪** economic conditions, business practices, customs, crime increases/decreases, publicity, technology, physical/natural science, geography, drugs, human behaviour, racism, etc GENERAL EXAMPLES W/IN THESE THAT ARE OBVIOUS TO EVERYONE

### CONTEXTUAL FACTS

* Aka non-adjudicative facts🡪 Legislative, social, behavioral, cultural, reference facts
* Preference for evidence to be put to the court through an expert witness – particularly closer to facts at issue
* *R v Spence* - 2005 SCC – challenge for cause – AC black, interracial crime, CO East Indian
  + “social fact”- social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case
    - General, not specific to facts of the case
  + “legislative facts” – related to legislation or judicial policy
  + **“adjudicative facts” – the where, when and why of the allegation**
  + **For all – closer they approach the dispositive issue, stricter the rules**
* *R v Clayton* – 2007 SCC 32 – para 109 – can take judicial notice of stats can reports published by DOJ

### JUDICIAL NOTICE OF THE LAW

Judge can take judicial notice of any law in jurisdiction🡪 Judge presumed to know the law – not bound by parties knowledge, Can’t judicially note other jurisdiction’s law – expert opinion

# General admissability principles pt 2.

### Strength of an inference

* The strenfth of an inference: How likely or unlikely does this evidence make a fact in issue?
* E.g. Police lawfully seize AC’s phone🡪 does It rings once with ONE caller asking to buy drugs or does It rings 30 times with each caller asking to buy drugs, 30 times makes it much more likely
* Assessed in terms of the fact in issue 🡪 *Handy* – similar fact factors, Expert evidence – opinion based on proved facts tends to support the inference relevant to a fact in issue
* Circumstantial evidence🡪 Must consider reasonable inferences available in light of the rest of the evidence tendered and the issues at trial, Can’t ignore other evidence (each piece of circumstantial evidence is often small on its own), But can’t overwhelm by jumping rather than inferring – no speculation Consciousness of guilty 🡪 Post-offence conduct 🡪 after-the-fact conduct

### Reliability

* Typically not assessed at the admissibility phase🡪 Typically assessed by the TOF – question of weight, Can be hard to assess in isolation, Unreliable evidence may hinder, not help, search for truth
* SO reliability is a factor when weighing against prejudicial effect
* Threshold vs ultimate reliability🡪Threshold – reliable enough to be admissible (very basic), Ultimate reliability – what the TOF ultimately uses/accepts
* *Mezzo/Buric* rule – reliability is generally for TOF not TOL
  + But some retreat from this rule allowing probative vs prejudicial analysis
  + Unreliable and prejudicial might be excluded🡪 E..g. unreliable confession, unreliable ID

### Threshold reliability and hart

* *Hart* – set out rules of admissibility for “Mr. Big” confessions, also opened the door to threshold reliability as part of probative value vs prejudicial effect test
* Compares threshold reliability requirement in expert evidence/hearsay to Mr. Big confessions/other evidence🡪 Where the credibility or reliability of the evidence is so deficient that it robs the evidence of any probative value – excluded (using hearsay example)
* **TOL not usurping the role of the TOF – simply acting as gatekeeper🡪 Is the evidence worth being heard by the TOF? Is it reliable enough to get through the door or is it too unreliable and lacks probative value ?**

## What is prejudice?

* IT IS NOT that it makes case for other side legitimately stronger
* **Its based on some bad, improper form of reasoning**
* **Types of prejudice🡪Moral prejudice, Reasoning prejudice, Unfairness to witness, Unfair surprise, Inability to test**
* Less concern about prejudice in judge-alone trials, bc judges give reasons and juries do not
* Moral prejudice🡪 typically bad character evidence, accused is more likely to have done this crime bc he did other crimes for example, risks are conviction bc ac is a bad person or to punish ac for other bad acts
* Reasoning prejudice🡪 Distracting jury, distorting trial process, wasting time,
  + Distracting jury by arousing emotions, Bad character evidence, gory crime scene photos, jury may Want to punish/help one side or the other
  + Undue emphasis 🡪 Sending evidence into deliberations
  + Improper purpose – distorting truth seeking 🡪 E.g. “rape myths”
  + Distracting side issues
  + Usurping function of jury🡪 E.g. expert/opinion evidence might make the jury feel like someone else is deciding
  + Undue consumption of time🡪 little relevance, but would take a lot of time, reasoning prejudice can require that to be excluded
* Other prejudices 🡪 Inability to test (Processes recorded/observable, Threshold reliability), Unfairness to witness (Curtailing cross-examination (e.g. sexual assault cases)), Unfair surprise (adjournment not exclusion)

### CUmulative evidence

* TJ can exclude cumulative evidence🡪 Can stop party from going overboard in trying to prove a fact, Disallow repetitive evidence on the same point when proven
* This is essentially just to prevent undue delay, wasting time, etc.
* Cumulative evidence – evidence that adds very little to the probative force of the other evidence in the case

# Trial fairness

### Historical evolution

Harrer🡪 “trial fairness” from dissents in cases prohibiting exclusion for “fairness”, Frustration of court’s inability to protect the reputation of the administration of justice by admitting unfair evidence not otherwise inadmissible

***Charter* gave the tools to get this done🡪Excluding evidence obtained in a manner that breached the charter when admission would bring the reputation of the administration of justice into disrepute 24(2)**

* *Corbett* – excluding or editing AC’s criminal record despite s. 12 *CEA*
* *Hebert* – expanding common law confessions rule – focus on reliability AND fairness, if obtained in an unfair manner can be excluded
* *Potvin* – discretion to exclude otherwise admissible prior testimony where testimony was obtained in unfair manner

### *Harrer*

* AC gave statement to US police – didn’t get right to counsel, *Charter* only applies to Canadian government
  + **But – evidence obtained in an unfair manner, admission would make trial unfair**
  + 11(d) (presumption of innocence) – duty of judge to protect trial fairness is constitutional imperative
* **Assessing “fairness”🡪 Not all evidence obtained in breach of *Charter* is unfair to admit, Contextual balancing, Were efforts made to comply with the law as it was at the time?, Would the evidence have been obtained anyways? Is the evidence reliable/misleading? Was police misconduct abusive?**

### Fairness- what does it mean

* Charter entitles the accused to a fair hearing, not the most favourable procedures that could possibly be imagined, A fair trial is a trial that appears fair from the perspectives of the AC and the community, Doesn’t require perfection, BUT Satisfies the public interest in the truth, while preserving basic procedural fairness to the AC!
* Not an ideal trial from the accused perspective but takes into account everyone’s perspective

### Reputation of the administration of justice

* Purpose of fair trials are to protect the AC’s rights and to protect the reputation of the administration of justice….But does this mean third parties rights are protected? When do 3rd parties have Standing to argue?
  + *R v Marakah* – interpreted as fairness to rights of third party?
  + Even if no *Harrer* – common law abuse of process
* *Harrer vs Charter* 
  + Harrer is re: state/non state agents, 3rd parties rights infringed, any court or tribunal
  + Charter only applies to state agents, standing issues (you have to have standing to raise a charter issue), court of competent jurisdiction, eg. Only trial, not prelim, bare minimum not exhaustive
* Harrer vs Seaboyer
  + Harrer= fairness AS fairness, an end of itself, evidence collection and presentation
  + Seaboyer= integrity of reasoning process, fairness more to non-AC

# Calling witnesses

## Competence and compellability

**Competence:** Who can testify? Ability to provide reliable evidence, willingness to testify truthfully, all witnesses are generally presumed competent, oath, affirm, truth, Except AC for Crown

**Compellable:** who can be forced to testify? Contempt if no testimony, self-incrimination is not allowed, ss. 7, 13 charter, certain qs are privileged

### Competence

Historically the accused and their spouse were excluded from testifying. Even if the spouse was a victim. Children also excluded b/c not persons, presumption of innocence. Anyone who would not take a strict religious oath would not be allowed to testify.

**ACCUSED + SPOUSE NOW**🡪 S. 3 *CEA* – allows accused to testify, S. 4 *CEA* – allows spouse of AC to testify (But protects spousal communications/privilege), S.4(2) *CEA* – modern – AC’s spouse competent for Crown (But protects spousal communications/privileged)

**CHILDREN NOW🡪** S.16.1 CEA – Children under 14 Presumed competent, No oath/affirmation necessary, they just need to Promise to tell the truth**,** But no questions about understanding of telling truth for purpose of assessing competency**,** Evidence treated the same as adults**,** children may Testify if they can understand/respond to questions**,** Party challenging W must show can’t understand/respond to Qs

**Mental incapacity? 🡪** S16 *CEA* deals with this and asks (1) Can W understand nature of oath/affirmation? (If no, can they testify on promise to tell the truth?) AND (2) Can W communicate the evidence? (Accurately perceive, remember, and communicate the evidence), If no to #1 and #2, not able to testify

* **Challenge must be made at first reasonable opportunity**🡪 Burden of establishing issue on challenger (BOP), Witness is called, unless evidence of trauma, Can call expert evidence on the capacity of the witness, TOF present (i.e. in jury trials the jury will be present during this)

### Compellability

**General rule is that all witnesses are compellable, as there is a duty to court and society as a whole**

**Limited exceptions to this🡪**

* the accused (crown cant call AC)
* Ac’s spouse (explicitly for Crown, likely for AC, but limited by spousal privilege)
* complainants (Qs about sexual history have limits specifically, but they can be called
* Corporate officers (directing mind of Accused corporation)
* Judges (about a specific case, or what they dealt with in that case)
* Jurors (cant ask about deliberations of the jury, public interest immunity)
* Lawyers on the case (specific, narrow test, off the record)

### Oath/affirmation

Historically – had to be oath on Bible/God

Modern – can swear on the bible, other religious/holy text, or eagle feather, or can affirm (swear to tell the truth without any reference to deity/religion), all of these are Considered the same for the purposes of evidence

Don’t have to prove W doesn’t believe in deity to affirm (anymore) – s. 14 *CEA* re affirmations

## Presentation of witnesses

**General Principles (subject to exceptions)**

* Each party gets to choose who they call as witnesses
* Each party gets to question all witnesses
* Witnesses don’t just give speeches, they answer Qs
* Questions must focus on issues in dispute, keep it relevant/admissible
* Parties examine their own witnesses in chief and then cross-x the other side’s witnesses

**Purposes of questions**

* All Evidence elicited by questions
* Theory behind that Lawyers are in the best position to know what is relevant/admissible
* Basis of adversarial system – each side makes its case
* Questions themselves are not evidence, unless the witness accepts the truth of the Q
  + If witness says denies a suggestion put to him/her in cross-examination the question isn’t any evidence that it happened,
  + If witness’s answer incorporates part of the question, that does become evidence

**Phases of testimony**

* 1. Examination in chief 🡪 Open-ended questions, not leading
* 2. Cross-examination 🡪 Can ask leading questions, suggest things to the witness
* 3. Re-examination 🡪Can clarify things that arose in cross-examination

## Examination in chief-phase 1

**No Leadings Qs**

* General prohibition against leading questions ( Qs that Suggest the answer)
* Not all yes/no questions are leading – the question must presuppose/suggest the answer
* If what is presupposes is something the witness already testified to it isn’t leading/prohibited, just directing the witness to a specific time
* Example from text: “What did the man do after he shot the woman?” would be fine if the witness had just testified that the man shot the woman

**Why are leading Qs prohibited? 🡪** Risk of harm to truth seeking function in theory bc the person who is calling that witness is suggesting answers and witnesses presumptively favor the side calling them **,** But text suggests risk may be overblown**,** Witnesses don’t necessarily favour the side calling them

* Not all issues are heavily in dispute
* Leading questions come in degrees
* Cross-examination could correct any misleading statements
* Disclosure gives full picture of evidence to the accused anyways (in a criminal trial), so if something is missed they can cross-x on it

**Exceptions to the leading Qs rule:**

* TJ discretion to relax prohibition when necessary, in the interests of justice
* Things not in dispute (e.g. introductory topics, date, jurisdiction, interacted with AC on date X)
* Directing to subject matter
* Expert qualifications
* Complex/technical matters
* Contradicting a previous witness statement re whether s/he made an out-of-court statement – need precise wording
* Providing direction and focus to witness
* Refreshing memory
* Adverse/hostile witness

**What happens if leading Qs are asked?**

* Answers are NOT prima facie inadmissible!
* Just given less (to no) weight
* Depending on the circumstance: i.e. how the leading question was asked, how important the issue was

**How do you refresh witnesses memories? (three categories/times they can be refreshed)**

### Refreshing memory before trial

* Recommended/allowed to Review police statements/preliminary inquiry transcripts/etc prior to trial –
* Perfectly proper to have witness read any statements they’ve given before trial
* Any risk remedied by cross-examination with full discosure and ethical obligations to not
* Negligent witness prep to not at least offer to the witness to review their statements
* Witness testifies to their current memory
* Out of court statement (used to refresh memory before court) not admissible into evidence unless some other hearsay exception is met

**SAFEGUARD TO PRETRIAL REFRESHING**

* Counsel’s duties to not assist in misleading the court (no suborning perjury)
* Cross-examination by opposing counsel, which can include questions about pre-trial prep
* Disclosure of materials to cross-examiner
* Clear for crown witnesses – must disclose trial prep materials
* Less clear for defence witnesses – no general rule of disclosure
* No hypnosis – can make testimony inadmissible, bc it tampers with their memory

### Refreshing memory during trial

* Try asking question in a different way to try to get to missing piece
* Refer witness to materials/information to jog memory
  + E.g. ask W to review statement given to police
  + Can use almost any writing, material, or information that would be reasonably capable of reviving the memory
    - Can’t use things that wouldn’t refresh memory or with undue risk of prejudice
      * *Shergill* – W can’t use police notes summarizing interview, not verbatim and based on interpreter’s relay not direct communication
        + Also had prelim transcript to use instead
    - To then testify based on current memory being revived
    - Thing used to refresh memory is not evidence itself
    - Difference between past recollection refreshed and past recollection recorded
* Exhaust current memory – unless wastes time/useless (i.e. if they say they don’t remember anything, then don’t keep pestering them)
* Determine whether reviewing the item may help revive the memory, i.e. lay a foundation to use the record to refresh the memory
* Ask court for leave to refresh the memory🡪 Exclude jury if necessary for arguments, TJ can refuse if prejudice > probative value, If granted recall jury and explain that attempt to refresh will occur, Have W read document silently (or be excused to listen, etc.), Ask if memory has been revived, If yes, continue to question
* If the witness is feigning memory loss, then this whole process will be futile, but you have to still do it bc it is the proper procedures and you cant just impeach your witness, you end up going to hostile witness procedure
* Generally the material used to refresh must be disclosed, for Crown witnesses typically already a part of the disclosure, doesn’t usually become an actual exhibit, not evidence itself

### Memory exhausted – getting their prior statements admitted

* Witness says their Memory is NOT refreshed, we move to past recollection recorded which is…
* A Hearsay exception – out of court statement admitted for POTOC without contemporaneous cross-examination
* Necessary/reliable – principled exception
* Hearsay rules can be relaxed (not abandoned) for defence
* Traditional rule – admissible if Recorded in reliable way, Recorded when sufficiently fresh/vivid to be probably accurate, Witness testifies that the record accurately represented his/her knowledge/recollection at the time it was made, Original record used, if available – basically subset of reliable recording, Usually also requires witness to not have a current memory of that fact that they made that statement, Evidence is otherwise admissible (no other rule banning what the evidence would be)
* Memory exhaustion does not mean they remember nothing, memory must be exhausted re the fact being proven by the statement, that specific portion of the record, so they may remember 90% but you need that extra 10% to prove your point

**Reliable Recording?**

* Must prove the statement is an accurate reflection of the memory
* Must be concrete record – written, recorded, etc. 🡪Not just oral testimony of another W saying heard first W
* Record verified by witness when fresh
  + E.g. oral statement to police written in police notes might not be sufficient if W didn’t see notes and confirm accurate
  + But might not be necessary if all people involved in making the record testify (more likely just to use principled exception to hearsay)

**Made when memory is fresh🡪 Contemporaneity/timeliness requirement**

* But must remember the purpose of the requirement – not strict contemporaneity (i.e. the same day) but close enough to event to ensure accuracy – Q is whether events fresh in W’s mind
* Length of time that is too long depends on facts
* Routine/exceptional event, intervening events, mental capacity, drugs/alcohol, etc.
* Objective test

**W states that it was accurate at the time**🡪 they must testify that the record accurately represents his/her knowledge/recollection when it was made, this is strictly applied

**The evidence must be admissible generally**🡪 cant use this rule to backdoor inadmissible evidence

**Then, put the record into evidence**🡪 generally you would have the record read into evidence by the W, this is preferable, with counsel assisting if uncooperative, some cases say if it is read in then shouldn’t be an exhibit, some say contrary or up to TJ, just go with the flow

### Unconstitutionally obtained materials

* *R v Fliss* – wiretap between Undercover officer (UC) and AC violated s. 8, intercept was inadmissible
  + But UC has independent recollection of conversation, so could testify about the conversation despite the wire being excluded
  + UC also allowed to read wiretap transcript to refresh his memory
  + Seems kind of shady...
* TJ likely wrong excluding wiretap in the first place, so appellate level less concerned about its use

### Unfavourable witnesses

* Witnesses might not testify as expected, Not help as expected, or even might hurt your case
* **Can’t automatically impeach your own witness – generally can’t to your own witness:** 
  + Cross-examine W
  + Call other Ws to testify W shouldn’t be believed
  + Questioning W re prior discreditable conduct
  + Questioning/proving W’s prior convictions
  + Questioning to show bias/calling evidence of bias of your own witness
  + Cross-examining on prior inconsistent statements/proving if denied of your own witness
* Why? 🡪 historically the reasoning was that you were Vouching for your Ws – but not really you get the Ws you find
  + Improper pressure on W to give misleading but favourable evidence – but not really b/c of other safeguards (cross-ex, ethical duties, etc), not much of an issue now but this is why it is like this historically

**Non impeachment**

* Asking your W about his/her criminal record generally ok, just being honest and open (Not trying to impeach, but blunt Qs from opponent)
* But could be prohibited if trying to use to impeach without following proper procedure
* Can’t ask about rehabilitation/underlying facts etc until credibility is actually challenged by other side (can’t rehabilitate your yet untarnished W)
* Asking to explain prior inconsistent statements (Not to impeach, but to blunt attack, avoid qs from cross x)
* Can call contradictory witnesses – indirectly undermines
* Can argue that TOF should disbelieve certain parts of your W’s evidence🡪 But can’t argue to believe opposite without evidence of opposite

**Impeachment exceptions**

* Common law – hostile witness
  + Must show W is hostile
  + *R v Coffin* (aka *Coffin* procedure) – hostile means W does not give evidence fairly and with a desire to tell the truth because of a hostile animus towards the calling party
  + Not just unfavorable evidence, Not just lying b/c of different interests, Must prove actual hostile animus towards the party (HIGH THRESHOLD)
  + Factors🡪 Demeanour/attitude, Substance of evidence, Motive for animosity/favouritism, Prior inconsistent statement, Circumstances where it was made, explanation for recanting, failure to disclose recantation
* S. 9 *CEA🡪* Cross-examine, Prove prior inconsistent statement
* Preliminary Issues
  + Need for leave of the court – expressly required
  + Need to attempt to refresh – if forgetfulness is viable you have to go through that process first
  + Might remember, might prove past recollection recorded, Either way would obviate need to attack

### SCOPE OF CROSS X FOR HOSTILE WITNESS

* **Once proven hostile party can cross-ex W “at large”**
  + Any facts relevant to issues in the case to impeach credibility
  + Prior inconsistent statements, content of statements, circumstances around its making
* Can cross to get helpful evidence (not just against credibility), ALL EVIDENCE YOU WANT GO GET IN GENERAL
* **NOT prior bad conduct (criminal convictions, etc) or reputation for untruthfulness – so still narrower than general cross of opposite party**

### Test for hositility

Use the CEA and not the common law test, the CL test is more stringent and difficult,and doesn’t really add anything

CEA TEST

* Historically if hostile W denied making prior inconsistent statement couldn’t do anything to prove it
  + Purpose of s. 9(1) to allow proof of denied statement
* **Test 🡪 If W proves adverse, Adverse initially meant hostile (like common law test), but relaxed to now mean unfavourable in that testimony advances position opposite to calling party**
  + **Similar factors as hostile**
  + **Can contradict OR with leave of court prove prior inconsistent statement**
  + **But must first ask W whether s/he made the statement before calling independent proof**
* Still can’t impeach with general bad character evidence
* Can contradict with other evidence – doesn’t make test higher than common law which allowed calling contradictory evidence
  + Don’t have to be adverse first

### Cross xing an adverse witness

* **S9.1 allows proof of prior inconsistent statement**
  + **But doesn’t say anything about right to full cross-ex**
  + **Courts disagree but general trend is to allow full cross-ex – real debate is about scope (again disagree)**
* Scope of cross best considered against harms to avoid
  + Minimal risk of perjury to avoid impeachment – general rep/bad character not allowed anyways
  + Minimal risk of automatic capitulation to calling party – already shown will be adverse/contrary in position
  + Harm of not allowing cross – W’s testimony won’t be tested, opposing party unlikely to cross
* Right could come from stretching interpretation of s. 9(1) or bringing in the common law

**S. 9(1) Procedure**

* Voir dire w/o jury to call evidence/argue that the witness is adverse
* Ask about/prove prior inconsistent statement
* If W admits, then no need to call other evidence to prove
* But calling party can’t cross-ex W on voir dire
* If W proved adverse, bring jury back and prove prior inconsistent statement and may also get to cross-ex

### Cross x of prior inconsistent act, cea 10-11 , 9(2)and cl

* Generally permissible – two exceptions
  + Prior inconsistent statement falls under collateral fact rule
  + Must first confront W with the prior inconsistent statement to allow them to deny it or explain the inconsistency
* Common law, ss. 10, 11 *CEA*
* Common law – can cross if🡪 Confronted W with statement in cross, Statement not collateral, Applied to any statement oral or written (*Queen Caroline’s Case* Changed to require in writing, shown to W, and put into evidence)
* **S. 10 – Cross examine on prior statement if:** 
  + **made in/reduced to writing or recorded on audio/video/otherwise;**
  + **Relative to subject-matter of case – collateral fact rule**
  + **Without showing statement to W**
  + **BUT must draw witness’s attention to contradicting parts before proving contradiction**
* S. 11 – Can prove statement if W doesn’t admit
  + Must be proven inconsistent before proof of statement itself
* Both effectively require notice to the W of the inconsistent statement
  + But TJ has discretion to allow proof anyways – fairness/explanation
* Don’t need to prove inconsistency to cross-ex
  + Different than for own Ws
  + But still has to be admissible evidence
* Don’t have to show statement to W before cross-ex
  + If W denies statement – must show before prove it in a different way
  + TJ can require showing statement to W for fairness
* W gets chance to explain inconsistency
* **Use of prior inconsistent statements** 
  + **Not admissible for POTOC**
  + **Unless adopted as true by W**
  + **Or proven as exception to hearsay**
  + **Must instruct jury only to assess credibility**
* Historically didn’t consider prior inconsistent statement in deciding adversity under s. 9(1)
  + *Wawanesa* changed to allow consideration
* Parliament also attempted to clear this up with s. 9(2)
  + Allowing cross-ex on prior inconsistent statement before proof of adversity, and that the court can consider that cross-ex in determining adversity
* Allows two-stage process for adversity
  + 1 – cross-ex on prior inconsistent statement under s. 9(2)
  + 2 – using evidence obtained in 1, attempt to prove adversity
* But can skip use of s. 9(2) if not required on the facts
* Interpreted to mean that if party shows W made a prior inconsistent statement, party can cross-ex W on it, in front of the jury, without proving either that they are adverse (9(1)) or hostile (common law)
* Narrow cross – limited to prior inconsistent statement inconsistencies with trial testimony
* Also assumes party can prove prior inconsistent statement if W denies making it
* **Limits to 9(2)**
  + Only statements made in writing or reduced to writing, recorded on audio tape or video tape or otherwise (i.e. NOT oral statements)
  + In/reduced to writing – includes transcripts, verbatim notes but not not-verbatim notes
  + Party seeking to cross must prove statement is inconsistent
  + Inability to recall facts is inconsistent with prior statement where could recall facts
* **Procedure for 9(2) (Comes from *Milgaard*)**
  + First: Advise court of 9(2) application – exclude jury for voir dire
  + Advise judge of particulars, produce alleged statement
  + TJ reads/views statement to determine if inconsistent
  + If inconsistent counsel must prove the statement
  + Produce it to W – if W admits, it’s proven
  + If W doesn’t admit – must prove with other evidence
  + Opposing party gets to cross-examine and call own Ws
  + Submissions in voir dire
  + If proven – cross-examine on prior inconsistent statement in front of jury

**Trial judge discretion**

* TJ has discretion to refuse applications under s. 9(1)/9(2)
* Factors
  + Voluntariness, threats, inducements, police trickery
  + Interests of justice / trial fairness
  + Reliability
  + Calling party knows in advance that W will recant – usually rejected because can’t know for sure what W will do
* Effectively weighing probative vs prejudicial

**Use of proven Proven prior inconsistent statement?**

* If W accepts prior as true, then it can be used for POTOC
* POTOC can go either way depending on proof of hearsay exception
* Not for POTOC if W denies and not in under hearsay exception, can just use it as a factor in assessing the witnesses credibility

**S 9 and Hearsay?**

* Do not necessarily have to exhaust s. 9 to get to necessity for hearsay, fact specific

## Cross examination

* Fundamentally important to adversarial system
  + Meant to Test/challenge W/s reliability/credibility
  + Elicit favourable evidence to the other side
* Generally can ask leading questions – suggest answers
* Can cross on anything relevant – not limited to responding to evidence in chief
  + Must be admissible evidence – can’t get inadmissible in via cross
  + Balancing probative vs prejudicial
  + Relaxed proof of relevance – may only show relevance further along
  + TJ can limit abusive, harassing, etc. cross-ex – irrelevant or probative < prejudicial
  + Depends on circumstances of what is at issue, prior testimony of that W
* Can’t demand “yes” or “no” answer, sometimes witnesses need to be able to explain things more than a simple yes or no
* **Good Faith basis**
  + Counsel doesn’t have to be able to prove suggestion put in cross – but must have good faith basis to believe it’s true
  + Remember – question itself is not evidence unless adopted by the witness, i.e. the witness repeats is
  + ***R v Lyttle* – counsel can ask Q in cross if good faith basis**
  + Reason to believe it is true, w/o being able to prove it with other evidence
  + Can’t put to W what you believe to be false
  + can be testing W’s evidence on a point already given that you believe to be false, but can’t suggest **new** false things
  + Officer of the court – not to call false evidence/calculated to mislead
  + Factors – nature of Qs, potential impact, if other evidence shows likely foundation exists/lacking, potential for prejudice, limiting instruction
  + Counsel knowing W will deny doesn’t mean not good faith basis
* Denied Questions
  + Questions are NOT evidence, if questions are denied and substance of Q is not proven in another way, jury should be instructed that there is no evidence of that point and Q is not evidence

### Impermissible cross x

* Can’t have W1 testify about credibility of W2 (or any different witness) – irrelevant
* Can’t cross W about whether their evidence was accepted or rejected in another, unrelated matter – irrelevant
  + Except perjury/giving contradictory evidence convictions
  + OR if W puts his/her evidence being accepted by other courts into issue
* ITS PROVEN, that they Falsely accused other people
  + Must be able to prove not just acquittal of other person but PROVEN falsity
* Can’t cross defence W on knowledge of s. 13 (right against self-incrimination / having compelled testimony used against you)
* “rape shield” legislation – s. 276 in relation to prior sexual conduct

### Permissible cross x for witnesses

* Challenging ability to observe, recall, or narrate events
  + Eyesight, intoxication, distraction, lighting, distance, etc.
* Prior inconsistent statement
* Prior disreputable conduct to show W is a person who shouldn’t be believed (e.g. prior criminal convictions)
* Bias or prejudice skewing W’s objectivity, personal interest
* Bad character – credibility, less likely to tell the truth, allowed for witnesses and not the accused
* Prior convictions – *CEA* s 12
* Different rules for AC and other Ws
* Partiality/bias

### Confrontation principle

* **Challenging credibility w/o cross, basically you need to put that to the witness first to deny things or explain things before you attack their credibility**
* *Browne v Dunn*
  + Important/peripheral
  + Obvious credibility attack
  + Breach remedies
  + Precludes calling other Ws
  + Limiting closing submissions/argument
  + Recalling W
  + Giving more/less weight to evidence
* Purpose is fairness to the W

### Crown cross-x of accused

* AC’s constitutional rights and Crown’s special role
* Can still cross-examine thoroughly/challenge AC’s credibility
  + Abusive cross can be abuse of process
* Can’t ask
  + why crown Ws would lie (or re other Ws credibility)
  + About disclosure, tailoring evidence to fit disclosure, etc.
  + Right to silence
  + Trial tactics/decisions they’ve made
* Exceptions – where AC’s evidence makes it relevant/opens the door/puts that in issue first

### AC cross of co-ac

* Disposition or propensity to commit this crime
* Facts underlying prior convictions
* Prior bad acts – to challenge credibility
* Disposition for violence re duress
* Statement to person in authority w/o proving voluntariness, only to assess credibility, not for POTOC

## Re-examination, reply, case-splitting, re-opening, crown witnesses

### Re-examination

* **Only clarifying/expanding issues arising from cross**
  + Not getting new/missed facts out
  + Explain terms, context, inconsistencies, etc.
* **Same rules as chief** 
  + no leading questions (unless 9(2) etc)
  + Only admissible evidence

### Reply and case splitting

* **General rule – crown must call all of its evidence first, at once**
  + Prevents surprise
  + Avoids confusion/inefficiency
  + Prevents undue focus on reply/rebuttal evidence portion
* **Exception – reply/rebuttal evidence**
  + Evidence only relevant as a result of defence evidence
  + E.g. disproving defences arising from defence evidence only, rebuttal experts, disproving alibi, character in issue, Not Criminally Responsible due to MD, prior inconsistent statements
* Surreply – more defence evidence as reply to Crown

### Re-opening crown’s case

* **Crown’s case closed, but they need to call something else, they need to apply to re-open to call new evidence that was clearly relevant to the Crown’s case**
* If Crown’s case not closed – TJ considerable discretion to allow more evidence
* Crown’s case closed, defence not elected as whether they will or won’t call evidence – TJ some discretion, Crown must show not unfair to AC
* Crown’s case closed, defence elected – very narrow once defence elects whether to call evidence or not
* Main examples
  + Conduct of defence (in)directly contributed to Crown’s failure to lead evidence on point in chief
  + Crown’s omission/mistake on non-controversial matter – formal/technical

### Re-opening defence case

* **TJ discretion to allow defence to re-open any time before sentence**
* Evidence must be relevant to issues in dispute
* Pre-conviction
  + Probative value? Why didn’t you give this evidence before?
  + Why not led before?
  + Prejudice to Crown/co-AC?
  + Orderly/expeditious conduct of trial?
* Post-Conviction
  + *Palmer* test
    - Due diligence? (tactics??)
    - Relevant – bears upon decisive or potentially decisive issue
    - Credible – reasonably capable of belief
    - Could reasonably be expected to affect result

### Crown witnesses

* Crown has discretion to choose witnesses
* Unless proof of oblique/improper motive Crown can’t be ordered to call a witness, even just for cross, includes the complainant
* No adverse inference – specific, narrow exceptions

# Credibility

Howery’s notes: You can be truthful but if you answer Qs in a strange manner you can still be found not credible, howery gives the example of the policy officer who just straight up wouldn’t answer questions and they had to cross-x him for 6 days

## What is credibility

**What is credibility?**

* Do they have a motive to lie?
* Unexplained inconsistencies?

**Factual accuracy of W’s evidence🡪 ability to accurately recall, opportunities of knowledge, powers of observation**

**Methods of assessing credibility**

* No expert ev allowed re: cred
* R v S(RD): more of an art than a science (Credibility)
* Use life experience
* Assess cohesion, plausibility, external factors, cross-x, etc
* May believe all, some , or none of anything witness says (not all or nothing)

**Common framework of instruction to the jury re: credibility**

* Reason to tell the truth or to lie?
* Reason ev is or is not reliable?
* Interest in the outcome? Reason to favour one side vs the other?
* Seem to have a good memory? Issues in remembering genuine or excuse?
* Evidence reasonable/consistent or not? Inconsistencies on unimportant points?

**Demeanour**

* Great emphasis in historic common law
* Partial explanation for rule against hearsay – TOF can’t observe speaker
* Part of reasoning by SCC re when Court could order W to remove the Niqab – importance of seeing W’s face to assess their evidence
* But increasingly criticized based on studies showing observation does not assist in assessing credibility
* Issues of cultural bias – e.g. failure to make eye contact in R v E(T)
* Issue of honest but mistaken W – can give false credibility when issue is reliability
* Modern – dangerous to give too much weight to demeanour evidence, just one factor

**Stereotypes**

* “common sense” can be racist, sexist, etc.
  + E.g. How a victim of domestic violence should act
  + E.g. lack of eye contact means not credible/evasive vs. cultural
  + E.g. R v Wilson – AC knew there was child porn on a computer because AC was gay (example of how historically stereotypes have been very problematic)

**Women and children**

* Historically common law encouraged TOF to treat evidence of women and children with suspicion
* Rape myths – more later
  + Even consensual sexual conduct with spouse referred to as “prior sexual misconduct” to be used against a sex assault complainant, used as late as the 80s, used to say that the complainant was consenting and probably deserved it/etc
* Corroboration requirements for all sexual assaults (removed) (i.e. other witnesses, but this creates issues because most SAs don’t have witnesses to see them as they happen in private places)
* Child complainants – believe evidence is unreliable or fabricated if not immediately reported, was an initial suspicion against this

### *r v W* 1990 SCC

* McLachlin J (as she then was) – started effort to remove stereotypes for children
* **1 – remove rules that children’s evidence was inherently unreliable and treated with special caution**
* **2 – not apply the same test as assessing adults** 
  + Children experience things differently, less likely to put value on time/place, etc. that adults would, their functioning is very differently
  + More flexibility in assessing children’s evidence
  + Recognizing how children’s brains work not making them do the same as adults

**Racial/Ethnic Groups**

* Received less focus than eliminating stereotypes re women/children
* Some racist reasoning is overt – but it is increasingly unconscious
* E.g. *R v Barton* – “prostitute” “native girl” “native woman”
  + ABCA – Without specific instruction risk that TOF would believe that AC bought CO’s consent for anything he wanted
  + As counsel, if witnesses use terms that are inappropriate or 6tjkyqnot something you want on the record you need to go back on the record and correct them i.e. “native girl”🡪 do you mean “indigenous woman?”
* When prepping a witness try and get them to use the correct terms, if not these racial biases can sway the judge

**Judges social context (judicial notice)**

* R v S(RD) – SCC conflicting opinions
* Conflicting stories between AC and police, TJ accepted AC’s evidence sufficiently to acquit, found police overreacted
* **4 Js - judge can take presence of racism in the community into account when assessing evidence**
  + **Didn’t explicitly use racial analysis for non-white AC, but said wouldn’t be improper for TJ to consider societal racism**
* 2 conc Js – need evidentiary link to find that history of racism motivated this specific witness
  + No link between history of racism and THIS police officer – can’t predetermine credibility of this person based on generalizations
  + Two situations when you CAN use social context
    - **1 – to rebut stereotypes (e.g. police never lie)**
    - **2 – as a lens through which TOF can assess the evidence**

**Same scrutiny to both sides**

* Error to apply stricter scrutiny to defence evidence
* Difficult argument to make successfully must point to some reason that makes it clear that a higher level of scrutiny was applied to the AC vs the Crown evidence/CO

**Motive to lie**

* Positive motive to lie – compelling evidence to disbelieve, good reason to scrutinize their evidence
* Absence of motive to lie – more difficult
  + Doesn’t necessarily mean no motive to lie exists
  + Difference between absence of proven motive and proven absence of motive
  + Have we proven they have no motive to lie or do we just have no proof of why they would have motive to lie?
* Just one of many factors – can’t be the only/main reason to reject AC’s evidence
  + Can’t ask AC why the CO would lie🡪 no witness can testify on the credibility of other witnesses, so this is not allowed

**Interest in the outcome**

* Part of motive to lie
* Can’t disbelieve AC b/c wants acquittal
  + Presumes guilt
  + Part of analysis – but not sole factor

**Disbelieved prior testimony**

* Cannot cross-ex a W on the fact that W’s evidence in a previous case was rejected – irrelevant
* Unless proven as perjury

### R v W(D)/ r v H(CW)

* Where AC testifies/calls evidence
  + 1 – If you believe AC’s [exculpatory evidence obviously] testimony you must acquit
    - (Howery: there are limits to this, if the AC testifies based on exculpatory evidence, then yes acquit but if their evidence is like that they did it obviously not acquit)
  + 2 – If you do not believe AC’s testimony, but you have a RD based on it, acquit
  + 3 – if you have no RD based on AC’s evidence, must look at whether the rest of the evidence proves BRD
  + 4 – H(CW) – if unable to decide who to believe, must acquit
* This is a way to describe BARD, it doesn’t change the standard of proof but is helpful to explain it especially to juries

**Religious Beliefs**

* Improper oath helping – can’t use religiosity to bolster Ws (I.e. “you’re so religious you’d be terrified that god would smite you under oath!)
  + Exception – AC can oath-help themselves (call good character evidence, but this opens the door to bad character evidence from the crown)
  + Exception – once W’s credibility is attacked can call limited oath helping evidence
* **Can’t ever use religion – religious beliefs don’t show tendency to tell the truth or lie – religious/non-religious can both lie**

## Circumstantial evidence

### Direct evidence

* Main question in assessing direct evidence – does the TOF believe the witness’s testimony?
  + Assess credibility and/or reliability
  + Honest but mistaken witness
* W testifies to something W actually observed, heard, perceived through their senses
* If accepted as true can conclusively establish a fact in issue without the need for interpretation or deduction
* Can have inaccurate perception of accuracy (e.g. eyewitness evidence can be perceived as more accurate than it is), studies have shown that it is actually not that accurate, the law treats it as too accurate

### Circumstantial evidence

* Tends to prove a fact in issue by proving other events or circumstances through which the fact in issue can be reasonably inferred
* Requires an inference to be drawn between proof of fact A and fact B
* TOF can draw inferences from circumstantial evidence
* Historically suspect – but less so in modern rules
* Two steps
  + 1 – assess reliability/credibility of evidence
  + 2 – assess reliability of the inference to be drawn from evidence
* Depending on what the circumstantial evidence is the inference may be less or more strong

**Wigmore: 3 types of circumstantial evidence**

* 1 – Prospectant – inferring the event from a prior act/event/mental state
  + E.g. proof of a plan prior to the incident
* 2 – Concomitant – inferring the event from circumstances contemporaneous with the event
  + E.g. opportunity, alibi
* 3 – Retrospectant – inferring the event from a subsequent act/state of mind
  + E.g. after the fact conduct, possession of relevant items/evidence/property,
* All of them are treated the same, doesn’t have to be happening at the exact same time of the incident, can happen at various different times

**Using common sense**

* TOF instructed to use common sense/logic when assessing circumstantial evidence,
* Benefit of jury to get differing/variety of life experiences
* Drawing reasonable inferences – not theoretical possibilities (i.e. A and B went into a room, a gunshot sounded and only A came out, it must have been aliens!)
* Also not mathematical precision but still looking at common sense probabilities

**Inferences vs Speculation**

* Inference – deduction of fact that may logically and reasonably be drawn from another fact or group of facts or found otherwise established by evidence adduced at trial
* Speculation – hard to exactly pinpoint (typically bad, not enough to draw inference you’re trying to draw)
  + E.g. guessing/speculating what might have happened on different facts
  + E.g. suggested inferences are too remote to be reasonable
  + Closer to guessing than reasoning from evidence
* Gaps in evidence can be inference or speculation depending on the circumstances and the deduction from the gap

**Individual fact vs. Cumulative Evidence**

* Probative value of a piece of evidence must be assessed along with the rest of the evidence
* Must evaluate circumstantial evidence as a whole, not piecemeal
* Criminal trial – must prove all elements of the offence BRD
* Do NOT have to prove each piece of evidence BRD
  + Error to examine evidence “in bits and pieces”
  + Exception – if one piece of evidence is the ONLY evidence on an element (e.g. the only evidence of ID) then that evidence must be proven BRD, in order for the element to be proven BRD
  + Each piece of evidence does have to be assessed at minimum for its specific worth, then as a piece of the whole

**Strength, weakness of inferences**

* Stregnth/weakness of inference depends on the facts of the case
  + nature of the evidence itself
  + how it fits into the whole
  + Reasonable/logical inference doesn’t need to be easily drawn or the most compelling inference
* Inference gets weaker the greater the number of steps required between the first evidentiary step and the ultimate inference (if you have to make a whole bunch of assumptions from your fact to the conclusion, it will not be as good of evidence)
* Drawing reasonable inferences requires TOF to look at:
  + Probabilities
  + Comparison to other hypothesis/possibilities (non speculative)
  + Reasonable possibilities that suggest guilt or innocence
* Alternative possibilities must be
  + Grounded in the evidence
  + Not based on remote possibility or speculation without evidence (i.e. aliens)
  + Looking at the evidence as a whole

**Dangers**

* Issues both with inferences and credibility/reliability
* Speculating inferences not based on evidence
* Risk of isolating evidence – not considering as a whole
* Risk of unreasonable inferences – stereotypes, bias, etc.
* Requiring evidentiary basis for alternative inferences – risk of the unknown alternative not in evidence

**Admissibility Stage**

* Same admissibility rules as other evidence – burden on proponent to prove relevance by showing a factual nexus between the evidence and a fact in issue
  + Contextual – based on facts in issue in the case
  + Does the evidence reasonably tend to make the fact in issue more or less likely?
  + Balance probative vs prejudicial
* Basics for admissibility – ultimate weight and strength of inferences for TOF

### Common examples of circumstantial evidence

**After the fact conduct**

* Renamed from “consciousness of guilt” to “post-offence conduct” to “after-the-fact conduct” increasingly neutral title
  + Can also be “consciousness of innocence” if not what a guilty person would “normally” do
  + Requires probative value not substantially outweighed by prejudicial effect (AC weighing)
* Proven lies – relevant to credibility, but also can be ATFC
* E.g. Flight, suppressing/altering/creating/concealing evidence, resisting arrest, demeanour, refusal to participate in lineup/parade, concocted alibi, change of appearance/disguise, suicide attempt, failure to attend trial, etc.
* **Must be relevant to fact in issue** – e.g. if AC’s fleeing the scene is equally consistent with murder or manslaughter, and AC admits manslaughter might not be relevant/admissible (i.e. the AC comes in and says yes I did kill them but it was MS not murder, so me fleeing the scene doesn’t matter bc I had no mens rea, evidence of flight isn’t relevant)
* Careful planning for jury instruction required

**Association**

* Association/prior relationship between 2 people
  + E.g. murder trial – association between AC/deceased, usually relevant to motive or AC’s state of mind
* Can be relevant to co-AC to prove second perpetrator when know first – but not if only evidence
  + But probative vs prejudicial balancing – bad character evidence risks

**Demeanour**

* Out-of-court demeanour can also be relevant – non-verbal cues during investigation, etc.
  + E.g. emotional state of reporter
  + E.g. corroborating state of mind or credibility
  + E.g. AC’s demeanour after the incident
* But notoriously unreliable
* Questions for admissibility
  + All lay opinion evidence – can W describe the demeanor and provide some foundation for their expressed perception?
  + Familiarity/experience interpreting this person’s demeanor (for example, would be much better at explaining someone closes’s demeanor, like your sister or partner etc)
  + Conditions of observation (distance, lighting, stressors, etc)
  + Person showing demeanour truthfully or falsely (e.g. fake crying)
* Is the described demeanour clearly described or ambiguous?
* Probative vs prejudicial

**Habit**

* Different than similar fact – see later lecture
* Habit, routine, custom, or practice circumstantial evidence of what that person did on a particular occasion
  + E.g. if W always gets up and brushes their teeth first thing in the morning, that is some circumstantial evidence that they got up and brushed their teeth on the morning in question
* Habit – inference of conduct on given occasion based on established pattern of past conduct
  + Must be:
  + 1 – person’s regular practice (cant be USUALLY must be ALWAYS)
  + 2 – responding to a particular kind of situation
  + 3 – with a specific type of conduct (cant be too vague to consistent)
* Different from disposition – inference of existence of a state of mind (disposition) from conduct on one or more previous occasions and further inference of conduct on the specific occasion based on the existence of that state of mind

**Motive**

* NOT the same as mens rea – Crown has to prove mens rea, doesn’t have to prove motive
  + Motive is the reason why the actor acted
  + Always helpful to have, always better to have
* SCC explains role of motive
  + 1 – motive is always relevant, evidence of motive is always admissible
  + 2 – proof of motive is not required – legally irrelevant to criminal responsibility
  + 3 – proved absence of motive is always relevant, jury instruction
  + 4 – proved absence of motive may be important ingredient in the Crown’s case, especially re ID/intent (e.g. other person had no motive)
  + 5 – motive is always a question of fact (for the TOF)
  + 6 – each case turns on its own circumstances, motive is always a matter of degree ( a small motive, an overwhelming motive, etc)
* But still always assess probative vs prejudicial – especially if motive remote, if too remote too prejudicial
* Lack of proof of motive is NOT proven absence of motive

**Opportunity (to do something)**

* Evidence that AC had physical and temporal availability to commit the crime may be highly relevant (depends on facts)
  + Non-exclusive opportunity is relevant but cannot base guilt alone
  + Crown may call others within limited group of opportunity to deny, to try to get to exclusive opportunity (if believed) (i.e. only 3 people could have done it so the crown calls the other 2 who aren’t accused to say they didn’t do it)
  + Exclusive opportunity can prove ID BRD
* Alibi – opposite of opportunity, “I was somewhere else”
* AC showing had no opportunity to commit because was elsewhere

**Possession**

* Can be an element of the offence (prove BRD) or a piece of circumstantial evidence for a different offence (not reqd BRD)
  + Requires proof of – (1) knowledge of and (2) control over the item
* E.g. possession of items stolen in B&E, B&E tools, weapon or item capable of causing CO’s injuries, large amounts of money
  + E.g. doctrine of recent possession – strong inference that AC was involved in the taking of the item
  + Not conclusive – rebuttable
  + Depends on – recency, nature of property, credibility of explanation of AC,
* E.g. possession of documents can prove knowledge of contents and/or involvement in subject matter described
  + Relevance is fact of possession not truth of contents – show AC knew contents of documents
  + Can be for POTOC if AC acts on documents
  + i.e. if they have instructions on how to build a bomb, are accused of making a bomb, that evidence is obviously relevant

**Trace Evidence (forensics)**

* Trace evidence is forensic evidence which can connect an AC to a crime scene
  + More circumstantial than obvious evidence, i.e. trace amounts of blood or DNA
  + relevant to ID
  + Absence of any traces of blood can be relevant to planning/deliberation/cleanup (this can prove intent or after the fact conduct)
  + Innocent explanations (AC was in that space before, your hair or skin cells were transported after getting on someone else)
* Balance probative vs prejudicial
* Typically through expert evidence – see other slides

# Calling counsel as a witness and removing him from the record: *R v Malley*

**Facts:** young mother who was in a car accident, made a paraplegic as a result of that accident, she got a settlement, she was living off of it, Malley was her financial advisor and a family friend, most of the people he dealt with were retirees, she blows through all of her settlement money, he starts giving her his own money and doesn’t tell her its all gone, he had invested her money in high risk investments, she ultimately gets a knock on her door, a package, with a bomb In it that killed her, for six months the red deer police had no leads, but eventually they get a trace DNA sample from the tape of the package, and its Malley’s

* He gave a significant number of false explanations to the police
* They found everything in his home to basically build the pipe bomb, used his points card to buy the parts for the bomb, tons of evidence against him
* They found all of these pieces except one cap, he lied saying he made his own Christmas and that was his hobby, this was disproven
* Fabrications in his statement to police
  + Explanation for gunpowder (he liked to reload his own bullets??)
  + Explanation for flashlight bulbs
  + Explanation for toggle light switch (I have a home building business, although he didn’t use toggle switches for the homes he built)
* Fabricated physical evidence
* Yanew gunpowder purchase
* The “Pipe Story”
* Why are these relevant? They are the BOMB components that the Crown could prove Malley possessed.

**The pipe story**

* In fall of 2014, Defence counsel advised the Crown that Malley still had the pipe and cap that the Crown could prove he bought.
* Along with his P.I. Defence counsel provided a galvanized steel cap and pipe, of the same type used in the bomb, to the RCMP in fall of 2014, along with a video of the pipe and cap being removed from Malley’s mother in law’s house on May 13, 2014.
* Defence later sent the Crown letters setting out Malley’s explanation about the pipe and cap.
* Defence’s P.I. didn’t know the “Pipe Story”, that is, Malley’s explanation for the pipe. The only evidence available of Malley’s explanation was in the letters provided by Defence counsel, or from Malley himself

**Evidence against this story**

* Malley was an experienced home builder and renovator.
* The material of the pipe and cap was wrong for the project – Malley owned the correct material.
* The use of the cap was inconsistent with Malley’s stated purpose.
* The Pipe was too short.
* The lower slab concrete was not removed – as Malley said it was.
* Malley previously “explained” all the other bomb components he possessed, but didn’t mention the pipe and cap.
* Evidence discredits Malley’s installation date claim.
* ATCO would’ve done this work for FREE!
* No other house built or renovated by Malley used 6” galvanized steel sleeves, they ALL have long, plastic sleeves.

**Why does this matter?**

* “It has long been accepted that actions taken by an accused person after a crime has been committed can, under certain circumstances, **provide circumstantial evidence of their culpability for that crime**. Examples of such actions include flight, the destruction of evidence, **or the fabrication of lies**.”
* “Evidence of this kind is often called “consciousness of guilt evidence”, since **it is introduced to show that the accused was aware of having committed the crime in question and acted for the purpose of evading detection and prosecution**.”
* Quotes from cases talking about lies being circumstantial evidence

**Post-offense conduct/admissibility**

* POC is just like all other circumstantial evidence – admissible when relevant
  + Innocent explanations do NOT make it inadmissible
  + But the jury must be reminded of any innocent explanations.
  + If POC is equally consistent with the Crown and Defence theories the jury must be instructed to give it no weight.
* Does NOT have to be proven BRD
* POC admissibility does NOT require a *voir dire*

**Uses of post-offense conduct**

* POC – rebutting “innocent association”
  + Malley claimed “innocent association” with all of the bomb parts – using his lies together can rebut that innocent association.
* Multiple fabrications = similar fact.
* Infer lies are to cover up guilt.

**Allowing an accused to lie his way to an acquittal is not a fair trial**

* The Supreme Court recognized that accused persons must also be cross-examined on their prior inconsistent statements, if fair trials are to be had:
  + “It seems a long stretch from the important purpose served by a right designed to protect against compelled self-incrimination to the proposition advanced by the appellants in the present case, namely that an accused can volunteer one story at his or her first trial, have it rejected by the jury, then after obtaining a retrial on an unrelated ground of appeal volunteer a different and contradictory story to a jury differently constituted in the hope of a better result because the second jury is kept in the dark about the inconsistencies.
  + The protective policy of s. 13 must be considered in light of the countervailing concern that an accused, by tailoring his or her testimony at successive trials on the same indictment, **may obtain through unexposed lies and contradictions an unjustified acquittal, thereby bringing into question the credibility of the trial process itself**. Effective cross-examination lies at the core of a fair trial: [citations omitted] Catching a witness in self-contradictions is one of the staples of effective cross-examination.”

**The pipe story became a possible prior inconsistent statement**

* S. 10 of the *CEA* allows any party to cross-examine a witness on a prior statement of that witness.
* S. 11 of the *CEA* allows the party to prove the statement, if the witness does not admit it was made.
* BUT – the Crown cannot cross-examine an accused on statements made by his counsel.
* So, the only way to prove that Malley made the “Pipe Story” statement is to call his Defence Counsel.
* Best way to minimize this risk is have proof that doesn’t rely on you: have a third person, a recording etc

**Calling counsel as a witness**

* In some circumstances “the proper administration of justice demands that opposing counsel become a witness”.
* Burden on the calling party – BOP, this is not something you do lightly, it is a high threshold
* Requirements – Counsel’s evidence must be:
  + Necessary;
  + Material; and,
  + Admissible.

**Necessary**

* Factors:
* Importance of the issue for which the testimony is sought,
* Degree of controversy surrounding the issue,
* Availability of other witnesses to give the evidence or other means (ASF),
* Potential disruption of the trial process,
* The overall integrity of the administration of justice.

# Calling witnesses—other statements

## Voluntary Confessions Rule

* Voluntary confessions rule applies to statements of the accused tendered by the crown
* Crown must prove that AC’s statement is voluntary if:
  + Exclupatory or inculpatory statement or assertive conduct
  + Not bodily samples only statements/communicative conduct
  + Made by AC
  + Tendered by Crown
  + Statement made to a person in authority (AC proves) (usually made to police, so this isn’t usually an issue unless they are undercover, etc
* Crown must prove BRD (this is unlike most evidence, it has to be BRD! Reason for higher threshold is due to danger of false confessions, also studies show that jurors feel that even if they are threatened by force people wouldn’t falsely confess)
* Must have voir dire unless AC waives (i.e. the AC agrees that the statement is voluntary)
* Must still exclude inadmissible/prejudicial evidence from admissible/voluntary statement
* Historically – voluntary confession rule was about reliability
  + protect against police coercion to extract unreliable statements
  + Avoid false confessions
  + Admitted involuntary but corroborated statements (i.e. if the police beat them up and then they got reliable confession backed up by other evidence)
* **Modern – reliability + fairness**
  + **Even if can corroborate and prove reliable not fair to extract involuntary confessions**
* **S7 protections**
  + **Involuntary confession triggers 24(2) analysis for derivative evidence (evidence obtained as a result of hearing that confession)**
  + **But *Charter* doesn’t subsume common law rule – confessions rule is broader than *Charter***
  + **Voluntariness in general is from the common law and goes back to the 1700s, predates charter**
* **Exceptions to the voluntary confessions rule** 
  + Actus reus – voluntariness rule (and ss. 9/10 *Charter*) don’t apply when statement is actus reus (e.g. uttering threat, refusal for breath demand) (once you start committing offenses with your words!, Crown just have to prove that the words were spoken not the voluntariness of them)
  + Using statement in *Charter* application
    - *Charter* app not about guilt but about rights breach – all facts known to state actor at time are relevant
    - Could lead to absurd situations – police have to assess voluntariness to determine if they can use statements for grounds, etc.
    - Whether the charter was breached is a separate issue from whether or not the accused is guilty

**Persons in Authority**

* Voluntariness rule ONLY applies if statement made to person in authority
  + Based on fear of reprisal or hope of leniency from person in authority,
* **Two-part subjective-objective test – onus on AC**
  + **AC believes s/he is speaking to a person who could influence/control the proceedings against the AC**
  + **AC’s perception is reasonable in context**
* Police/prison guard automatically PIA
* No other automatic categories – case by case assessment
* Other ones that come up rather regularly: statements to employers, parents, etc these are up for debate
* If the accused belief isn’t reasonable then they aren’t very likely to pass the test

**Sufficient Record**

* **Record must prove:**
  + **Statement was made**
  + **Circumstances around statement/treatment of AC**
* Including police-AC interactions prior to statement
* Best practice – audio/visual
  + Not always possible – AC might make a statement “in the field” where video/audio recording not available or spontaneous statement when no interview underway
  + Rule still applies that police must prove a reliable record – can be met with proper note-taking and reliable testimony
  + But for example if the accused

***R v Oickle*- Voluntariness test threshold is high!**

* 1      This appeal requires this Court to rule on the common law limits on police interrogation. Specifically, we are asked to decide whether the police improperly induced the respondent's confessions through threats or promises, an atmosphere of oppression, or any other tactics that could raise a reasonable doubt as to the voluntariness of his confessions. I conclude that they did not. The trial judge's determination that the confessions at stake in this appeal were voluntarily given should not have been disturbed on appeal, and accordingly the appeal should be allowed.
* 2      In this case, the police conducted a proper interrogation. Their questioning, while persistent and often accusatorial, was never hostile, aggressive, or intimidating. They repeatedly offered the accused food and drink. They allowed him to use the bathroom upon request. Before his first confession and subsequent arrest, they repeatedly told him that he could leave at any time. In this context, the alleged inducements offered by the police do not raise a reasonable doubt as to the confessions' voluntariness. Nor do I find any fault with the role played by the polygraph test in this case. While the police admittedly exaggerated the reliability of such devices, the tactic of inflating the reliability of incriminating evidence is a common, and generally unobjectionable one. Whether standing alone, or in combination with the other mild inducements used in this appeal, it does not render the confessions involuntary.

**Voluntariness factors**

* Threats or promises
  + Not just *quid pro quo* – focus is on effect of threat/promise not just that one was made, was AC’s will overborne?
  + Strongest – re charging/sentences/release
  + Middle – counselling, “better for you”,assess overborne will
  + Lowest – moral/spiritual inducements – generally not invol
* Atmosphere of Oppression
  + Conditions of custody/interview (food/water/sleep/etc)
* Police trickery – misleading evidence/polygraph
* Operating mind
  + AC understanding – mental capacity, intoxication, etc.
  + Are they on alcohol or drugs?
* The police are allowed to exaggerate to some extent and suggest things that may NOT be but it’s a gray area
* Another example: if you know the AC has been up for 24 hours and then you arrest them, and interrogate them that confession is likely not voluntary bc sleep deprivation and that’s just cruel
* Suggesting fully untrue evidence is generally not okay
* Factors can work together, things that would seem not that much of a threat or promise may be more likely to overwhelm the will of someone with lower mental capacity

**Police trickery**

* Part of voluntariness and separate consideration
* **Exclude if police tactics are “dirty” and “shock the community” – rare**
* Pushing the limits and exaggerating evidence isn’t likely to get something excluded, but if they are legitimately making up evidence and lying, especially to a vulnerable person, that will be an issue

**Police Caution and right to silence**

* Failure to read the caution (right to remain silent, anything you say can be used against you) is a factor for voluntariness
  + Should give caution if RPG that interviewee committed a crime
* Number of times police try to get AC to speak / number of times AC asserts right to silence is also a factor
* Giving the caution helps determine voluntariness, so even if someone comes in for an interview voluntarily giving the caution helps the voluntariness element
* Difference between US and Canada: in the US once you assert your right to remain silence (verbally!!!), the police need to leave you alone, in Canada you can assert it over and over and still sit in a long interrogation
* If you refuse for hours on end and the police still bother you, make you sit there, it could potentially be involuntary because it gets to a harassment level (but if they are giving the AC bathroom, food breaks, etc this might not be true)

**Derived Confessions Rule**

* Involuntary statements can taint later statements and have them excluded as well – not automatic
* **Factors**
  + Time between statements (if closer timing then the taint is more likely)
  + New evidence discovered between statements
  + Same/different police officers present (if the same person is doing the second interview or getting the second statement its much more likely to be involuntary)
  + Similarities/differences of circumstances
  + Distinguishing for AC that this is new/old statement not usable (reiterating that this is a new interview, tell AC earlier statement was involuntary and clean slate that may be helpful)
* Often happens in the same arrest process, patrol will get an initial statement, and then the investigation cop doing an interview’s statement is tainted

**Mr. Big Confessions**

* *R v Hart* – new regime for admissibility
* **Presumptively inadmissible – two-prong test**
  + **Probative > prejudicial – burden on Crown (Probative – reliability of confession, Prejudicial – bad character from scenario)**
  + **Whether police conduct was abuse of process – burden on AC**
    - Inducements ok, but not obtaining confession by physical violence/threats
    - Issues w/ using mental health, addictions (i.e. suppling someone w/ drugs who is addicted), youth (18-19), etc.
* Befriending the accused can be an inducement in of itself if they have no friends and no social network
* b/c the accused doesnt know these people are police officers the “person in authority” factor doesn’t apply
* Once the crown has proven probative > prejudicial 🡪 onus flips to accused to show police conduct was abuse of process?

**Specified Groups 🡪 recommendations for dealing with specific groups**

* Youth
  + Extra protections in addition to adult rules
  + S. 146 *YCJA* – codifies voluntariness rule
* Indigenous people (RULES FOR AUSTRALIA, but helpful for us)
  + Australia has special rules – Anunga Rules
  + We don’t have special ruels but these could be persuasive
  + 1.     An interpreter should be present to insure complete and mutual understanding.
  + 2.     Where practicable, “a prisoner’s friend” should be present during interrogation. The prisoner’s friend should be someone in whom the prisoner will have confidence, by whom he will feel supported.
  + 3.     Care should be taken in administrating the caution; and after the interrogating police officer has explained the caution in simple terms, he should ask the prisoner to tell him, phrase by phrase what is meant by the caution.
  + 4.     Care should be taken in formulating questions so that, so far as possible, the answer which is wanted or expected is not suggested in any way.
  + 5.     Even when an apparently frank and free confession has been obtained, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources.
  + 6.     The prisoner, if being interrogated at meal time, should be offered a meal and where facilities so permit, should always be offered tea or coffee. If there are no facilities he should always be offered a drink of water. Further the prisoner should always be asked if he wishes to use the lavatory.
  + 7.     No interrogation should take place while the prisoner is disabled by illness, drunkenness or tiredness. Further, interrogation should not continue for an unreasonably long time.
  + 8.     If sought, reasonable steps should be taken to obtain legal assistance for the prisoner.
  + 9.     If it is necessary to remove the prisoner’s clothing for forensic examination, steps must be taken to supply substitute clothing.
* The guidelines are not absolute rules but the consequences of their non-observance may be the exclusion of the statement of an accused. I see no good reason for making a distinction between an accused and a witness in the type of situation we have here. Justice Cawsey cites, I suggest, the *Anunga Rules* with approval and notes that they are now applied almost universally in Australia and have been included in Australian police training manuals. Justice Cawsey notes the sensitivity of the judiciary to these issues but points out a further understanding of Aboriginal culture is required for the following reasons:
  + **a.**     A standard caution administered to an aboriginal person may have little or no meaning.
  + **b.**     Some aboriginal people are deferential to people in authority and may therefore, answer any questions posed to them by police officers.
  + **c.**     Aboriginal people will, at times respond by giving an answer they believe the police officer wishes to hear.
  + **d.**     Although aboriginal persons may appear to understand and speak English well, they may not understand the concepts used or they may translate them into equivalent aboriginal concepts.
  + **e.**     Non-aboriginal concepts of time, space, and distance may not be the same as the concepts held by an aboriginal person.
  + **f.**     When an aboriginal person is questioned about an event, all facts may not be brought out, especially if telling the whole story requires that the aboriginal person criticize directly someone present, or if the telling of the story would result in overt expressions of emotion.

### General notes

* Reid Technique🡪 not generally used anymore, super dated
* Expert evidence🡪 false confessions Generally not permissible to call expert evidence on false confessions – violates general rule of not calling W1 to testify to credibility of W2
* If Crown tenders AC’s statement, must put in both inculpatory AND exculpatory parts, all for POTOC
* Jury warning may be necessary even if statement not to person in authority, if voluntariness risk factors
* Conflict evidence from AC may require instruction

## Prior consistent statements

* Generally excluded
  + No probative value
  + Self-serving
  + Hearsay
* Just because you repeated a statement a bunch of times doesn’t make it true, is generally a waste of time
* Rule against oath helping
* Typically not relevant that W said the same thing
  + Repeating it multiple times doesn’t make it true
* Probative value generally low
* Wastes trial time to prove W said the same thing
* Initial fabrication

### Principled approach

* Modern tendency of evidentiary rules to back away from categories and adopt principled approach
* Balance probative vs prejudicial
  + What is the use of the statement
  + What is the value of the statement
  + Not just “goes to credibility” – how, exactly?
  + If for POTOC must still meet hearsay rules
  + If not POTOC – look for purpose
    - must be relevant/material
    - Probative > prejudicial

### Exceptions

* Prior consistent statements may have legit purpose
  + Rebut allegation of recent fabrication
  + if prior statement made before motive to fabricate
  + Recent just means after motive to fabricate
  + Bolsters credibility/negates motive to fabricate
* Prior identification (e.g. photo lineup)
  + Doing this in court is not that valuable, bc pointing out who the accused is in court is not that difficult, not that many other people there
  + Photo lineups generally has more value as evidence, there are lots of rules and regulations that make it so that they aren’t biased (i.e. police officer doesn’t know who the suspect is)
* Recent complaint (generally usurped by 275)
  + Different from fabrication no specific intervening event
* Statements, reaction, conduct of AC (i.e to being arrested, etc)
* *Res gestae* – more of a hearsay rule (describing something as its happening, like a 9/11 call)
* Narrative (put in so that your evidence makes sense, i.e.the background behind the story)
* Example: allegations of domestic violence after breaking up, it will need to rebut the allegation of recent fabrication

**Limiting Instructions to the Jury**

* Explaining to TOF how they can(not) use Prior consistent statements
  + Tell TOF consistency is not necessarily the same as accuracy/reliability
  + Most likely to be fatal when trial hinges on credibility
  + Less likely fatal if
    - Elicited by defence (the evidence)
    - Clear not for POTOC
  + Facts of case show no harm (no concerns re self-corroboration, no substantial wrong, can still properly assess reliability, other instructions are sufficient)
* Not for POTOC
  + Except – hearsay exception also proven
* Not for self-corroboration
  + Except – rebutting recent fabrication

## Principle against self incrimination (This is into charter, not voluntariness)

* common law confessions rule
* S. 7 – principle of fundamental justice
* **S. 11(c) - Any person charged with an offence has the right… (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;**
* S. 13 - A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.
* S.13 is much broader than s. 11, remember s.11 only for the accused

**Purpose?**

* To protect against unreliable confessions and abuses of state power
* But can be balanced against enforcement concerns

## Testimonial compulsion

* Crown can’t call AC, one AC can’t call other Co-AC
* S. 11(c) doesn’t apply to corporate Acs
* Only protects prosecutions with true penal consequences – typically not administrative charges (remember the charter isn’t meant to protect property rights)
* S. 4(6) *CEA* – can’t suggest that TOF should infer guilty from not testifying
  + Only in 1997 – *R v Noble* – did SCC can’t infer guilt from silence at trial
* Can use silence at trial in specific ways:
  + When case already proven BRD, to infer no other explanation
  + To diminish weight of alibi evidence called by defence
  + On appeal to assess whether a new trial is required

**S. 13 and use immunity**

* Can compel AC to testify in other matters – civil, regulatory, other criminal trials
  + Issue is use of statement in AC’s criminal trial
* S. 5 *CEA* – must answer questions , can’t use answers to incriminate AC, IF at the time of the initial proceedings:
  + Statements were known to be incriminating, AND
  + Witness expressly claimed the statutory protection
* S. 5 requirements are moot now because of s. 13 which doesn’t have those strict requirements
* Doesn’t protect perjury or giving contradictory evidence (i.e. when testimony is the *actus reus*)
* can’t cross-ex witness on knowledge of the rule (i.e. are you skirting the evidence bc you know about the rule)

**Current Rule**

* *R v Henry*
  + AC must testify at this trial
    - None admissible if AC doesn’t testify
  + AC’s previous testimony must have been compelled
    - Testimony of non-AC can’t be used (compelled)
    - **Testimony of AC at prior trial/hearing CAN be used – AC was not compelled, voluntarily testified in his own matter**
    - E.g. prior trial testimony at re-trial, bail hearing statements, etc.
* *R v Nedelcu*
  + s. 13 only applies to “incriminating” testimony – i.e. could be used to prove guilt
    - if “incriminating” Crown can’t use at all
    - **If not incriminating, can use for cross-ex re credibility**
    - Disbelief of AC’s version is not positive proof for the Crown

**S.7 and derivative use immunity**

* *CEA* and s. 13 don’t give transactional use or derivative use immunity (i.e. if police goes and gets evidence from compelled testimony)
* R v S(RJ) – s. 7 gives compellable witnesses derivative use immunity for “evidence which could not have been obtained, or the significance of which could not have been appreciated but for [their testimony]. (emphasis added). ‘
* AC must show plausible connection between testimony and evidence then burden flips to Crown to show would’ve discovered anyway
* Doesn’t give transactional immunity – can still be prosecuted for that offence with other evidence, you were compelled to testify at Accused B’s trial for murder and you’re accused A, you could still be prosecuted for that murder under other evidence that isn’t your testimony
* Purpose is: To protect truth-seeking by removing incentive to lie

Constitutional exemption from testifying

* S. 7 – narrow possibility to “plead the fifth”
* *S(RJ)* (SCC 1995) – opened up possibility for s. 7 violation based on compelled testimony in rare/ltd circs
* *BCSC v Branch* (SCC 1995) – may not compel W if:
  + Predominant purpose is to obtain incriminating evidence, rather than a legitimate public purpose, AND
  + Compulsion would cause prejudice beyond possible derivative use
* *Bagri* (SCC 2004) – witness may refuse to testify “where proceedings are undertaken or predominantly used to obtain evidence for the prosecution of the witness”
  + No reference to prejudice requirement
  + Now likely either 1 or 2 from *Branch*
* Timing of remedy
  + Extreme example – subpoena quashing (example of self rep calling a dog handler to say that stab wounds were a dog bite)
  + More likely – trial stage

## Non-testimonial compulsion

**Linguistic Evidence**

* Non-testimonial statements/documentary records
* S. 7 protects some self-incriminating communications/statements that were created because of state compulsion
  + But doesn’t protect evidence created before/independent of compulsion
  + Doesn’t always violate s. 7 – balance regulatory / crim interests
* *R v Fitzpatrick* – use of reports about fish catching mandated by legislation didn’t violate s. 7
* *R v White –* use of driver’s accident statement compelled by legislation did violate s. 7 (i.e. you have to make a statement after an accident, this cant be used against people)c
* Factors
  + Adversarial relationship at time statement was made
  + Pre-dominant purpose of legislative requirement for statement
  + Voluntary participation in regulated industry/activity
  + Incentive to falsify records existing with or without use immunity
  + Emotional/psychological pressure to divulge intimate information
  + Impact of potential use of statement in criminal prosecution on truthfulness
* Investigators need to clearly delineate criminal vs regulatory investigations

**Non-linguistic evidence**

* Pre-*Charter* no success in non-linguistic compulsion
* Post-*Charter* s. 7 could be used re non-linguistic evidence, but not much impact
* Non-linguistic evidence
  + Breath/BAC samples – allowed compulsion
  + Fingerprint/photo identification – allowed compulsion (these are authorized by statute)
  + *Stillman* – can’t take bodily samples/impressions without statutory authorization or consent, But based on bodily integrity not s. 7
* *B(SA)* – DNA warrants upheld as constitutional
  + Important, reliable, modest intrusion, warrant on RPG req’d

## Right to silence at the investigative stage

***R v Hebert and subsequent rules***

* *R v Hebert* – first delineation of scope of right to remain silent during police investigation
  + Even if not a “person in authority” because Under Cover – s. 7 “right to silence” is violated if Under cover officer actively elicits statements from detainees (i.e. fake cell mate, hey so did you do it what are you in for etc?)
  + If “person in authority” – subsumed in confession rule
  + Only applies during detention – not to Undercover tricks before or after, e.g. “Mr Big” doesn’t violate s. 7 (common law instead)
  + Person eliciting must be a state agent (even if not “person in authority”) - would the exchange between the AC and the informer have taken place, in the same form and manner, but for the intervention of the state or its agents?
* Only applies if statement actively elicited, not passively observed
* Form of conversation – like interrogation? Initiated? Leading Qs?
* Relationship between agent and SU – exploiting vulnerabilities, obligations or trusts?

**Use of silence at trial**

* S. 7 generally prohibits inferring guilt from silence
  + Even if AC selectively disclosed incriminating information can’t draw inference from revealing some but not all
  + Doesn’t apply to defence Ws giving unexpected evidence that could’ve been disclosed earlier
* Exceptions
  + Introduced by defence
  + If Crown can show probative > prejudicial
  + E.g proves AC is lying, if AC says denied immediately on arrest but actually remained silent, etc., other inconsistencies w/ AC’s trial evidence
  + If inextricably bound up with narrative/other evidence can’t be easily extracted – but requires jury instruction
  + Silence to psychiatrists can diminish claims of mental issues – can’t infer guilt but just for assessing defence psych evidence
  + Defence cross of co-AC – but with limiting instruction
  + Alibi – TOF can draw adverse inference if no timely and adequate alibi notice from defence to Crown – fair opportunity to investigate alibi

## Accused statements right to counsel vs voluntariness

**Triggering factor**

* 10(b)/right to counsel 🡪 Upon arrest or detention, Doesn’t apply to police if the person is not arrested or detained, Detention includes psychological detention
* Voluntariness 🡪 Person in authority, Automatically for police, doesn’t apply to people who are not in a position of authority
* 10b right to counsel path🡪
  + Upon arrest or detention – Informational component – You have the right to speak to a lawyer, including a free lawyer, do you want to speak to a lawyer? (paraphrase)
  + No 🡪 done
  + Yes 🡪 Implementational component – put them in the phone room with working phone, phone books/ipad
  + Diligent efforts by AC to contact a lawyer?
    - Yes – leaves phone room says done/satisfied 🡪 Done
    - No – leaves phone room anyway 🡪 Done
    - Yes, but doesn’t talk to a lawyer
  + Want to keep trying?
    - Yes – back in phone room (repeat until done)
    - No – Waiver
      * Yes waive 🡪 Done
      * No, don’t waive 🡪 back in phone room (repeat until done)
* **PURPOSE**
  + 10(b)/right to counsel
    - Protecting/informing of other rights
    - Get advice re right against self-incrimination, whether to consent to samples/searches,etc
  + Voluntariness
    - Prevent false confessions
    - General principles of fairness, reputation of the administration of justice
* Don’t conflate the two! They are different concepts!!!!
* The friend couldn’t say, “ X told me the AC did XYZ” its more about the circumstances and timing of the disclosure
* See para 11 of the decision, crown says “don’t tell me the details of what they told you”
* What was happening at the time of the admission, what was their demeanour like,
* The surrounding circumstances may be admissible but the actual details of the admission of what the AC allegedly did is not!!!

# Character and similar fact

* **Exception to general rule prohibiting evidence of other bad acts**
  + Ensure AC only convicted because guilt of THIS offence proven BRD
  + avoid “rounding up the usual suspects” – rehabilitation
* **Probative value > prejudicial effect**
* ***R v Handy* – raised the bar on admissibility**
  + Proponent must show how evidence proves a fact in issue
  + Crown must show on BOP that probative value to a specific issue in trial > prejudicial effect
* **Probative value**
  + **What is the issue in question?** 
    - How do(es) the similar act(s) (dis)prove it?
    - Proving ID vs rebutting innocent association?
  + **Evidence of collusion/tainting in similar acts**
  + **Similarities/differences**
    - Temporal proximity (are they close together in time? Are they really far apart?)
    - Extent of similar details (committed the same GENERAL offence? Or the same exact offence against the same plaintiff?)
    - Number of occurrences
    - Surrounding circumstances (i.e. was it an accident? Is that plausible?)
    - Distinctive features unifying the events (this accused is the only person who commits crimes this way, its pretty obvious it is this person)
    - Intervening events
  + **Evidentiary strength 🡪** Easily provable or devolving into mini trials? (10 diff trials on 10 diff incidents?)

**Prejudicial effect**

* **Moral prejudice – convict b/c AC is a bad person**
* **Reasoning prejudice – too much weight by TOF, convicts of this offence b/c guilty of other bad conduct**
* **Must consider in entire circumstances**
  + Graphic, repugnant similar fact more prejudicial
  + i.e. like a similar act of violence but the similar act was much more violent and awful, that would be very prejudicial, people will want to convict based on that

**Your reasoning path**

* **General reasoning**
  + AC’s prior acts, conduct, records, or possessions show a *specific* propensity to act in a manner probative of the issue in question, AND
  + This *specific* propensity manifested itself in the charge or fact in issue in this case
* **Improbability of coincidence (i.e. it is very unlikely that 10 people would accuse you of SA (butt-grabbing) and it would be an accident)**
* **Specific vs general propensity reasoning**
  + If its very specific and repeated over and over then it will have more probative value, but if it’s a violent offence and they are just generally “a violent person” that is much less probative
  + Patterns and specificity are more probative (bear spray shopper example)

**R v Handy**

* **Principled approach – test for admissibility**
  + Does the evidence satisfy the threshold issues?
  + What is the probative value of the evidence?
  + What is the prejudicial effect of the evidence?
  + Does the probative value of the evidence exceed its prejudicial effect?

**Threshold issues**

* **Three threshold issues to assess before prob vs prej**
  + Is the evidence discreditable to the AC?
    - Tends to show other offence or behavior a RP would view with disapproval
  + Is the evidence caught by the exclusionary rule?
    - Doesn’t capture all discreditable conduct
    - **If tendered for another purpose e.g. narrative, context, relationship of parties (other exception to bad character), if it is already admissible for some other reason you don’t need to get into similar fact**
    - Not habit or physical state
    - Not where no likelihood that evidence would engage impermissible propensity reasoning (e.g. motive, post-offence conduct, linked to the offence itself, not other bad acts)
  + Is the evidence linked to the AC?
    - Can be direct or circumstantial
    - No link to AC – irrelevant and inadmissible

**Probative value of the Evidence**

* **Must assess probative value in relation to a material issue at trial – derives relevance and probative value re issue**
* **Doesn’t relate to issue at trial – inadmissible**
  + If issue admitted by AC – inadmissible
  + Must be live not theoretical issue (can’t theorize defences)
* **Issues – elements of offence, disputed elements, defences raised, conduct of defence/cross**
  + Extent to which evidence is capable of establishing the issue in question
  + Identity, actus reus, mens rea, knowledge
    - Or multiple purposes – but must decide predominate issues to properly balance prob vs prej
* **TJ may need to wait until later in the trial to understand the full scope of the evidence/issues**
  + Often difficult to know how probative this evidence is going to be, how relevant at all until you hear everything

**Prove Mens Rea or Rebut a Defence**

* **Similar fact to rebut “innocent association”**
* **Proving knowledge, disproving accident**
  + E.g. knowledge goods were stolen,
  + E.g. prove acts were done to further broader criminal purpose, scheme, conspiracy, etc.
  + E.g. rebut “accident” in sexual assaults, or other violent offences (if theyre trying to plead “oh it was just an accident” you can use other incidents to show it wasn’t an accident and they often do **this)**

**To prove the actus reus, the conduct occurred**

* Prove the conduct occurred, (i.e. SA, A)
* Much harder to prove that 10 people are all lying about something you did to them

**Support Credibility**

* **Can’t use credibility at large as issue**
* **Requires an accurate and precisely defined issue**
* **Not unfairly discount credibility of child/youth sexual assault victims**
  + Multiple children making the same allegation (without collusion) can rebut the adult AC’s denial
  + But really going to mens rea/actus reus proof rather than just credibility – better way to frame evidence

### Identity

* **Same principles/factors – but applied more rigorously**
* ***Arp* – extremely formalized analysis – striking similarity**
  + Improbability of coincidence still main concept (the likelihood of someone else doing this crime is so low we find BRD that you are guilty)
  + Still leading case on similar fact to prove ID
* ***Handy* – cogency increases with specificity of similarities**
  + But away from “striking similarity” verbiage – but subsequent cases returned to it
* **Similarity of acts factor is most relevant to probative value**
  + *Arp* – higher degree of similarity required when using similar fact to prove ID than actus reus/mens rea
    - ID – striking similarity required
    - Other – don’t need similarities to be striking, can be probative based on improbability of coincidence
* **Question – is the objective improbability that AC’s involved in the alleged acts the product of coincidence?**
* **Generic vs specific similarities – must assess similarities based on the issues of the case**
  + All sexual assaults on children involve sexual assaults on children
    - But if all children ID the AC, could be relevant to actus reus/mens rea on more generic similarities
    - Multiple children with the same allegation

**Inquiries for identity**

* ***Arp* – two preliminary inquiries for similar fact to prove ID**
  + Did the same person likely commit the acts?
    - Improbability of coincidence
    - Doesn’t require “trademark”/”signature” – focus on cumulative effect of similarities and if individual evidence shows a “signature”
    - Considers likelihood of acts by same person, not links to AC
    - But can be hard to separate/differentiate
  + Is there evidence linking the AC to the similar acts?
    - Link between AC and acts is precondition to admissibility
    - But threshold isn’t high – TJ doesn’t have to decide likely AC
    - Not mere opportunity
* **Not clear how much circumstantial evidence linking AC to the offence can help bolster similar fact’s admissibility to prove ID when acts are not “strikingly similar”.**

**R v Trochym**

* **AC on trial for gf’s muder**
* **Evidence showed that likely murderer was banging on victim’s door late at night**
* **“similar fact” evidence that AC once banged on an ex-gf’s door after she broke up with him**
* **NOT similar enough – banging on a door is not distinctive in any way or linked to this AC**
* One time banging on an ex girlfriends door is not enough, not similar enough if it is something literally anyone could be doing and is a semi-common action
* Not similar enough to suggest that other people would be less likely to be the perp

**Temporal Proximity**

* **Temporal connection may be the factor that defies coincidence or innocent explanation**
* **Stealing murder weapon gun the day before the murder**
* **Long time delay – less relevant**
  + People can logically change and mature over time
  + But depends on the facts and the issue in question
  + Example of SA, someone saying they SA’d in junior high school, but not they are accused in their 50s-60s
  + However a delay may not break the chain of logic if its in similar circumstances (doctor example, SAing a child 10 years prior in the same position)

**Number of Occurrences**

* Probative value can increase with number
* But dissimilarities might increase with number too (i.e. you have 10 but 6 are actually not that similar)
* No requirement of X number, can be one, usually more

**Surrounding circumstances**

* **Surrounding circumstances might give more relevant similarities than the conduct of the offence**
  + E.g. sexual assault by teacher against multiple students – similarity came from exploitation of student-teacher relationship, pattern of grooming
  + E.g. less probative value when act in totally different circumstances, e.g. sexual assault in long-term marriage vs one-night stand casual meeting

**Distinctive unifying features**

* **Not door banging (not distinct or unifying)**
* ***Wood* – “The uniqueness argument is that nobody else kills like this”, very distinct, unique, different way of committing a offence**
* **Distinctive MO – unifies incidents and gives probative value**
  + I.e. a serial killer who always does things a certain to the body or picks certain victims or whatever
  + Or the bear spray shopper
  + Is there something distinctive about it and how and is that enough?

**Intervening Events**

* **Intervening event between other bad act and charged offence can show AC no longer has specific propensity**
  + Physical change or incapacity
  + Lose nexus between prior misconduct and charge
* **Passage of time without event should be considered under proximity**

**Evidentiary Strength**

* **Collusion – crucial factor**
  + Evidence stronger if can disprove collusion (e.g. Ws never met prior to disclosures, didn’t all chat about it before and plan this)
  + Can be deliberate or accidental/unconscious
  + TJ gatekeeper role particularly for collusion
    - ACTUAL Collusion destroys improbability of coincidence
    - Not just opportunity for collusion – goes to weight
* **Threshold credibility**
  + Can’t use similar fact evidence to bootstrap its own credibility (i.e. bc this is similar to the facts of this case it should be admissible)
* **Proof of prior conviction (Easiest way to prove similar fact)**
  + Guilty plea – strongest
  + Found as fact in other proceedings that they did this– strong
  + Outstanding/yet unproven – may lower probative
* **Ability of defence to respond**
* **Dependent on testimonial credibility or less disputable records/possessions**

**Prejudicial Effect**

* ***Handy* – two types of prejudicial effects from similar fact**
  + Moral prejudice
    - Convict b/c AC is a bad person deserving punishment
    - Increases with repugnancy of other acts
    - Must assess relative to current allegations repugnance
    - i.e. multiple allegations of SA against children will have more prejudicial effect than multiple shoplifting charges bc of how shocking that is and how much they will want to put the person away
  + Reasoning prejudice
    - TOF improperly reasons to guilt – aroused emotions, distorted truth, distracting side issue
    - Increases with multitude of charges/witnesses
    - Less concerning when evidence from same CO
  + Prejudicial effect is not about them being more likely to convict, its that they are more likely to convict bc they just want to punish them and for the wrong reasons

**Balancing**

* Last step – balance identified probative value against prejudicial effect
  + **Starting from presumptive inadmissibility**
  + Crown must prove balance on BOP
* QBJA vs QBJJ
  + More risk for improper reasoning with jury
  + Less risk with a judge bc they publish their reasons/say them but juries don’t
* Qualitative not quantitative balance

**Similar acts of others**

* Defence can argue third party suspect and introduce evidence of similar facts of unknown third party
  + *Grant* – *Handy* test doesn’t apply to defence similar fact
  + *Seaboyer* governs admissibility for defence evidence
  + *i.e. there were three offences and maybe the AC was in jail for one of them and couldn’t have possibly done it*
* Different test for known third party suspects vs unknown third party suspects
  + Known third party suspects require defence to prove a connection between the third party and the offence before they can call any evidence that the third party did it
* Improbability of coincidence and air of reality
  + **Not just banging doors**

**Standard of proof**

* Don’t have to prove similar acts BRD before TOF can consider them unless it is the only evidence on essential element of the offence
  + Just a piece of circumstantial evidence
* Admissibility – proof on BOP

**Co-accused**

* No general prohibition against defence leading similar acts/other discreditable conduct of Co-AC
  + Co-ACs can show each others disposition for the crime
* TJ must balance rights of AC1 vs AC2 to fair trials
  + Ensure prejudicial effect doesn’t substantially outweigh probative value
* Limiting instructions are particularly important to ensure proper use of the evidence
  + Both for AC1 and against AC2
* Potential for unfair trial may require severance – but rare, value in having one trial for all Co-ACs

**Group Identification**

* **Similar fact to prove group/gang criminality and ID members**
* **Static gang – Crown must prove**
  + Membership never changed (no one is added or taken out)
  + Gang always remained intact
  + Gang never committed crimes unless all present
  + Accused was a member of the gang
  + Accused was present at relevant time
  + So if someone is accused of a crime but no evidence that they were actually there then all they need to prove is that there is a static gang and the gang was there and then it can be proven BRD they did the alleged crime
* **Rotating gang – Crown must prove**
  + Also prove additional link/connection to AC before similar fact admissible to show AC’s identity and participation
  + Options for proof
    - Show AC’s role sufficiently distinct that no other member of gang/person could have performed it (i.e. were they the leader?)
    - Independent evidence linking AC to each crime
  + Irony – if crown could prove this, relevance of using similar fact goes away (just prove it with that straight evidence)

**Limiting instructions to the jury**

* ***Arp* – template instruction for similar fact to prove ID**
* **Explain both what the jury can and cannot do with the evidence**
  + That they don’t have to accept the evidence at all
  + Must still find AC guilty BRDof the offense charged
  + Positive instruction – what jury can do
    - Explain purpose for which evidence was admitted / how it can be used
    - I.e you can use the evidence of 9 other people saying the AC grabbed their butt to say hm this is a pattern
  + Negative instruction – what jury can’t do
    - Can’t jump from pattern to guilt (i.e. they are a bad person so guilt)
    - Must consider evidence on each count
    - Not guess at their possible COs evidence/existence

**Multiple Count Indictment**

* **Normal rule – can’t use evidence on one count to prove other counts, unless meet similar fact test**
  + If similar fact can be cross-admitted to prove the issue in question on more than one count, but nothing else
  + Possible that C1 could be used as similar fact for C2 but not vice versa, e.g. if issues with C2
* Requires careful limiting instructions about how TOF can and cannot use evidence
* Could result in a severance application (could also be AC’s being charged w multiple things) – AC’s burden on BOP to show required in interests of justice

**Procedural Requirements**

* **Crown must give fair notice to defence of similar fact theory, but may not need to make a similar fact application**
* **Timing of application depends on if conduct is multi-count charged or extrinsic**
  + Disputes on timing resolved by TJ
  + Extrinsic evidence necessarily requires a ruling

## Character evidence

**Character of the accused**

* Character of the AC Presumptively inadmissible – Crown can’t call evidence of AC’s character to show AC is the type of person to commit the offence
  + Many exceptions – competing interests
  + Exceptions primarily based around relevance to trial issues
* Admissibility must identify the issue in question
  + Directly relevant to an issue at trial (e.g. motive, knowledge, etc.)
  + Relevant to credibility
  + Disposition to engage in or refrain from certain conduct
* Balance probative vs prejudicial
* AC can put character into issue, “I am not the kind of person who would do that”– Crown can rebut with character evidence and pact convictions
  + If youre defense important to prep your client on

**Proving Character**

* Reputation – general reputation in community
  + Generally the only way to admit AC’s good character
* Opinion (lay or expert)
* Prove Specific acts

**Character vs. Habit**

* Character🡪 general disposition, global traits of a person, can be good or bad, i.e. flaky or reliable
* Habit🡪 routine and specific course of repeated conduct, doesn’t give rise to reasoning or moral prejudice, no element of discredit or moral disapproval

**Relevance**

* Can be relevant to
  + Matters in issue
  + W’s credibility
    - Prior good or bad acts make more/less worthy of belief
  + Assessing probability of conduct
    - More likely to repeat something done in the past
* Character is circumstantial (not direct) evidence – allows inferences about how a person might behave

**Example of fact in issue**

* Motive – AC was ripped off by CO in drug deal gone wrong, AC now has motive to kill CO, drug deal admissible to prove motive despite bad character of AC to be in drug deal
* Domestic violence murder – prior history of DV typically relevant as motive/intent/identity
* State of mind/actions of W – threats from AC etc explain delayed reporting
* Attempting to interfere w/ administration of justice – threats to suppress evidence, intimidating witnesses, W can explain changed story because AC threatened
* Opportunity, Means, Lifestyle – drug related offences, organized crime lifestyle, etc. but only where relevant to specific trial issue
* Drug subculture – motive, knowledge substance was a drug, etc. (i.e. cant just say they thought there was a block of baking soda on their counter)
* Allegation of inadequate police investigation – can rebut with evidence of why police focused on AC (e.g. related criminal behavior), why eliminated other suspects – need *voir dire* to balance probative vs prejudicial
* Narrative, context, background – e.g. co-ACs met and planned crime while in jail together, without bad character of being in jail it would be difficult or impossible for jury to understand, the context is necessary to explain the motive or the background

**AC Puts his/her character in issue**

* Opens up the Crown to call otherwise inadmissible bad character evidence
* **4 ways AC can put character in issue:** 
  + **3 re AC’s good character**
    - **Eliciting good character evidence from Crown Ws**
    - **AC testifying about specific acts of good character (i.e. I walk stray dogs and help orphans)**
    - **AC calling W to testify to AC’s reputation in community**
  + **1 re other people’s bad character**
    - **Conduct of the defence to lead otherwise inadmissible bad character evidence**

**Conduct of Defense**

* AC leads evidence of 3P propensity to commit the offence
  + Saying 3P more likely than me to do this
  + Crown can rebut showing AC same propensity
  + Can’t mislead jury – can’t think JUST 3P had propensity
  + Not just 3P suspect alone – have to rely on 3P propensity
* ***Scopelliti* Defence (self-defence)** 
  + AC leads evidence of victim’s violent propensity to show likely aggressor
  + Crown can sometimes rebut showing AC same propensity
    - Probative vs prejudicial
    - More likely if not ALL bad character of AC, but just rebutting aggressor
  + Not just self-defence – have to be leading evidence to say V was more likely to be the aggressor because of V’s bad character
* Incidental to cross-ex – AC discloses criminality while testifying

**Statutory Exceptions in the criminal code**

* *Criminal Code* s. 666 [yes really, the “devil” section]
  + If AC adduces evidence of good character, prosecution may prove AC’s convictions for any offences
  + Even if AC doesn’t testify
  + If AC testifies re good character, crown can cross-ex re specifics underlying any conviction

**Statutory Exceptions- CEA**

* *Canada Evidence Act*, s. 12
  + Any W can be questioned about conviction for any offence and record proven if denied
  + Only for assessing credibility
* AC – only nature of crime, substance of indictment, place of conviction, sentence imposed
* Other Ws – broader scope, can cross on underlying details
* *Corbett* – AC can apply to have all/part of criminal record excluded
  + Probative vs prejudicial
  + Factors
    - Nature of prior conviction – credibility?
    - Remote/near to current charges
    - Similarity to offence charged – avoid propensity reasoning
    - If exclusion would give TOF distorted picture given conduct of defence
    - Context of the case
    - Nature of attack on Crown Ws
* Note: for sex work offences, they count as prior sexual history and are not admissible under 276

**AC’s good character**

* AC can call evidence of AC’s good character
  + To support AC’s credibility (im the type of person you should believe bc I am very honest, not the type of person who would do this type of crime, etc)
  + To infer that AC isn’t the type of person to do this crime
* Rules
  + Other Ws – AC’s rep in community, NOT specific acts, personal opinions
  + AC can testify to specific acts of good character
  + AC can call expert evidence of improbability that AC committed offences
  + Crown can rebut
    - generally just general reputation unless similar fact or s. 666
    - If AC testifies – can cross re underlying facts of prior convictions an specific misconduct, may be allowed to prove specific acts to avoid distorted picture to TOF

**Putting Character in Issue**

* To be done overtly, given the consequences
* Not just defending specific offence, giving AC’s antecedents (e.g. employment, residence, marital status, etc)
* **General test:** 
  + **AC introduces evidence of relevant character trait unconnected to subject matter of the offence charged, and**
  + **Purpose is to support general inference that AC is unlikely to have done the offence or their credibility should be enhanced**
* OR – AC testifies “I’m not the kind of person who would do...”

**Methods of Proof**

* Other Ws – General Reputation ONLY
  + Literally proof by gossip, general opinion
  + W called to testify to AC’s general reputation in community being good or bad
  + Only possible continuing justification – trial economy
  + If we had people testifying on every specific good or bad thing that someone did it would take forever every time
* AC – testifying to specific acts of good character
* Expert Opinion – must follow expert rules
  + To prove one (or both) of two things
    - Perpetrator had distinctive character trait that AC lacks OR (i.e. someone who has erectile dysfunction who allegedly SA’d someone with penetration)
    - AC’s character renders AC unlikely to engage in alleged conduct given nature/circumstances of the offence
  + Distinctive group issues with relevance

**Crown Rebuttal**

* Cross-ex of AC on specific bad acts, including facts underlying convictions
* Calling evidence of AC’s general reputation
* Similar fact
* Expert evidence of disposition
* Exceptional circs – calling evidence of AC’s bad acts
  + Avoid distorted picture
  + Must first put allegations to AC (*Browne v Dunn*)

**Character of others**

* Generally admissible – relevant and not excluded otherwise
  + If relevant, only excluded if prejudice substantially outweighs probative value
* AC can call evidence of bad character to attack W’s credibility
  + E.g. circumstances of convictions, outstanding charges, uncharged/other bad acts, etc.
  + NOT if W’s evidence accepted in other proceedings
* Reputation for veracity in community
* To establish relevant conduct – fact in issue in the case
* Violent disposition – evidence must support disposition claimed
  + Crown can rebut with evidence of peaceable disposition

**Co-accused**

* When one co-accused against the other 🡪Lower threshold than for Crown admissibility
* Must balance rights of each co-AC in the trial
* Propensity can be called by Co-AC as long as prejudicial effect doesn’t clearly outweigh probative value
  + Typically use limiting instructions for jury
* Co-AC can’t cross-ex other co-AC on acquittals bc you were found to be not guilty, uncharged, upstanding charges are all okay but finding not guilty is out of the scope bc they were found innocent
  + Can go after anything that isn’t an acquittal

**Limiting Instructions**

* TJ must instruct jury on proper uses of character evidence
  + Describe evidence in question
  + Explain how NOT to use the evidence
  + Explain how they can use the evidence
* Failure to give limiting instruction is error of law
* AC’s criminal record – must give limiting instruction re use
* Must instruct jury re both uses of good character
  + Probability of whether AC would’ve done offence(s)
  + Support credibility of AC if testifies
* Third party suspect evidence
* Co-AC bad character

**Non-crim example, bad character in family law evidence**

* Remember normal witnesses don’t have the same protections as the accused
* TJ did let the cross x happen and CA did say that was fine
* She was forced to admit she had previously sworn a false affidavit, and that is lying to the justice system
* Her prior lies to the justice system relevant to whether or not she was lying today, so valid
* She brought it up first so it Is admissible?

**(EXAMPLE) Severance Application- assessing similar fact and bad character**

* Would similar fact be met here? What is the bad character component and what are the prejudicial effects that could arise?
* What are we trying to prove here?
  + Might be relevant to know hes having sexual interactions with 13 year olds so he isn’t exactly worried too much about age (i.e. for the CO who was 12)
  + Pattern of sexual activity with young girls/younger girls
  + Significant differences here are difficult to overcome
  + If the AC had said: all of these people consented to having sex w/ me, similar defence
  + The dissimilarity (i.e. one he thought she was older, one said it never happened, etc) is powerful here
  + Lots of differences
  + Also possibility of collusion here is high bc the girls all know each other
  + Prejudicial effects are significant: he is a bad person who has sexual relations with young girls and assaults them, they aren’t going to look at convicting him on the facts
  + TJ did order them to all be severed into three separate trials

# Opinion Evidence

## Lay vs. expert

Lay opinion vs Expert opinion🡪 person qualified by general life experience is a lay opinion, ex: R v Graat [1982] 2 SCR 819, Expert opinion is a person qualified by specific training, education, and experience (R v Mohan, R v JLJ)

* On many things, lay opinions are irrelevant and thus not admissible
  + E.g. witness can’t say “I believe X is guilty” - witness testifies to what s/he saw, heard, etc.
* Given by witness without scientific/technical/etc training on the issue
  + But who was/is in a better position to assess the issue than the jury
* More weight if also gives at least some facts to support opinion
  + E.g. I believed he was drunk because he was stumbling around and smelled like alcohol.
* More weight if also gives background in assessing the topic
  + E.g. I believed he was drunk and I was a bartender for five years
  + E.g. I believe the person shown in the video was my sister because I recognize her face and I bought her the shirt she is wearing

## Lay person

### Person, Place, or thing

* Often used in photograph or video evidence
  + Can also be audio recordings – voice recognition
* Question – why is the witness in a better position to identify than the jury/TOF?
  + What is the witness’s prior knowledge of the person/place/thing?
    - E.g. identifying family members in a photograph or video
    - E.g. witness was present when photograph/video was taken
* Witness who doesn’t know AC will not be allowed to identify AC in photograph/video
  + Jury/TOF can look at AC and compare to photograph/video just as well as witness
* If youre going to do identification of the accused, you must be better positioned than the judge or jury (i.e. you know and recognize the person)

### Handwriting

* CEA s 8:
  + Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting those writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writing in dispute.
  + But dispute as to whether requires expert or lay – or even whether just TOF compares itself
    - BUT judge should caution TOF about handwriting comparisons without expert
    - i.e. if someone is just like yeah that is my friends handwriting, but for example if you saw you mom sign her signature every day under the common law its more flexible, see below
* Common law – opinion admissible based on familiarity

### Intoxication by alcohol or drug

* Lay witnesses can testify that someone they observed out of court was intoxicated, by alcohol
* Weight of opinion is greater if:
  + Witness describes particular experience with intoxicated people (i.e. I was a club bouncer, I was a server at a bar, etc)
  + Witness provides some facts which supported their opinion
* Historically lay witnesses could not testify about intoxication by illicit drugs
  + But can if they observed consumption or has prior experience with or observing the drug use
  + (I.e. I thought they were high on meth bc I have experience with people high on meth, or I saw them doing meth, or im a police officer and know various types of drug intoxication)

### Mental, physical, or emotional condition

* Lay witness can give opinion evidence about
  + His/her own mental/physical condition
  + Mental/physical condition of another person or animal
    - Outward appearance of excitement, fear, sadness, happiness, pain, etc
    - Factors to weight of opinion
      * Familiarity with the person/animal in question (i.e you know really well how people close to you respond to anger or tiredness etc)
      * Identifying facts underlying opinion (I thought they were angry bc they did X)
      * Familiarity with the condition (but ive seen a lot of people upset in my life and this person although I don’t know them well, looked upset)
* capacity to consent (i.e. a drunk person who wasn’t able to form sentences, couldn’t stand up, couldn’t focus their eyes, that person was not in a position to consent)
* Apparent age of another person (most people are reasonably okay at guessing how old people are)
* Condition of objects – old, new, worn, etc. (new vehicle, old vehicle etc)
* Speed, distance, size, weight, etc.

### Impermissible topics of lay opinion

* Credibility of another witness – generally not permissible
  + Rule against oath-helping
  + But – can call evidence of good character
* How another person might act in a certain scenario
  + But – can give evidence about habits

## Expert evidence

### Limitations

* Expert evidence is admissible to allow a person with special knowledge – expertise – draw an inference from the relevant facts and share that inference with the TOF
  + Allowed when the TOF is unlikely to properly understand the facts, or appreciate their significance, without the assistance of the expert
* Cannot usurp the function of the jury
  + Expert unnecessary if jury can properly draw own conclusion
  + Jury must know it isn’t bound by the expert’s opinion

### Trial judge as gatekeeper

* The trial judge must act as the gatekeeper of expert evidence
  + Ensure only proper expert evidence is heard by the TOF
  + Minimize the inherent dangers in expert evidence
* Historic Questions (paraphrased)
  + Is expert opinion necessary to assist the TOF in properly deciding the issue?
  + Is the witness offering the opinion qualified to be an expert?

### Dangers of expert evidence

* Devolve to trial by expert, not by judge and jury
  + Prevent jury from being overwhelmed by the expert
  + TOF must make their own judgment – not just blind faith on expert
  + Hard when cross-ex is by counsel – typically not an expert in the field (hire your own expert!)
* Expert relying on non-proven, thus non-cross-examinable evidence
* Risk of admitting “junk science”
* Contest of experts distracts TOF from actual issues
* Inordinate expenditure of time and money

### Tests for expert admissability

* Must be **established science**-🡪 regularly in court, proven as “good science”, i.e. DNA, fingerprints,
  + Mohan test!!
* **Novel science**🡪 never or rarely before used in court, not proven yet in court (may be used for a long time outside of court), JLJ TEST, + MOHAN TEST after JLJ Is passed
* **R v Mohan**
  + Previously proven science
  + Two step process (two steps process clarified by ONCA in *R v Abbey* as adopted by the SCC in *White Burgess Langille Inman v Abbott and Haliburton Co [White Burgess]*)
    - **STEP 1: Threshold admissibility 🡪 four prongs** 
      * **Relevance** 
        + **Does the expert’s opinion tend to (dis)prove a fact in issue?**
        + **Prima facie admissible if so related to a fact in issue that it tends to establish it**
        + **BUT – must also consider cost-benefit analysis within relevance**
        + **Probative vs prejudicial**
        + **Prejudice typically- inordinate amount of time not commensurate with value or misleading in that its effect would be out of proportion to its reliability**
        + **Assist TOF or confuse/confound?**

**Overwhelm TOF with its “mystic infallibility”**

* + - * **Necessity in assisting the TOF**
        + **Can the TOF come to a proper conclusion on its own?**
        + **More than “helpful” but not strict “necessity”**
        + **“Opinion must be necessary in the sense that it provides information which is likely to be outside the experience and knowledge of the TOF”**

**“Necessary to enable to the TOF to appreciate the matters in issue due to their technical nature”**

**Ordinary people unlikely to form a correct opinion without expert assistance**

* + - * + **Avoid usurping the function of the TOF**
        + **No longer have a rule against expert evidence on the ultimate issue – but it is a factor to consider and apply the test strictly**
        + **Used to exclude expert opinion on credibility or oath-helping**
      * **Absence of exclusionary rule**
        + **Is the expert’s evidence inadmissible for another reason? i.e. Is it pure bad character evidence, etc?**
        + **Evidence to be given by expert must be otherwise admissible**
        + **E.g. not bad character of AC (without meeting exception)**
      * **Properly qualified expert**
        + **Even if the opinion would be admissible, is THIS person qualified to give it?**
        + **Witness proposed to be an expert must be shown to be qualified**
        + **Special or peculiar knowledge through study or experience**
      * **Novel science – extra steps here**
    - **STEP 2: Balancing – probative value vs prejudicial effect**
      * **Expert evidence that meets the four threshold requirements can be excluded if its probative value is outweighed by its prejudicial effect**
      * **TJ has residual discretion to exclude on cost-benefit analysis**
      * **“TJ must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence” (*White Burgess* quoting *Abbey* ONCA 2009)**

### EXpert’s duty to the court/tribunal

* Expert’s duty to the court is to provide independent assistance to the court in an objective unbiased opinion – fair, objective, and non-partisan
  + Duty over any duty owed to a party, overrides party’s interests
* 3 underlying concepts:
  + Impartial – objective assessment of the questions at hand
  + Independent – product of expert’s independent judgment, uninfluenced by who retained him/her or outcome of litigation
  + Unbiased – doesn’t unfairly favour one party’s position over another
* **Ultimate test – would the opinion changed based on which party retained the expert? If they were retained by the other side?**

### *White burgess* scc 2015

* Made impartiality/independence a threshold admissibility rule (vs just weight later)
* But just threshold (not ultimate) impartiality/independence – threshold Q – does lack of independence made expert incapable of giving an impartial opinion on the facts at hand?
  + Not just would a RP think the expert is not independent – still goes to weight
  + **If witness is unable to put their duty to assist the court above their obligation to the party calling them, they do not qualify to be an expert and are excluded**
* Once expert testifies that understands their duty to the court, onus is on opposing party to show realistic concern about expert being unable/unwilling to comply with that duty
  + If realistic concern is shown – burden flips back to party calling the expert to establish impartiality/independence on BOP
* **Places this analysis under the “qualified expert” prong of *Mohan*.**

### *R v j(j) r v (JLJ)* scc 2000 novel science test

* Novel scientific theory or technique – protect against “junk” science
* List of factors to consider in admissibility of novel science (not prerequisites)
  + Whether the theory or technique can be and has been tested
  + Whether the theory or technique has been subjected to peer review and publication
  + The known or potential rate of error or the existence of standards
  + Whether the theory or technique used has been generally accepted

## Procedural rules for expert evidence

### Notice

* Civil – Alberta Rules of Court – Part 5 Disclosure of Information, Division 2 Experts and Expert Reports
  + Set out rules for what must be included, sequence of parties’ reports, pre-trial questioning of expert, expert report admissibility, and when expert can be personally called (vs just report going in)
* Criminal – 657.3 CC
  + Notice at least 30 days before trial – name, description of area of expertise, and statement of qualifications
    - Crown must provide copy of expert report within a reasonable period before trial
    - AC must provide report no later than close of crown’s case
* Remedy for not meeting notice requirements – adjournment, order to provide materials required, or recalling witnesses re expert’s testimony

### Number of experts

* CEA – s 7 – no more than 5 experts per side without leave of the court
* Factors for leave to call more than 5 experts
  + Whether the other side objects
  + Number of expert subjects in issue
  + Number of experts proposed for each subject
  + How many experts are customarily called in cases with similar issues
  + Disadvantage to opposing party having fewer experts
  + Whether it is necessary to call more witnesses to adduce evidence on issues in dispute
  + How much duplication there is in the proposed opinions of different experts
  + If the time/cost of additional experts is disproportionate to the amount at stake in the trial

## Junk science?

Why do we care? Junk science leads to wrongful convictions!

**Example: Gary Dotson**

* First person exonerated by post-conviction DNA testing – 1989
* Convicted in 1979 of rape and spent 10 years in prison
* In 1988 victim recanted saying she fabricated allegations to conceal consensual intercourse with her boyfriend
* Trial forensic evidence misleading – indicated both semen in CO and Dotson had type “B” blood (only 11% of population had B)
  + BUT didn’t tell the jury that CO also had type B and that her fluids were mixed in the sample tested, so could’ve masked the blood type of the semen
  + Based on the testing at the time ANY male could’ve provided that semen

**Innocence Project Exoneration**

* Of those post-conviction DNA testing exonerated, 156 also had testimony based on forensic evidence (”expert” evidence) put in to convict them
  + Most were for ”rape” (sexual assault) (bc there is generally DNA in those types of cases)
* Analysis of 137 of those 156 cases (transcripts) – showed 60% had forensics later shown to be invalid
* Cases all tended to be rape or rape and murder – because there is data (DNA) to compare to later (e.g. “rape kit” can be tested for DNA)

**Types of subsequently invalidated evidence**

* Mostly cases – serological analysis (blood type) and microscopic hair comparison
* Also – invalid evidence re bite marks, footprint comparison, and fingerprint comparison
* Invalid evidence came from 72 forensic analysts across 52 different labs

**Types of Invalid Conclusion**

* Invalid science testimony occurred predominantly in two areas:
  + Misuse of population data (bad math)
  + Conclusions re probative value unsupported by data

**Biggest Error🡪 non-probative evidence presented as probative**

* Most common type of invalid testimony (48 cases)
* Analyst provided a statistic purporting to show that the AC was included in a subset of the population and another subset was excluded
* E.g. Dobson – type B blood for AC, type B identified, but ignored that CO also type B, tainted sample such that sample could’ve been anyone
  + Testing not sophisticated enough to discern between female and male parts of the sample, wouldn’t know if sufficient semen to identify male
  + Not really 11% of population, but full male population
    - Also only 11% for Caucasian population,
* Evidence wasn’t relevant – didn’t make a fact in issue more or less likely to be true

**Error: Exculpatory evidence discounted**

* Error in 23 cases
* E.g. Paul Kordonowy’s case – serological tests of victim’s underwear revealed Type A antigens, which neither AC nor CO possessed
  + Analyst told the jury to ignore that evidence
  + Analyst suggested (without evidence) that bacteria could’ve changed the reading and produced Type A antigens

**Error: inaccurate frequency or statistic present**

* 13 cases – frequency or statistic presented was erroneous
* E.g. Perry Mitchell – semen found Type O, Type O secretors compromise 35% of the population, serologist divided that in half (presumptively on the idea that half would be male and have semen?) and testified that only 17.5% of men could have contributed the semen
  + Actual math would say 17.5% of the population are (1) male and (2) type O, but 35% of the male population has type O
  + E.g. (population of 200 total, 35% of the population is 70 people out of 200, assuming equal distribution of males and females 35 of those 70 would be male and 35 female, when you divide the population into males and females again assuming equal distribution, you still get 35% of males being O (35/100) and 35% of females being O (35/100).

**Error: statistic provided without empirical support**

* 5 cases – statements made providing frequency or probability with no empirical support
* E.g. microscopic hair comparisons – no adequate empirical data exist at all re microscopic comparison of human hairs
  + Bromgard case – analyst testified that 1 in 10,000 chance that two hairs found at the crime scene could come from someone other than Bromgard – stat was simply made up, no evidence to back that up

**Error: non-numerical statements provided without empirical supports**

* 19 cases – non-numerical statements of probability given without empirical data
* E.g. microscopic hair comparison due to lack of empirical data would say things like “very probably” ”highly likely” , when the most that they could accurately say is “could have” or “is consistent with”

**Error: conclusion that the evidence came from the accused w/o evidence**

* 6 cases – analyst testified that the evidence came from the AC with no backing
* E.g. Ray Krone – analyst testified that the bite marks came from Krone’s teeth, two other cases where forensic odontologists (forensic dentists) also unequivocally stated that the AC made the bite marks
* Forensic disciplines involving impression evidence e.g. bite mark and shoe print comparison have not developed any objective criteria at all by which to judge assertions about the likelihood that evidence came from a particular defendant

**Invalid serology testimony**

* Pre-DNA serology (blood typing) was the most precise method for including or excluding individuals as the source of biological evidence at a crime scene (e.g. saliva, semen, vaginal fluid, blood)
* 137 wrongful conviction cases, 100 used serology, 57 invalidly
* ABO frequencies had well-established and scientifically valid databases, issues arose in how they were applied/results were communicated:
  + Ignoring masking and quantification – serology couldn’t do isolation/amplification like modern DNA techniques can, so amount of semen could be so small in a mixed sample that it wouldn’t be identified (e.g. semen in vagina would be overwhelmed by CO’s material)
  + In mixed stain where no ABO blood group different than victim should’ve given the result that no one could be excluded (since they only ID’d CO) – often didn’t explain this to jury
  + Instead analysts testified that perpetrator included within some smaller percentage

**Invalid Microscopic Hair Comparison Tesimony**

* 137 total examined, 65 had microscopic hair analysis, 25 of those had invalid evidence – most (18) invalid individualizing
* Forensic hair microscopy involves side-by-side comparison of head and public hairs found at scene with dozes of head and public hairs plucked from the AC/CO, examined under microscope
  + Examiners commonly distinguish between human/animal hair, and give opinions on the likely race of the donor, area of the body it came from, then testify that hairs are similar or dissimilar to sample
  + Hair is commonly found at crime scenes, and there are considerable variation in the microscopic characteristics of hair from different people – no single class characteristic is very unusual, but 20 representative hairs with a range of characteristics that are similar would be forensically significant
  + 1984 FBI handbook recognized that cannot give positive evidence, subjective and can lead to different opinions among equally qualified experts
  + Most examiners can say is hair is “consistent” with AC or ”could’ve” come from AC
* Errors
  + Invalid probability – giving stats (e.g. 1/1000 etc) when they don’t exist

**Invalid DNA testimony**

* 137 cases, 11 had DNA at trial, 3 were invalid, 1 had gross error in analysis, other 7 had DNA that excluded the AC but was convicted anyway
* E.g. Alejandro – analyst testified that he had done banding patterns that were identical to the AC, could’ve only come from him, w/ no random match criteria given – later showed he at best compared only a partial banding pattern and Alejandro was actually excluded

**Invalid Bite Mark Testimony**

* Forensic odontology involves two very different disciplines:
  + 1 – older – identification of deceased by matching well-preserved 3D set of teeth to dental records, often used to ID dead in mass disasters
  + 2 – more controversial – interpretation of lacerations, abrasions, and bruises on the skin, including decomposing skin,
    - Q – whether can tell the marks are from human bites or other postmortem artifact (skin is elastic and a poor medium for accurately registering bite marks)
    - Assumes every person’s dentition is unique – hasn’t been tested, no scientific studies support assumption that bite marks can demonstrate sufficient detail for positive identification
    - 6 cases with bite marks – 4 odontologists testified that they were certain AC left bite marks

# Collateral Fact Rule

## Collateral Fact Basics

* A fact or topic that doesn’t relate to the facts or elements that have to be proven in the case.
  + When you look at things you need to prove/disprove, if it's something not on that list, it's going to be a collateral fact.
* General rule – if you ask a W about a collateral fact, you are stuck with their answer
  + Can’t call other evidence to disprove
* Could you call evidence about this fact if W hadn’t given an answer you want to disprove?
  + Would it be relevant without W’s answer?
    - If no, then collateral
  + E.g. Character witnesses - someone committing theft but they were never convicted - you're stuck w/ their answer

### Reasons for the Rule

* Confusion/distraction
  + Instead of looking at the case itself on its merits, you risk confusing the jury which is no bueno in court
* Delay/undue consumption of time
  + Huge waste of time for something that doesn’t help prove/disprove a fact and it adds to the above in confusing the jury and makes it an even longer process than it should be
* Unfair surprise
  + No idea what random things you might be suggesting which wastes more time because the other side can call for time to rebut
* Other prejudice (e.g. rebuttal)
  + Opens up a whole can of worms that doesn't have anything to do w/ what you're trying to prove – can unjustly prejudice the jury
* Back to the overarching rule probative > prejudicial
  + Requires factual analysis of the case, that is, what is actually at issue and has to be proven
    - If it doesn't have to do w/ the facts of the case, it's likely not going to be ruled to be probative
  + TJ (trial judge) has significant discretion on whether something will be allowed in or not

### Collateral Fact Cross-Examination

* Can cross-examine on collateral facts – just risk being stuck with an answer you don’t like or believe is false, without being able to disprove it
  + Subject to TJ’s discretion to limit cross if irrelevant/”too” collateral (prejudicial > [substantially] probative)
  + If witness denies your suggestion to them and there's nothing on the record to prove that they're lying is the deterrent to using collateral facts – don’t use it unless you can prove/disprove what they’re saying on the evidentiary record
* Evidence proving W’s answer false that does relate to the facts/elements of the case can be called to rebut W’s answer (i.e. not collateral)
* Fact is collateral if the only issue it goes to is credibility and nothing else in the case
  + Regardless of how essential credibility is to that trial, it’s still a collateral fact if it can’t go towards anything else in the case. You have to think long and hard about whether you want to introduce collateral facts in because you can’t rebut what they say.
  + E.g. If calling evidence about a previous convicted case and dude is like yeah I stole (acts of dishonesty) then it's ok but if asking about something random (e.g. did you drive to work or take the bus) then you're wasting time
  + Has to go to the specific elements of the case; collateral facts really only go to the credibility but still can't going off proving every single issue b/c distraction + mini trials which is a waste of time & money and the judge won’t be too happy with you for trying to prove every little thing under the sun

### Examples

* ***R v Brown example in text*** – allowed to cross-ex on prior sexual contact b/c CO claimed to be a virgin at the time of this sexual assault and that this sexual assault was the only reason she knew how to explain sexual acts in such detail
  + Goes to the exact evidence of the case to disprove virginity and provide another explanation for knowledge
  + Went to the exact thing they're trying to disprove - you're claiming that your sole mechanism for knowledge was this act (the one that the accused is on trial for – the alleged sexual conduct is their first experience) so if you've had similar acts in the past and it can be proven, then that's not true and it goes to the AR

### Examples - 2

* CO has made prior reports of sexual assault by other people, no charges laid, D cross-examines CO on “false” accusations of others (claiming pattern of false accusations), CO denies falsity
  + D stuck with CO’s answers that CO didn’t previously falsely accuse anyone/her prior accusations were true
    - E.g. you have a pattern of falsely accusing people but if CO denies it, defence is stuck with the **answer. Only way to get around that is if prior allegations were proven to be false - not that police investigated and couldn't determine w/ enough evidence to charge vs. if complainant was charged w/ public mischief for making false statements or if complainant recanted their statement**
  + UNLESS CO’s prior allegations were actually PROVEN false, as opposed to just not charged (e.g. CO recanted in the police investigation of the other files)
    - This exception is essentially an unproven criminal charge if CO falsely reported and admitted that to police – unconvicted public mischief

### Exceptions

* Partiality/bias against a party
  + E.g. grudge, civil lawsuit
  + Has a motive to false accuse/lie about this person, have crim cases to bolster their civil suit (e.g. domestic violence to bolster the family law case)
* Proof of prior conviction (proving criminal record)
* Proof of Prior Inconsistent Statement
* General reputation for untruthfulness
* Medical Evidence of Mental Disorder
  + Affecting reliability of W’s evidence
  + Different than voir dire into competency to testify
  + Diff from saying incompetent to testify - there's some mental health reason that this is an unreliable witness
* Medical Evidence of Physical limitations
  + Affecting reliability of W’s evidence (e.g. sight, hearing, etc)
  + If asking witness oh don't you need glasses + you weren't wearing glass so you can call to show that's not true + ability to perceive wasn't as good as they're claiming. Ability to see is very relevant to weight given to identification
* Proven Pattern of False Allegations
* Rebutting good character evidence of AC

### **Main Purpose of the Rule**

* **Avoiding mini trials on other matters during this trial**
  + **Is all of the evidence being suggested admissible otherwise or are we starting a whole new trial in our current trial? Looking at whether this would be admissible otherwise would help you det if it's a collateral fact or not**

# Sexual Activity Evidence

### Historic Issues

* Protections put in place to combat historical bias against women
* Ss. 276, 277, 278.1-278.97 – admissibility of Co’s prior sexual history/reputation, and production of therapy records
  + “rape myth” provisions
  + Exclude discriminatory evidence
  + Encourage sexual assault reporting
    - Not likely to go to court if your past sexual history trotted out in front of everyone in court
  + Balance CO’s rights with AC’s
* Historically treated diff from when it did now - any sexual acts done by a women were bad char evidence showing that women shouldn't be believe b/c they're a slut or they consented before so they consent today. Even sexual contact btwn spouses was deemed to be bad character evidence for the woman. Basically, any time a woman was a complainant in sexual assault, they can be challenged (even encouraged by courts) and described as bad evidence that made them more likely to consent and less believable.

### Prior Sexual History s. 276

* Historical
  + Used to be “character” evidence
  + Was admissible to assess CO’s credibility and consent
    - i.e. prior sexual acts made CO more likely to lie and more likely to have consented
    - “twin myths”
      * **Twin myths: inference that prior sexual acts (consensual or not) was also seen as bad char to a woman. If previously assaulted, that can be brought in too.**
  + ***R v Seaboyer*** 
    - struck down first attempt as too limiting to FAAD
      * Didn't allow any time when the accused can call all prior history - some periods of time where evidence is relevance that isn't 'you consent to everyone' - does need to be a text for appropriate times for this to be admissible
    - Created common law rule until Parliament responded
      * Included prior sexual acts with AC
  + ***R v Darrach*** – upheld Parliament’s second attempt
* S.276
  + **Evidence of complainant’s sexual activity**
  + **276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, 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.**
    - **Explicitly going at the two twin myths … but talks about where admissibility is ok - not for twin myths but for something else**
  + **Conditions for admissibility**
  + (2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not 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 278.93 and 278.94, that the evidence
    - **(a) is not being adduced for the purpose of supporting an inference described in subsection (1);**
    - **(b) is relevant to an issue at trial; and**
    - **(c) is of specific instances of sexual activity; and**
      * **Can't just be a general sexual rep**
    - **(d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.**
      * **Hyping both elements of the prong - typically not substantially outweighed - bumping up the probative value, not just some but significant probative value**
  + **Factors that judge must consider**
  + (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;
      * How important is this to the defence? Peripheral or at the heart of the issue?
    - (b) society’s interest in encouraging the reporting of sexual assault offences;
      * How much are we going to deter ppl to report sexual offences if we allow this in? Trotting through this person's entire history vs. something relevant
    - (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
      * Just decision isn't helping person get acquittal but a just outcome - is the outcome going to be based on the truth instead of trying to push one way or another?
    - (d) the need to remove from the fact-finding process any discriminatory belief or bias;
      * Trying to protect against twin myths, discrim/biases against women in the common-law rules
    - (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
      * General type of prejudice - what are your facts + which way are they going? Might be the case that the fact of being involved in sex work is prior history if you have convictions of prostitution. But obviously a lot of prejudices in society re: sex work which may arouse prejudice in jury.
      * E.g. sexual conduct non-consensual and victim of numerous diff assaults from diff person or same person might arouse sympathy and need to punish someone for all the things this person suffered through
    - (f) the potential prejudice to the complainant’s personal dignity and right of privacy;
      * Gets into records component but also in what trial do you ever get your full history of something this private trotted out in front of whoever wants to come? Want to have respect to person's dignity + right not to have life laid out in front of everyone
      * Need to keep it as narrow as it needs to be if there's only two things relevant
    - (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
      * Recognizing all the biases in common-law where women weren't given equal protection; not the same to men, same type of logic wasn't being applied other than women being more vics of SA
    - (h) any other factor that the judge, provincial court judge or justice considers relevant.
      * We can't identify every single factor relevant in each case - just because not here from a-g, you have the jurisdiction for court to consider it as well
  + **Interpretation**
    - **(4) For the purpose of this section, sexual activity includes any communication made for a sexual purpose or whose content is of a sexual nature.**
      * **E.g. sexting**
* General Rules of 276
  + Sexual activity with AC or 3P
    - Unconditionally excluded if twin myths
  + Less credible or likely to have consented
  + Presumptively inadmissible if other inferences
  + Formal application/hearing – AC or Crown
    - Crown can’t waive
    - Judge decides whether admissible
  + **List of offences in 276(1) meant to be broad and inclusive – sexual offence connected to charged offence**
    - **If it's related to one of these charges, it's likely to be included**

### Application Rules - s. 278.93

* Included b/c the code is talking about everything b/c of the bias from the common law before - code does set up how to do a hearing - she's not really going to go through it
  + Jury + public excluded - defence can't have open hearing
  + C can't be held as a witness and use that to prove they can cross-ex accused
  + C can be in trial
* **Application for hearing — sections 276 and 278.92**
* 278.93 (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 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).
* **Form and content of application**
* (2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and 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) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and 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 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

### Hearing Rules - s.278.94

* **Hearing — jury and public excluded**
* 278.94 (1) The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under subsection 276(2) or 278.92(2).
* **Complainant not compellable**
* (2) The complainant is not a compellable witness at the hearing but may appear and make submissions.
* **Right to counsel**
* (3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.
* **Judge’s determination and reasons**
* (4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and
  + (a) if 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) or 278.92(3) that affected the determination; and
  + (c) if 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**
* (5) The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.
  + Judge has to have clear reasons of what's admissible + not and why (factors that affected the determination)
    - Have to show what it's used for - even strict rules for judges that they have to cover

### Purpose of "Rape Shield" legislation

* **Prevent discriminatory reasoning – “twin myths”**
  + **Discriminatory and distort trial process**
    - **Takes away from what happened on actual facts and goes to judging the person**
  + Remove evidence of any other discriminatory reasons that CO would be “more likely to consent”
* **Only admissible where specific instances of sexual activity are relevant to an issue at trial AND have significant probative value not substantially outweighed by prejudice – factors in 276(3)**
  + Heighted probative element
* Side note – Gladue vagina tissue ACTUAL facts
  + In Barton, biggest backlash against crown was putting the actual internal vaginal tissues. Deceased died to internal injury and crown is saying that injury was caused by knife vs. defence saying it was hand which makes a diff wrt intent and knowledge of likelihood to cause harm. Coroner still had tissue when they did examination itself, brought it to trial and showed jury, crown given significant backlash by saying disrespect to vic by bringing them to court.

### Application Required

* Application required whether evidence is to come from anyone – including AC
  + Or in any context – includes marital/relationship
  + Has to be made, can't be waived by crown. If both sides are ok w/ putting something in, it's fine. But here, formal application req'd
    - **Crown =/= c's lawyer - needs to be a separate person repping rights of the person**
* Obviously doesn’t include THIS charge itself
  + If acc has diff version of something that happened, that's not excluded. Anything about the thing you're charged for isn't excluded
* **Crown can’t consent to no application/waive**
* Treated as applying to evidence called by the Crown too – even though section says defence

### What is "sexual activity"?

* **Included:**
  + Not just overt sexual acts
    - Sexual conversations
    - Flirting
    - Prior relationship – Goldfinch “friends w/ benefits”
  + Pre or post allegation
  + Consensual or unconsensual
  + Commercial sexual activity (i.e. prostitution)
    - Prostitution offences are included
    - Even though on crim record, gets excluded for purposes of trial which counts as sexual activity
* **Not included:**
  + CO’s virginity
    - Unless to bolster credibility/character
      * Whether or not someone has had sex before isn't relevant
  + Childhood sexual exploration – if for alternative explanation as to how child would know
    - How would they know about this act as a concept if they weren't sexually assaulted before or via TV? Not saying 5 y/o consented/is a slut but trying to explain how they possibly know about this action b/c no 5 y/o would know about this unless SA.
* Broad - meet purpose of the rules
  + Very dep on what the evidence is + how it relates to the twin myths
* Use dependent

### Proving Relevance to Trial

* **Must be specific incident – not general character**
  + **E.g. have sex w/ a lot of people = no; have to be specific**
* Consent – rare to prove actual consent,
  + Can’t have implied consent
  + Purely subjective to CO
    - Very rare that prior incidents are used to prove CO did actually consent. It's about communicative consent during the act
  + Must actively communicate consent, contemporaneously
  + Twin myth – prior consent = current consent
    - Being cautious that you're not prejudicing consent from before
* HBMBCC increasingly narrowed
  + HBMBCC: Honest but mistaken believe in communicated consent
  + Must specifically articulate how
    - How the specific incident(s) relate to the defence of HBMBCC
    - E.g. from my understanding w/ my relation, if my partner says pineapple, that means my partner wants to have sex with me esp with no context (vs. if it was about a grocery list - then no-go)
  + Can’t be used to dispel inference of unlikelihood of consent
  + Not just showing prior relationship
    - ACC: This person was my spouse/long-term partner b/c otherwise the jury will think this random person consents to have sex w/ me and court said no - that's exactly the same as saying prior consent = today's consent. Court said no this concept doesn't work - can't use prior sexual history to rebut inference, has to be solely related to the facts today.
  + Communicated consent – not inference of consent
    - Can be communication verbally or by actions but it actually has to be communicated in some way and not oh they're fine w/ it before so they're fine w/ it now
  + AC must take reasonable steps
  + Must explain how prior sexual acts made AC mistakenly believe CO was consenting THIS time without rape myth reasoning
    - Not saying oh you seemed fine w/ it before so I'm assuming you consented today w/o checking
  + **Prior negotiations, customs, practices between parties may be relevant to show reasonable expectations re incident in question**
    - If it's like this is our code word, it's going to be relevant. Very specific + shows why you believe there's consent. E.g. this is our general practice and we did all the things we normally do so it's consistent w/ actions before - more likely to be admissible than oh we've been in a sexual relationship for 10 years so I assumed they're ok w/ it today

### *Harris* factors re HBMBCC

* Viability of defence of HBMBCC itself on facts
* **Nature/extent of prior sexual activity as compared to sexual activity forming the subject matter of the charge**
  + How similar is it? The less similar, the less likely it is to be based on current conditions.
    - E.g. Saying watermelon vs. pineapple - same type of fruit argument is no-go
    - E.g. pineapple was a code word 10 years ago but we haven't used it since so less likely to work
* **Time frame separating the incidents**
* **Nature of relationship between the parties**
  + If something significant changed such that the pattern is no longer warrantable e.g. we've been split up for 10 years but they said pineapple to me so BOO YEAH!!!! - Yeah, no, that's not gonna fly.

### HIV Non-Disclosure

* **CO didn’t consent to HIV+ risk (fraud vitiating consent by nondisclosure)**
  + Prior history of “risky” sexual behavior still irrelevant to whether CO consented here
  + Look C engaged all this risky sexual stuff before so obviously CO's risky practices make it likely they consented with the ACC! Yeah no still no.
* Proving fraud by non HIV disclosure more difficult now – especially for aggravated sexual assault – proof of viral loads etc to show real not hypothetical risk
  + Viral load significantly high enough + ACC has to be unaware of it. Harder to prove w/ med tech nowadays.

### Credibility

* If for Credibility alone – irrelevant
  + Twin myth: sexual conduct b4 so you shouldn't be believed
* **Prior Inconsistent Statement – Allowed to show material inconsistencies (not rape myths)**
  + If there's something CO says inconsistent w/ prior statement but can't use it as a rape myth. Have to have good purpose and have ur questioning tailored to it
* **Motive to fabricate – requires air of reality to fabrication not just bald assertion**
  + E.g. if CO trying to excuse pregnancy by saying I didn't consent, it was SA so parents don't be mad at me - ACC says 20x prior sex but now ur preg and saying ur not consenting b/c of ur parents. Because of this other situation that gave you a motive to lie, I need to disprove those lies.
  + If re: twin myths, it's going to be out but if it's not then it might go through.
* **Reliability/ capacity to testify – to show trauma affecting ability to recall etc**
  + E.g. based on prior SA, CO was so traumatized that they don't have accurate ability to recall through no fault of their own, might not have capacity to testify so if you can prove something like that, it'll be credibility
* **Pattern of false allegations**
* Narrative/context – ongoing relationship might be necessary for context but must have significant probative value substantially outweighing prejudicial effect
  + There might be narrative before - have to explain a little bit more than you should to have the story make sense e.g. why are you + CO together in the same house? We're spouses. But it has to have significant probative value - watch the narrative to make sure you're not backdooring the CO

### Factors and Procedure

* **TJ doesn’t have to explain each factor listed**
  + Just have to talk about the ones they're heavily relying on
* **New procedure gives CO right to be heard at second stage – two hearings**
  + **First stage: have you go past threshold of getting hearing**
  + **Second stage: actual hearing**
* D must provide affidavit of evidence and relevance
  + Activity sufficiently identified
    - Not just generic prior sexual conduct, specific incidents req'd
  + More than CO’s general reputation
  + Specific enough to allow response
  + Ensure questioning not unfair
* TJ can refuse hearing if D doesn’t meet requirements
* Typically decided after CO testifies in chief, but can be pre-trial depending on circumstances
  + Not clear if prelim judge can do 276 application
    - Not clear whether jurisdiction exists
  + Usually want to get CO's version of events but it can be pre-trial dep on circumstances
* Applies retroactively to similar historic offences
  + If you get a historic offence e.g. SA in the 80s b/c we now have DNA tech w/ previous DNA analyzed - recognizing as a society that this isn't ok and just b/c offences are historic doesn't mean you get back to go to historic rules before all this protection for COs

### Sexual Reputation: S. 277

* 277. In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) (3) or section 170, 171, 172, 173, 271, 271 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.**
  + Challenging or supporting is important e.g. I was virgin at the time - that's the exact same thing as saying you shouldn't believe the person because of their prior sexual conduct

### Blanket Prohibition

* **Prohibits sexual reputation evidence for attacking OR bolstering credibility of CO**
  + NO exceptions
* Virginity is physical fact not reputation
  + Not how CO is viewed in community
  + So not excluded under s. 277
    - UNLESS Crown is trying to use it to show CO should be believed, is a good person, etc.

## Examples and cases

### *R v Goldfinch*

* ACC SA a woman he was in a previous relationship w/ CO as a friends w/ benefit - TJ says it's fine, relatively benign to tell jury that they're FWB
* Once deemed admissible, both sides calling evidence about prior sexual activity. Jury found AC NG. Appeal allowed; said evidence shouldn't have been admissible - went to the twin myths of prior consent = consent now. SCC majority said no - shouldn't have been admissible, didn't meet reqs of 276 b/c it's prior sexual history + served no purpose other than the twin myths.
* Weird fact scenario b/c it seems obvious on inference but obvious in gut where it's more likely to have sex w/ this person vs. stranger - seems inherently logical you should consider but in law, that's not the case. Have to consent today so clearly excluded within law. But seems like FWB relationship is relevant on practicality. But in law, this doesn't fly. Issue w/ balancing logical narrative vs. facts - don't want to call something seemingly innocuous and sway the jury unfairly.

### *R v RV*

* CO was giving evidence that she had gotten pregnant as a result of the SA. CO says at time of assault, conception date at or/around date of alleged assault and crown trying to use this as evidence that the SA happened. ACC wanted to call evidence that she wasn't a virgin + having sex w/ other people at the time. Would that be admissible? I was virgin, got pregnant consistently within that time frame - would it be admissible?
  + Motivation to fabricate - potentially lying about other acts to cover it up
    - E.g. young or mad to explain away the pregnancy
  + Could've been someone other than me - trying to prove it's me but there's other people which goes to proving identity - if it wasn't me, that's relevant to rebutting your story
  + Goes to the AR - if accused is trying to disprove he had sex w/ her, then someone had sex w/ her. Was it this accused or not and was it consensual vs. HBMBCC.
* Court did say ACC can argue that - clearly someone had sex w/ this person, have to explore options of whether it was someone else so would pass 276. No one is trying to suggest CO less worthy of belief b/c she had sex before or that prior consent = current consent but trying to figure out who had sex w/ you, do you have motive to false accuse, etc. which are all legit reasons and not the twin myths

### *R v Barton*

* 276 component:
  + Recall: truck driver met vic, consented to sex, paid her, left. Met her again 2nd night. ACC saying we agreed to say thing as the 1st night.
  + Big issue: it never got considered in 276 as a starting point. Everyone considering the first night as part of the narrative/how they met e/o and court said no, crown shouldn't have jumped in w/o looking at 276 and defence shouldn't have went w/ it despite the crown doing it too.
* Conversation of 'same thing as last night' - looking at it from that type of perspective, what do we think of whether it would be likely to pass 276 at trial?
  + By letting his story in, we're accepting it as true.
    - Looking at relevance - in terms of being able to assess what happened, have to look at all of Barton's lies but that's AFTER in the second stage where they decide to include the story
  + If no link btwn night 1 + 2, wouldn't have been admissible. Have to be linked to something + meet evidentiary threshold that it's relevant.
  + Link to collateral fact
    - If you have some instance of something, can't call evidence to impugn witnesses whereas 276 = 276 higher threshold, can't cross-ex w/o going through 276. Relationship btwn collateral fact + prior sexual activity in that they're dealing w/ conduct outside of these events - something else that isn't tied to what you have to prove and it needs a specific narrow reason to get across admissibility

# Privilege

### Atypical exclusionary rule

* Privilege excludes evidence that is otherwise relevant and material – unusual
* Not based on concerns about reliability, probative value, or fabrication
* Exclusion based on social values
  + Social values seen to have such overwhelming importance that they cannot be sacrificed to finding truth through litigation
  + Certain values are so important that we have to keep certain evidence out of a trial
* **Three types of privilege**
  + **Class privilege**
    - Few
    - Once shown to be within the class, exclusion applies, no need to show that your specific facts meet it, just show that it is within the class!
  + **Case-by-case privilege**
    - Most common type!
    - Analyze four Wigmore factors in relation to each case to determine if privilege applies
  + **Statutory privilege**
    - Created by … statute!
    - Some piece of legislation explicitly declares something to be privileged

### Case by case privilege- factors

Remember this is the most common form of privilege!

* **Must prove all 4 to have privilege met**
  + **1. The communication must originate in a confidence that it will not be disclosed. (has to be an understanding between the parties that it is a private or secret communication)**
  + **2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. (doctor-patient privilege, you need to be open with your doctor in order for them to actually treat you)**
  + **3. The relation must be one which, in the opinion of the community, should be sedulously fostered, and (if there is no value in protecting the relationship, it will fail this element, but doctor-patient example is one that the public as a whole cares about protecting)**
  + **4. The injury that would ensue to the relation by disclosure must exceed the benefit thereby gained for the correct disposal of litigation. (weighing the need to protect the secret against the benefit of the evidence in court)**

### Waiving Privilege

* **Privilege can be waived, but requires proof that the privilege holder:** 
  + **Knows of the existence of the privilege**
  + **Voluntarily evinces an intention to waive it**
  + **Typically must be express and clear**
    - But can be implied where fairness requires and other voluntary conduct by the privilege-holder supports a finding of implied or objective intention to waive
    - This is based on the CONDUCT of the privilege holder, the fact they haven’t say they have waived it isn’t definitive (actions by someone else irrelevant)
* **Can only be waived by the privilege holder**
  + **So for example, a lawyer CANNOT waive the privilege of your client**
* Can be made for limited purposes
  + Not all or nothing, you can waive to whatever extent you want
* **Routes to implicit waiver – trial fairness issues**
  + **1. Knew of existence of privilege, and**
  + **2. Voluntarily shows intention to waive**
* But may also waive without intention where fairness and consistency require
  + **E.g. rely on legal advice, put your reliance in issue at trial**
* **Common issue:** someone gets legal advice saying whether or not they can do something, but then when it becomes an issue at court they just say “well I relied on legal advice but cant tell you what it was”

### Inadvertent disclosures

* **Fact specific exercise to determine if lost/inadvertently disclosed info is waived:** 
  + 1. The way in which the documents came to be released.
  + 2. The timing of discovery (by the person who accidentally released them), and whether prompt attempt was made to retrieve the documents or information after discovery occurred.
  + 3. The timing of the application.
  + 4. The number and nature of parties who have become aware of the documents. (how far did the disclosure go? Much easier to pull it back if it was only to a small number of people)
  + 5. Whether maintaining the privilege will result in actual or perceived unfairness to the opposing party. (may be cases where there was an accident, and you took steps to mitigate that, but it still makes the trial unfair)
  + 6. The impact on the actual and/or perceived fairness of the court’s processes.

## Class privileges

### Solicitor client privilege

* Class privilege
* **Unique status within the legal system – recognized as a fundamental legal right**
  + Contemporary rationales:
    - Preservation of trust between lawyers and clients
    - Encouraging full and frank communication between lawyers and clients
    - Ensuring effective representation, nurturing relationship indispensable to continued existence and operation of Canada’s legal system
    - (essentially it would be very hard to do a lawyer’s job if you don’t know all the facts good and bad)
* **Applies to persons, corporations, governments, public bodies etc – anyone/thing getting legal advice.**
* **Privilege belongs to the client for loss/waiver (remember, lawyer cant waive)**
* Exists forever – unless/until waived/lost
  + Exception – advice re will can be disclosed as necessary re execution/tenor of the will
* **Doesn’t protect physical evidence/documents that existed pre-sol-cli relationship**
  + **If a client brings documents to a lawyer, from before, it will not be protected**
* May protect fees, bills, client’s name, etc.
  + The fact that someone has even retained you is protected by privilege!!!

#### Three requirements to prove (*Solosky v Canada* summary)

* **1. Communication between lawyer and client**
  + Includes lawyer’s staff/agents, hired experts, etc. (i.e. includes paralegals and other staff!)
  + Includes initial stages of forming client relationship (not formally retained, if they come for consult)
* **2. Communication made in course of seeking legal advice**
  + Not lawyer acting in other capacity than giving legal advice (maybe they were giving career advice, business strategy advice, etc)
  + Not other documents sent to the lawyer for purpose getting legal advice (advice privileged, documents are not)
  + Includes in-house, government, etc lawyers but ONLY for legal advice, not other advice e.g. purely business advice etc
* **3. Communication made in confidence**
  + Expectation of parties, consider presence of third parties (was it meant to be made in confidence?)
  + Might waive against third party in communication, but not against the world (a waiver doesn’t mean a waiver to the whole world, for example if a client brought their spouse with them to a meeting they may be waiving to their spouse but not the whole world)

### Exceptions to s-c privilege🡪 crime fraud, public safety, and innocence at stake

* Guiding concept – absolute necessity (it has to be absolutely necessary)
  + Near-absolute privilege – exceptions are exceptionally narrow
* **Crime-fraud** 
  + When client seeks guidance from a lawyer to facilitate the commission of a crime or fraud, the communication will not be privileged (cant go to a lawyer and get advice on how to commit a crime)
  + Immaterial whether the lawyer is an unwitting dupe or a knowing participant
    - **Client must know, or ought to have known, that communication is criminal or be knowingly pursuing a criminal purpose**
  + *R v Cox* (1884) – “A communication in furtherance of a criminal purpose does not ‘come in the ordinary scope of professional employment’.”
  + **Only for FUTURE crimes or conversations that are criminal themselves (e.g. conspiracy to commit) – not getting legal advice about past crimes**
    - Potentially expanding to not protect communications about “unlawful conduct”
  + Onus on other party – not clear if on BOP or prima facie case or RPG, etc.
* **Public safety (comes from *Smith v Jones*)**
  + ***Smith v Jones*** *–* Lawyer Jones sent client to Psychiatrist Smith for interview for defence/sentencing. Jones correctly told client that communications with Smith were protected by solicitor-client privilege (SC privilege includes other experts brought in!!). Client tells Smith that his first murder was a trial run and he planned to repeat his crime, kidnapping, raping, and murdering female sex workers in Vancouver. Smith told Jones that the client was dangerous and would likely commit future crimes without proper treatment. Jones said wouldn’t disclose to court. Smith sought direction allowing Smith to disclose to crown/police. (in this case the test below was met)
  + **Three prong test from *Smith v Jones*– all mandatory, weight may vary on circumstances (if one is particularly strong, it may outweigh weaker evidence on one of the others)**
    - **1. Clear risk to identifiable person or group (in this case female sex workers in Vancouver)**
    - **2. Risk of serious bodily harm or death (again, met, murdering is a risk of death)**
    - **3. Imminent danger (he said he would literally do it again)**
  + **Weigh all three factors and determine whether the threat to public safety outweighs the need to preserve solicitor-client privilege**
  + If setting aside, disclosure should be limited to only include the info necessary to protect public safety and no more (not carte blanche disclosure)
* **Innocence at stake** 
  + Ultimately the system fears conviction of the innocent more than breaching sol-cli privilege
    - Originally started as an exception to confidential informer privilege
    - Innocence can include entrapment, possibly other charter breaches that result in stays
  + **Threshold test – two requirements**
    - **1. the information sought in the solicitor-client file is not available from any other source (last resort)**
      * If you can get it elsewhere, do not come to this test
      * If other potentially admissible evidence, should have *voir dire* on its admissibility first
    - **2. the AC is otherwise unable to raise a RD as to his guilt in any other way**
      * Have to exhaust all other potential defences first otherwise innocence not really at stake
        + If you haven’t exhausted everything then its not really exhausting all other avenues is it??
      * Normally have hearing at the close of the Crown’s case to assess if other way to raise RD, can have multiple applications
  + **Two stages after the threshold test**
    - 1. is there some evidentiary basis for the claim that a sol-cli communication exists that could raise a RD about the guilt of the AC?
      * Not just speculation
      * Onus on AC to demonstrate some evidentiary basis for claim
    - 2. Is there something in the sol-cli communication that is likely to raise a RD about AC’s guilt?
      * TJ reviews the record (the SC file)
      * Test not that communication for SURE raises RD, but is LIKELY to raise RD
      * Not just to strengthen evidence AC already has

### Litigation privilege

* Different than solicitor-client privilege
* **Purpose – to allow counsel to fully investigate, research, and prepare a case without risking disclosing those opinions, strategies, and conclusions to the other side**
* This is particularly important in civil litigation when in the end all of your documents essentially go to the other side
* Applies to all communications, confidential and non-confidential between solicitor and third parties where the dominant purpose of the communication is pending, apprehended, or ongoing litigation
  + Also covers related litigation involving the same or related parties and arise from the same or related cause of action
* Applies to even anticipated litigation, doesn’t have to be started yet
* **Ends once the litigation and related litigation is terminated, does not continue until the end of time**

### Solicitor client vs. litigation privilege

**SC**

* Only applies to confidential communications between lawyer and client.
* **Exists anytime client seeks advice from lawyer**
* Rationale – client’s interest in being able to get full legal advice without fear of disclosure
* Protecting a relationship
* Virtually absolute and permanent (unless/until waived)

**Litigation**

* **Applies to non-confidential communications between lawyer and other third parties, includes non-communicative materials.**
* **Exists only in the context of litigation**
* Rationale – adversarial trial process requires sphere for private investigation and preparation
* Protecting a process
* Ends when litigation ends

Common purpose🡪 the secure and effective administration of justice according to the law (Blank v Canada, DOJ)

### Law office searches in the criminal code s 488.1

* S 488.1 – Criminal Code provisions for searches of lawyers’ offices – struck down by SCC
* ***Lavallee, Rackel & Heintz v Canada (AG)* – 2002 SCC: special requirements!!!!**
  + *1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.*
  + *2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.*
  + *3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.*
  + *4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer’s possession.*
  + *5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.*
  + *6. The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.*
  + *7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.*
  + *8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.*
  + *9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.*
  + *10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.*
  + ***Extra hurdles for police when searching a lawyers office***

### Settlement negotiation privilege (another type of class privilege)

* Purpose – to encourage settlements of disputes without requiring litigation
* **Protect communications made in an effort to resolve matters – “without prejudice”**
* **Three requirements:**
  + **1. A litigious issue exists or is within contemplation;**
  + **2. A communication is made with the express or implied intention that it would not be disclosed to the court if negotiations fail; and,**
  + **3. The communication is intended to attempt to effect a settlement.**
* “Settlement” can be the ultimate issue (resolving the action), factual admissions, procedural concessions, etc – literally agreement of both sides on any issue within the matter.
* Result – neither side can mention/rely on settlement discussions if settlement is not reached
* **Exceptions**
  + Misrepresentations
  + Fraud (relied on false statements, will have to say what those statements were)
  + Undue influence
  + Abuse of process
  + Civil litigation settlements are not privileged in criminal setting

## Statutory privilege

### Spousal privilege

* Previously Common law, at common law, no spousal privilege because spouses were deemed THE SAME PERSON and thus accused and spouse were both incompetent to testify (AC incompetent, spousal was same person as AC, spouse therefore also incompetent)
  + Spousal privilege created when AC no longer incompetent
* **CEA s. 4(1) – spouse of AC is competent for defence, as of 2015 also competent for crown**
* **CEA s. 4(3) – spouse not compellable to disclose any communication made to him/her by spouse**
  + **Must be communication (1) between spouses, (2) during marriage**
  + Person who holds privilege is recipient of information – can waive w/o other spouse’s consent
    - No one can make the information holder testify
    - Spouse must invoke in front of TOF if asked about communications, to not give wrong impression of why Q isn’t asked (why aren’t you asking relevant questions?)
    - Advise TOF that decision is that of W not AC – W is entitled to invoke, AC cannot prevent from testifying
    - NO requirement to prove confidentiality of communication – contrary to normal *Wigmore* criteria
* Only applies to legally married spouses, (query wording being specifically husband to wife and wife to husband in CEA-- what about wife to wife, husband to husband, if legally married?)
  + Some ON courts reading it up to include common law, but ONCA said no in *R v Nero*
  + Its being increasingly limited, the courts think it is antiquated
  + If already separated or divorced, the rationale behind it no longer applies

#### Scope of spousal privilege

* **Temporal** 
  + Only communications during the marriage
  + Not before married, or after marriage ends (divorce or death)
* **Informational**
  + Privilege is over recipient’s spouse’s testimony
  + Not information itself – emails between AC and spouse, intercepted phone calls/text messages between AC and spouse, all admissible – just protects spouse from testifying to communication (if someone else hears or sees them, they can testify)
* **Communications**
  + Not factual observations about the spouse – *R v Gosselin* SCC said doesn’t cover spouse’s observations of blood spots on the AC’s clothing, arise from spouse’s observations and knowledge, **not communication from AC**

#### Loss or waiver

* Recipient spouse (whoever would be called to testify) holds the privilege – can assert or waive as s/he sees fit
  + Waiver may be explicit or implicit
* Third parties
  + Third parties who are told or overhear communications between spouses can testify to those communications
    - Privilege is about spouse’s testimony, not information in communication

### Journalist informant (source) communications (originally common law)

* *Moysa v Alberta (Laboru Relations Board)* – SCC 1989 / *R v McClure* – 2001/SCC – case-by-case privilege, Wigmore applies but considering s. 2(b)

#### *National Post v Canada* – SCC 2010 – no class privilege, case-by-case

* **weird fact – issue wasn’t testimony but document/envelope (i.e. “real” evidence)**
  + **National Post received a copy of a loan authorization that, if authentic, could show Chretien in a conflict of interest, Business Development Bank of Canada said the document was a forgery and reported it to police**
  + **Copies of the document had been widely spread, but the NP refused to produce the original on search warrant suggesting that forensic testing may identify their informer**
* **Rejected constitutional protection under s. 2(b) – general protection for all journalists too broad, focus on common law**
  + Rejected class privilege under the common law for 4 reasons
    - Immense variety and degrees of professionalism/lack in persons who gather/publish news – no professional organization managing professional standards (like the law society)
    - Uncertainty in whose rights – who can waive/invoke
    - Absence of workable criteria for creation or loss
    - Case-by-case allows tailoring to fit the circumstances
* ***National Post* – continued - applying Wigmore (TEST FOR PRIVILEGE ON A CASE BY CASE BASIS)** 
  + 1 – communication must be explicitly in exchange for confidentiality on source’s insistence
    - Source has to come to the journalist and essentially say “only if you keep my identity is secret”
  + 2 – source must insist on confidentiality as condition precedent
    - Before info🡪 promise of confidentiality
  + 3 – generally relationship between professional journalists and secret sources ought to be sedulously fostered (some flexibility to assess different sources and types of journalists)
  + 4 – does the most work – weighing against public interest like investigating crime, national security, public safety, or some other good (LIKE THE FREEDOM OF THE PRESS, ETC)
    - Howery: this factor is doing the “heavy lifting” in this test
* In THIS case is the public interest served by protecting the identity of the source
* Weigh up evidence on both sides, including regard for the “special position of the media” and the role of freedom of the press

#### JOURNALISTIC SOURCES PROTECTION ACT (CEA AMENDMENTS)

* **S 39.1 CEA – now sets out test for assertion of journalist-source privilege**
* **39.1(2) – allows journalist/former journalist to object to disclosure of information or document on the grounds that it identifies or is likely to identify a journalistic source**
* **39.1(7) – factors for court/decision-maker to consider in application**
  + Information cannot be produced in evidence by any other reasonable means; and
  + Public interest in administration of justice outweighs the public interest in preserving confidentiality of the source, having regard to, among other things:
    - Importance of the information/document to a central issue in the proceeding;
    - Freedom of the press; and,
    - The impact of disclosure on the journalistic source and the journalist
* 39.1(8) – allows conditions imposed on authorization
  + Court might say it is ok to breach but with limitations, conditions, etc
* 39.1(9) – onus on person seeking info to show they should get it (not on the journalist to show that they shouldn’t)

#### CC AMENDMENTS (SAME ACT )

* **Added s. 488.01 to create rules for warrants/production orders/etc in relation to journalist communications or objects, documents, or data relating to or in the possession of a journalist**
* Additional conditions (to normal warrant/authorization/order):
  + No other way to reasonably obtain the information, and
  + Public interest in the investigation and prosecution of a criminal offence outweighs the journalist’s right to privacy in gathering and disseminating information
* Doesn’t apply where the journalist allegedly did the offence being investigated
* Allows for special advocate to be present in the interests of freedom of the press

## CASE BY CASE PRIVILEGE (WIGMORE CRITERIA PRIVILEGE)

* Starting point – not privileged, fundamental proposition that everyone owes a general duty to give relevant evidence to ascertain the truth
* Result – if proven, effect is the same as class-privilege – communication is not admissible
  + But can also give partial privilege orders (e.g. production with vetting/REDACTION, imposing additional conditions, etc)

### Wigmore criteria

1. **Communications originate in a confidence that they will not be disclosed.**
2. **The element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties.**
3. **The relation must be one that the community believes ought to be seriously fostered.**
4. **The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.**

**Guidance**

* First three are conditions precedent (mandatory) with the fourth being the balancing factor.
* Onus always on the party claiming privilege to meet the test – but onus is less relevant in the balancing under the fourth factor.
* Wigmore criteria to be informed by *Charter* rights, values, and principles.
* Issue assessed within a voir dire – AC can testify without general cross-ex

### Religious communications?

* Statutorily protected in NFLD / QC
* ***R v Church of Scientology* – ONCA 1987 – no class privilege to priest-penitent**
* ***R v Gruenke* – SCC 1991 – no class privilege for religious communications**
  + No inextricable link between religious communications and the justice system
  + **Must meet Wigmore criteria**
    - Criteria should be informed by s. 2(a) and 27 (multicultural heritage – make “religious communications” non-denominational)
    - Determine whether the person’s freedom of religion will be imperilled by the admission of the evidence (not formal confession, or to a “priest” specifically, can be anything in the person in question making the statement in a religious context)

### Medical, psychiatric, and counselling communications

* Wigmore argued against doctor-patient privilege – people will still seek medical care
* Statutory protection for Quebec!!!
* **Protected in certain situations – therapy/medical records of CO, psychiatric assessments of AC**
* **Case-by-case is the general rule, but specific situation may call for special conditions**
* ***M(A) v Ryan* – SCC 1997 –** AM sued former psychiatrist for sexual assault, psychiatrist sought access to her therapeutic file to defend civil lawsuit – McLachlin affirmed CA’s decision producing only some documents with stringent restrictions, noting that:
  + 1 – made in confidence
  + 2 – confidentiality is essential to therapeutic relations
  + 3 – mental health of citizenry is a public good of great importance (even more so now)
  + 4 – interest in confidentiality compelling, but communications may be very important to just determination of the case

# Hearsay: the principled approach and background

## What is hearsay?

* Must be a Statement!
  + Verbal
  + Written
  + By conduct (pointing, gesturing!)
  + Made out of court
  + Tendered to prove the truth of its contents (POTOC)
* Purpose of putting the evidence in is the substance of what was said – proving it true
* Not when statement is tendered for another reason (i.e. to prove the fact of it being said/made, to prove that the hearer knew it was said – knowledge, etc. for some other reason)
* So before looking at the exceptions to hearsay🡪 are you putting it in for the POTOC

### Scope of hearsay

* Historically reluctant to definitively define – to avoid too narrow scope
* Core elements of definition:
  + Statement/assertion
  + Made out of court
  + Used to prove the truth of its contents (POTOC)
* Functional approach to scope – hearsay is about the use of the evidence, rather than the nature of the evidence per se
  + More about what use you are trying to put the evidence too, not the actual evidence
* Issue is out of court statement tendered for its TRUTH

### POTOC or other reason?

* **Key Question – is the evidence still relevant if it’s false?** 
  + Is it still relevant regardless of whether it’s true or false?
* **Why else could it be relevant?** 
  + Circumstantial evidence of ID – *R v Evans* – Person purchasing getaway car said he had big dogs, one of whom was about to give birth, and worked in chain-link fencing, so did the AC, so the Crown wanted to use these statements – SCC said yes for ID
    - What is the chance someone buying the car would happen to describe themselves as having these unusual circumstances
  + Using to prove FACT that representation was made – strange coincidence that person buying vehicle would claim to have the same unusual life facts as the AC
  + Fact that it was said / knowledge of speaker – If X says something, the fact that X said it clearly shows that X is aware of the content of X’s statement (true or false)
    - For example: murder case where someone says they are going to the grocery store for an hour in the same room as accused, and the accused knew and they get murdered on the way to the grocery store
  + Fact that it was said / knowledge of listener – If X says something to Y or in the presence of Y, the fact that X said it is some evidence that Y knows it (whether it is factually correct or not, this proves that Y heard it) (see previous example)

### Functional approach – contemporaenous cross x

* If testifying W adopts prior out-of-court statement, then absence of contemporaneous cross-ex issue goes away not hearsay
* But if W recants/doesn’t remember/doesn’t adopt – still hearsay
* Admissibility threshold – some evidence on which TOF *could* find that W adopted the statement
* Ultimate decision of whether W *did* adopt is for TOF

### Implied assertions

* Actions/circumstances that imply an assertion – is this hearsay?
  + Example – calls to AC’s phone asking to buy drugs
  + Implied assumption – AC sells drugs (or why are people calling AC to buy drugs?)
  + One call – often found to be hearsay – proving the statement itself true?
  + Multiple calls – often circumstantial evidence not hearsay – unlikelihood of coincidence that so many people would call asking to buy drugs from AC if AC didn’t sell drugs?
  + The likelihood that would happen over and over is slim
* **R v Baldree – SCC 2013**
  + PO answered AC’s phone and caller asked for AC to buy 1oz weed, PO asked how much AC charges, caller said $150, PO agreed to deliver the same
  + SCC – statement wanting to buy drugs was hearsay b/c relevance hinges on truth of speaker’s underlying belief, any inference depends on veracity of speaker’s belief
    - Not admissible under principled exception – PO didn’t try to find/subpoena caller so no necessity also just one person vs lots harder to prove necessity, no reliability because just one call not several
    - The onus is now on police to now answer the call and/or call them back and ask them to testify/ask them for more details, seems kind of silly
    - REMEMBER: multiple calls reliability goes up!
  + **Baldree repeatedly distinguished by courts to fit circumstances**

### Non assertive conduct

* Baldree opened possibility of non-verbal conduct being hearsay
* Canadian courts generally don’t characterize non-assertive conduct as hearsay, but rather circumstantial evidence
* **E.g. R v MacKinnon – opening purse to respond to PO question about what just bought from AC – not hearsay**
* **R v Badgerow – PO responded to 911 call from phonebooth that included description of hold back evidence – no direct evidence of what the Bell Canada (traced the call) told police, implied assertion that police attended that phone booth in response to the 911 call was hearsay, but in under the principled approach** 
  + **“bell Canada said something to the police so that they knew which phone booth to go to”**
  + Relied on truth that what the Bell Canada person told police was accurate (i.e. that this phone booth was the one where that 911 call was made)
  + Bell wouldn’t have any motivation to send them to the wrong phone booth or to mislead them

### Prior identifications

* Admissible – more reliable than “dock ID” in court
* E.g. photo lineup procedure has many more controls and factors supporting reliability than looking around the courtroom and seeing the AC in the prisoner’s dock or beside defence counsel and pointing the AC out as the perpetrator

### Conduct intended to be communicative

* Non-oral communication is equally hearsay
* e.g. head nod, hand gestures, pointing,
* **R v Nurse – ONCA 2019**
  + Deceased stabbed 29 times, two perpetrators fled, AC came back when EMS was present told police he saw three men dump deceased’s body from a car, PO testified that deceased pointed to an abdominal injury and then gestured towards the AC
  + Deceased’s pointing and gesturing were hearsay – likely inference was “AC did this” or was involved
  + Deceased actively shook of police’s attempts to restrain his hands to do the pointing/gesturing
  + Was an assertion by conduct – up to jury to determine it’s ultimate meaning
  + Was hearsay

### NON-hearsay, original evidence

* **Not trying to prove the truth of the contents, but the fact that the statement was made**
* **Three common scenarios**
  + **Knowledge**
  + **Agreement (contract, conspiracy, consent)**
  + **Narrative (statement necessary to make sense of the unfolding situation)**
* Investigative Hearsay – sort of
* To explain what was happening and what you did, some level of hearsay is going to be necessary. As long as its not POTOC its ok

### Knowledge

* Fact that statement was made can show knowledge
* E.g. show that speaker knew things only someone involved in the crime/event would know
* E.g. police having reasonable grounds
  + Whether the information that was told to police is true or not doesn’t matter for RPG, what matters is what the PO knew/believed at the time
  + PO can testify to what PO was told by people about what happened to prove RPG
* Its about what they reasonably believed at the time

### Contract, conspiracy, consent

* Words spoken to make a contract or other agreement or to consent to something can be put in to show that the agreement was reached
  + If you say you agree to something or consent to something, presumptively everyone is relying on that to make the legal agreement
  + **Subjective belief of contract/conspiracy/consent by the speaker isn’t relevant because the agreement is still binding**
* What they communicated is more important that their subjective belief, so the contract still stands.

### Narrative

* Out of court statements admissible can be admissible as “narrative” when they are necessary to explain how the events unfolded or why people involved did what they did – to advance the story
* Still not usable for the truth of the statements, but to explain the events and put them in context
  + Need to clearly explain to the jury how this can be used/not used
* Important that you need to be allowed to tell the full story.

### Investigative hearsay

* Potentially admissible in response to a defence challenge to the quality of the police investigation
* Crown can call evidence of what the police knew, when, why they focused on AC as opposed to other suspects, etc.
* Significant risks as it can bring up AC’s bad character
  + They can begin to bring up previous crimes or other evidence like that
* Must clearly explain to TOF how they can/can’t use evidence

## Rule against hearsay

* Hearsay is presumptively inadmissible
* Rationales for the rule include:
  + Inability to test reliability – can’t test the reliability of the out-of-court statement while in court (no observation, cross-examination, etc of speaker)
  + 4 weaknesses cross-ex is aimed at:
  + Perception – honest witness perceived incorrectly, sensory limitations, distractions, obstructions, significance of event at the time, intoxication, etc.
  + Memory – ability to recall accurately, significance at time, records/note taken, length of time between event and statement, intervening events/communications, age/mental capacity
  + Narration/transmission – ambiguity that the TOF can’t clarify/ask about because speaker isn’t there (can’t clarify details after the fact!)
  + Sincerity - more likely to lie/exaggerate in casual situations than in serious court/cross-ex (in general peoples propensity to not be as careful in situations out of court is higher)
* Jury distrust – can’t rely on jury to identify/overcome weaknesses of hearsay
* Trial fairness – adversarial system requires ability to challenge other side’s evidence

### Hearsay deprives procedural advantages

* Absence of oath/affirmation – less important as society becomes less religious, still has perjury as potential sanction, ceremony of court env’t
* No observations of demeanour – value to observing W’s testimony (but also putting less weight on demeanour to reflect different cultural norms)
  + For example: detecting sarcasm in a statement is hard to convey after the fact
* Indirect narration/transmission – W testifying to what 3P said is just a medium of transmission, possibility that W deliberately/inadvertently mis-states
  + Second opportunity for failures of perception, memory, narration, and sincerity issues
  + W who is testifying to what the they interpreted at the time, still up to potential weaknesses
* Absence of cross-examination – central/overriding objection to hearsay – “greatest legal engine ever invented for the discovery of truth”
  + General distrust of statements not gotten into cross x
  + Addresses issues with perception, memory, narration, and sincerity

**General distrust of juries**

* Hearsay rule based on deep-seated distrust of jury system – belief that jury will erroneously assess the probative value of the evidence
* Modern juries given more credit
* Most trials don’t have juries anyway

### Trial Fairness

* Inability to test the evidence may have a constitutional dimension under s. 7 if the AC cannot test the evidence, or conversely present reliable evidence (that might be hearsay) if the AC can’t make FAAD
* But – no constitutional right to confront/cross-examine adverse witnesses (Canada doesn’t have the US right of confrontation)
* TJ can ultimately rely on *Seaboyer* to exclude evidence where prejudice > probative, or *Harrer* to exclude it if it makes the trial unfair
* Importance of the evidence to the Crown’s case is not generally a relevant factor in assessing admissibility (despite trial fairness applying to the Crown too)
  + Doesn’t help decide whether it should be admissible

## Exception to hearsay exclusion

* Presumptively inadmissible hearsay can be admitted unless it fits into an exception!

### Historical context

* Conventional rules were excluding reliable evidence as hearsay resulting in “perverse or unjust acquittals” – so SCC changed the scope
  + Similarly recognized that hearsay rules may need to be relaxed for FAAD
    - Discretion to relax for “innocence at stake”
    - NOT just relaxed standard of hearsay for defence across the board – just as necessary in specific cases, grounded in trial fairness
* Guidepost – whether hearsay dangers are/can be mitigated and reliability of the statement tested/proven despite hearsay nature

### Hearsay analysis method and the principled exception

* **Starting point – presumptively inadmissible unless fits into exception**
  + Traditional exceptions presumptively remain
* **Hearsay exceptions can be challenged/modified to fit into the principled exception (necessity + reliability)**
* **Rare cases traditional exceptions may still be excluded because fails necessity and reliability on the facts of this case**
* **If hearsay doesn’t fall under a traditional exception, it may still be admitted if reliability and necessity are established**
  + Principled exception:
    - Necessity
    - Reliability

### Principled vs categorical exceptions

* Categorical approach was relatively easy to apply, predictability
* Explanatory function – telling litigants/judges relevant factors to consider
  + Categories link to different relevant/necessity issues
* Evidence fitting into a categorical exception is presumptively admissible because they are built around indicia of reliability that they would likely met the threshold reliability of the principled approach
  + Help assess reliability/necessity
* **Open to modification of categorical exceptions if necessary to meet principled exception necessity/reliability thresholds**
* **Burden on party seeking to admit hearsay to prove it fits within an exception**
  + **If fits a categorical exception – burden flips to other party trying to exclude to show inconsistent with principled exception – SCC says exclusion under principled approach of categorical exception will be rare/exceptional case**
  + **Do the analysis on both ALWAYS! Because if it fits categorical the other side will argue doesn’t admit with principled and vice versa!**

### Principled approach

* If no categorical exception – potentially admissible anyways under the principled exception: (1) necessity, (2) reliability
  + Necessity and reliability can be linked – e.g. evidence might be necessary because it is so reliable that the fact-finding process would be distorted without it
* Necessity and reliability are to be broad, flexible concepts – not new pigeon holes
* No fixed rules for running the admissibility voir dire
* Reliability at admissibility stage is just threshold reliability
  + Ultimate reliability is for the TOF

## Necessity- the principled approach

### General principles

* **Choice may not be between hearsay and other evidence, but hearsay and NO evidence – sufficiently reliable hearsay may be best option**
* Necessity means necessity to prove a fact in issue
  + Not necessary to prove the Crown’s case (i.e. corroborated hearsay is still better than uncorroborated)
  + Means can’t get THIS evidence in another way, not can’t get different evidence to prove the same point/fact, focus is on quality of this evidence
    - Quality of hearsay might be higher than quality of testimony at trial, e.g. spontaneous utterance categorical example
* Party trying to admit the hearsay has the onus to prove necessity
* List of examples not closed, not exclusive

### Deceased individuals

* Obviously necessity is met if the speaker is dead – they clearly can’t actually testify
* **Common for categorical exceptions to included deceased speaker**
* Doesn’t mean all statements of a deceased are automatically necessary – duplicative evidence isn’t necessary (e.g. same evidence from same speaker doesn’t all necessarily have to go in)
  + If the deceased has multiple statements are they all necessary? Make sure to analyze that.

### Witnesses beyond the compulsion of the court

* Cannot locate, unknown W, out of jurisdiction, didn’t respond to subpoena – may be necessary
* Must actually prove that the witness is beyond the compulsion of the court
  + Party seeking admission must prove their steps to try to get the person to court
  + Call evidence about the steps taken to locate/serve witness, etc
* Unknown speaker – very easy to challenge reliability
  + Must show reasonable steps to identify speakers, etc.
  + **Example of unknown speaker: like a person in a crowd or a 911 hang up call something like that**

### Incompetence

* W can be unavailable because they are incompoetent to testify
* R v Khan – child’s out of court statement when child was incompetent (under old rules of evidence)
* Party seeking admission must show that the W is not competent
* Legal competence, not medical or psychological assessment

### Incapable of Testifying—trauma/harm resulting

* Party seeking to admit hearsay may prove necessity by showing that W would suffer mental or emotional harm if they were forced to testify about the events in question
  + But must show no tools available to mitigate harm
* Related – sometimes child’s first/prior statement is necessary to put the full picture before the Court even when the child testifies

### Illness

* If W can’t attend because they are physically ill, this can be necessity
* Crucial Q – how long will this illness last? Are they available in the near future?
  + Scale here🡪 the flu or a fatal illness in the hospital? Fatal or serious illness will likely get waived
  + Short delay of trial is likely remedy if short illness

### Co-accused

* Crown cannot compel co-AC but this necessity is a result of the way the Crown set up the case, in its charging decision
* Also impossible to know during Crown’s case whether it is necessary, as the Co-AC might decide to testify anyways
* But SCC - non-compellability of Co-AC and undesirability of trying alleged co-conspirators separately, and evidentiary value of contemporaneous declarations made in furtherance of alleged conspiracy will prove necessity

### Mentally disabled or child

* Sometimes necessary to admit prior statements where current testimony leaves gap, and/or where credibility cannot be properly assessed without further statement
* First version from child can be reasonably necessary to obtain the accurate and frank rendition of the child’s version of events

### Recanted prior statement/no memory

* W who gives different version or claims (true/false) to not remember can make their prior evidence “necessary” – holding prior statement hostage
* Different considerations for recanting vs no memory
  + Recant – can still cross-ex on prior inconsistent statement
    - Casts doubt on either version of their story
  + No memory – no evidence

### Refuse to testify, contempt

* Refusing to testify removed W from authority of the court
* Have to assess whether anything can change the situation – e.g. prosecution/punishment for contempt
* Just being disinclined to testify or possibility of perjury doesn’t make out necessity

### Out of court statement is better evidence

* Sometimes out-of-court statement is more reliable
  + E.g. photoline up ID vs dock ID
  + Co-conspirators exception
  + Spontaneous utterances
* Lots of categorical exceptions fit here

### Multiple hearsay statements

* “Necessity” means contributes some new evidence to the pool of evidence that is not otherwise available, even if just modestly
* Must assess successive hearsay statements to ensure they each actually add something to make them necessary
* All statements of deceased/absent witness not automatically admissible, must give some additional value or required to show full account

### Inconvenience🡪 cost benefit analysis

* Principled exception could use elastic relationship of necessity and reliability to relax necessity in favour of high reliability
* Categorical exceptions such as public documents, business records, etc.
* High reliability
* Calling each person who make some contribution would halt the wheels of justice

## Reliability

### General principles

* Initially corroboration of hearsay was not seen as being usable to assess reliability, as it would only go to ultimate, not threshold, reliability
* Clear now that external corroboration can be considered
* Must still distinguish threshold from ultimate reliability
* **Threshold reliability – TJ can look at any evidence relevant to:** 
  + **1 – substantive reliability**
    - **establishing truth/accuracy of contents of statements,**
    - **Inherently trustworthy – circumstances in which it was made, evidence that corroborates or contradicts**
  + **2 – procedural reliability**
    - **providing the TOF with the necessary tools to test the reliability of the evidence by means other than contemporaneous cross-examination**
    - **Adequate substitutes for testing the evidence**
* NOTE – text swaps which is procedural and which is substantive

### Factors

* No comprehensive list – inconsistent with a principled and functional approach
* Can argue for other factors based on circumstances of your case
* Some factors have emerged from 25 years of principled approach

#### Sincerity

* Motive to be truthful at the time the statement was made
  + Under oath, affirmation, promise to tell the truth
  + Appreciation that lying was legally significant and might have consequences (e.g. public mischief, professional misconduct)
  + Appreciation that important decisions would be made based on statement (e.g. medical treatment)
  + Contractual/other duty to make an accurate statement
* Presence/absence of motive to fabricate
  + Proven motive to fabricate is a central component – lack of proven motive to fabricate doesn’t mean no motive to fabricate, might just be no evidence
* Availability of witness for cross-ex
  + Less helpful if W doesn’t recall or refuses to answer Qs
* **All these things point to what motivates these people to be truthful? Do they have motive to lie?**
* **Lack of motive to lie or tell the truth is not conclusive and we cant assume absence of one = the other**
* Accurate/reliability evidence of speaker’s demeanour at time of statement – ideally audio/visual recording
* Information not likely known by speaker if not true
* Corroborative evidence
* Striking similar referent statement
* Capacity for deceitfulness
* Prior inconsistent statements or prior consistent (for threshold)
* Statement knowingly made against pecuniary/proprietary/penal interest
  + A statement that actually would hurt them or make them look bad or incriminate themselves
* Location and situation where statement was made
  + Serious setting? Casual setting?
* Role/influence of recipient of statement – especially vulnerable speakers
  + Was the person a person in power? Children are easily manipulated but also any other vulnerable peoples
  + Motive to lie or motive to agree to the question
* Person in authority as recipient
  + Police?
  + This can taint the version of events
* No recollection of prior statement but testifies was true
  + i.e. I don’t remember but if I talked to the police it would be true
* Spontaneous/contemporaneous statement
* Circumstances would’ve led to immediate correction of inaccuracies
* Made before litigation arose
* Presence of inducements by state agent

#### Perception

* Event was significant enough to pay attention to at the time
* Speaker under influence of alcohol/drugs at the time
* Speaker under duress, emotional turmoil, mental illness at time

#### Memory

* Passage of time between event and statement
  + Time between statement made by speaker and recorded by recipient
  + Scale🡪 was it during, shortly after, YEARS after?
* Memorable event or duty to recall on speaker
  + Would it stand out in their memory? Was it something completely mundane?
* Speaker unlikely to have accurate memory due to age, mental ability, or other characteristics

#### Narration

* About the accuracy of the in-court recitation of the out-of-court statement – frailties of the recipient of the statement
* Leading or open question
* Alcohol/drugs
* Duty to clearly record/report material elements
* Duress/emotional turmoil
* Internal coherence or lack thereof of the statement, ambiguity of language, issues of translation from language spoken to court

#### Corroboration

* **SCC – Bradshaw – framework for using corroborative evidence**
  + Corroborative evidence useful in substantive reliability to show alterative explanations for a hearsay statement are unavailable
  + Corroboration that is equally consistent with truthfulness and accuracy as it is with another hypothesis is not useful
    - Not really corroboration if it is equally inconsistent with other things though...
  + Corroboration itself must be trustworthy
* Assessing whether corroborative evidence assists in substantive reliability:
  + Identify what parts of the hearsay statement are tendered for truth
  + Identify hearsay dangers raised by those aspects of the statement
  + Consider alternative, even speculative, explanations for the statement
  + Determine whether in the circumstances, corroborative evidence rules out these alternative explanations so that the only remaining likely explanation is truth
* **Bradshaw test appears more onerous for threshold reliability when substantive reliability is based on corroboration**
* **But remember this is just one factor, you shouldn’t generally rely solely on corroboration**

#### Other considerations

* Admissibility of some hearsay may require admission of contrary hearsay to ensure trial fairness
* Consider policy issues that may prevent admission
  + Crown stating not going to admit, not following statutory notice provisions, etc
  + Misconduct of police (e.g. beating) to obtain an involuntary statement to try to put in as hearsay

### Jury instructions

* When hearsay is admitted jury must be instructed on how they can and cannot use it
  + Not explaining why the hearsay was admissible – might confuse/taint
  + Not explaining normal rules of hearsay
  + Just explaining how they can and can’t use this statement
    - Must decide if statement was made, then decide what weight to give to it, if any
    - Deciding weight look to the rest of the evidence to support/negate

### Judge must give reasons!

* Hearsay admissibility is often challenged on appeal – TJ must give reasons for decision to admit/exclude
  + **If it is challenged there needs to be a basis on which to challenge!!!**
* If admitted by agreement – reasons not necessary, agreement is sufficient

# Hearsay cont’d

### Hearsay refresher

* Presumptively inadmissible
* Onus on party trying to admit the evidence to show on BOP that it is admissible – either categorical or principled exception
* Admissibility may be elevated to BRD if sufficient overlap between it and the elements of the offence such that it is impossible to decide admissibility without deciding an aspect of the ultimate issue
  + If it is the only evidence of that element

### Dying declaration

* **i.e. “joe killed me! I am dying~~~~”**
* **Preconditions:**
  + Declarant (original speaker of the hearsay) must have a settled hopeless expectation of death
    - Believe they will be dying right away
  + Death must ensue within a reasonable time
    - If they don’t die, it doesn’t count
  + Charge must be murder, manslaughter, crim neg causing death
  + Declaration must be statement of fact re cause of death
  + Declaration must be otherwise admissible if declarant were alive
* Reason – unlikely person would wrongfully accuse someone of their murder as they are dying
  + Is this reasoning doesn’t exactly fit your situation then it probably wont be an exception
* Threshold reliability – even if admitted still open for other side to challenge the accuracy

### Principled exception

* Dying declaration assessed under the principled exception
* Necessity – clearly speaker is dead
* Reliability – unlikely to want to die telling a deliberate lie
  + Motive to be truthful as only subject matter it is admissible about is the cause of the speaker’s own death, unlikely to falsely accuse someone of your own murder and exculpate the true killer
  + Perception – issue of whether dying person is capable of perceiving facts spoken about
  + Narration – issues with person who hears dying statement and testifies about it in court
  + All the normal issues we look at with hearsay you want to look at In this exception

## *Res gestae*

* Multiple types of statements fit under this category
  + Different issues for each type so better to split
  + **Same reasons for admissibility**
    - **Contemporaneity to events and absence of opportunity to lie**
      * **You’ve had less time to think of a good lie, or a good fake story etc**
    - **Allow W to testify in natural narrative,**

The Three Types

* Excited/spontaneous utterances
* Statements associated with (and giving meaning to) conduct (i.e. verbal acts)
* Statements of current subjective perception/intention

### Excited/spontaneous utterance

* Speaker does NOT have to be unavailable
* **Admissible if:** 
  + **Statement made contemporaneously with an unusual/overwhelming event that**
    - **Can’t be any old event at all, has to be something genuinely weird or unusual**
  + **Left the declarant (at time of statement) under pressure/emotional intensity which would guarantee reliability**
* **Factors**
  + Can possibility of concoction/distortion be disregarded?
  + Circumstances in which statement was made
    - Event so unusual/startling/dramatic to dominate thoughts of victim
      * Something that would overwhelm someone, i.e. 911 calls when someone is in the middle of a crime happening, calls for help, etc
    - Utterance instinctive response to the event
    - No real opportunity for reasoned reflection/fabrication
    - Spontaneous – must be closely associated with the event – speaker still dominated by the event, trigger for the statement
    - Special features which relate to possibility of concoction/distortion
    - Possibly – other issues like drunkenness of speaker
* Contemporaneity – stricter for witness than victim
  + Look at all factors to assess likelihood of concoction
    - Actual victim or an event is likely to be in that excited or shook up state more so than a witness
* Duration of event – no bright line, look at circs of case
* Overpowering nature of event – must be a link between the event and the statement
  + Statement is a product of surprise/shock from the event
* Classic example 911 calls – akin to cry for help
* Can be statement from AC
  + Needs to be more contemporaneous with the offense
  + To support or rebut a defence
  + Accused can call statements from other witnesses as well, but can also testify themselves

#### Principled exception (comparison) for spontaneous utterances

* Necessity
  + More problematic
  + No requirement for speaker to be unavailable – could actually testify but still have out-of-court statement in for POTOC
    - May require proof of necessity if speaker is testifying
* Reliability
  + Requires its own case-by-case reliability assessment – proof that speaker was so overpowered by the event to sufficiently guarantee truth
  + Problems of perception and narration can be addressed without the need for cross-ex of the speaker

Note: when looking at a hearsay question 🡪 argue it fits under a categorical exception of you can and then also try and fit it under the principled exception too

### Verbal acts

* Actions of person are so caught up in words spoken by that person that can’t separate words from actions
  + Conduct can only be understood with words for context
* Requirements:
  + Conduct to be characterized by the words must be *independently material to the issue*
  + Conduct must be *equivocal*
    - *Without the words! Like someone leaving a room and saying “im leaving to go to X…”*
    - *Cant be describing past conduct i.e. “I just came back from the grocery store”*
  + Words must aid in giving legal significance to the conduct
  + Words must accompany the conduct
* Not when words explain past conduct – reliability derives from close temporal/logical connection between words/conduct

### Statements of current subjective perception, emotion, or intent

* Statement of speaker’s present emotional condition, or knowledge/belief of a relevant matter, perception of pain/physical stimulus, or intended actions
* Speaker’s statements are likely to be the superior, often only, evidence of these matters
* Degree of spontaneity, at time associated with subjective state described, no motive to fabricate
  + Then can tend to prove truth of subjective perception, belief, or intent
* Distinguish when state of mind is original evidence without truth of statement being relevant vs where for POTOC
  + If the state of mind isn’t for the truth but is for some other reason we are out of the scope of hearsay, “do I care if this is true or not”

### State of mind: knowledge, belief, or emotion

* Must be relevant and probative to be admissible
* “state of mind” must be relevant – directly or indirectly
  + Can go to prove that a person behaved a certain way/did a certain thing
* Must show that person actually felt the way stated if feeling/emotion is relevant
* Statement of bodily sensation – flexibly contemporaneous
  + “I’m in pain”, “I’m hungry” etc
* Present intention – admitted to show that they acted on their intention and took a particular course of action
  + Made in absence of motive to fabricate, nature of plan described, proximity between time of statement and proposed implementation of plan
  + Can only use to prove speaker’s intent – not intent/actions of 3P
  + Motive/reason for actions is not admissible for POTOC, not to prove past acts that created future intent

## Records

### Public records

* Records of assertions made by public officials in the course of their public duty – generally admissible for POTOC
* Presumed accuracy, recognized necessity of inconvenience
* Requirements:
  + Some judicial/semi-judicial inquiry held re facts recorded
  + Object of inquiry was to make the report/document proposed as evidence
  + Report available for public inspection
  + Statements in report relate to matters about which maker had a duty to inquire and report
    - This, however, does not allow you to put in evidence from one trial into a completely separate trial, really only about if there was some inquiry you can put the conclusion in
* Applies to foreign and domestic public duties
* *CEA* – public documents s. 24
* Fact of guilty plea, not underlying admitted facts
  + Facts found in other proceedings not admissible in subsequent/different cases
* Doesn’t cover commission or inquiry reports, or standing committee reports – threshold reliability and fairness

## Statements made pursuant to a duty

### Common law business records

* Business records hearsay exception:
  + Record contains original entry
  + Made contemporaneously
  + In the routine (events don’t have to be routine, making the record does)
  + Of business (includes illegal businesses) (i.e. even if you are a drug dealer)
  + By recorder with personal knowledge of the thing recorded as a result of having done/observed/formulated it
  + Who had a duty to make the record
  + No motive to misrepresent
* Very similar test to the principled exception, so Howery would no expect you to do the principled exception test for this one
* Can have one document with multiple recorders – circumstances of the making of the statements allow admission despite double/triple hearsay
* Includes expression of observation and opinion when the recorder was under a duty to make observations/opinions

## Declarations of testifying witnesses made outside the present proceedings

### Are they hearsay?

* Presumptively yes – because of the absences of contemporaneous cross-examination
* If want to put in actual prior statement of W (not just get W to adopt same evidence on the stand) must meet a hearsay exception for past recollection

## Prior inconsistent statements – KGB statements

### Use of prior inconsistent statements

* Common law – hearsay with no value, only considered to assess credibility of W, not admissible for POTOC
* R v KGB – SCC – principled approach to hearsay and prior inconsistent statements
* Distinguished from other hearsay dangers because speaker is present, testifying, under oath, can be observed and cross-ex’d (cross is most important factor)

### KGB Exception

* Must have been admissible as the sole testimony of W
  + No other admissibility issues with contents
  + i.e. does it have bad character evidence, does it have other things that we would need to take out to make it admissible, etc
  + you would just edit it to remove those parts
* Reliability – asking TOF to choose between two statements of same W, must be sufficiently reliable to allow the TOF to weigh prior against trial evidence
  + E.g. look at circumstances of prior statement’s making
* Oath/affirmation before prior statement, or sufficient substitute (hence police warning in interviews)(this helps reliability)
  + Evidence that speaker appreciated solemnity of the occasion and importance of telling the truth
  + Reliable external evidence that tends to meaningfully confirm reliability of material aspects of prior statement
* Audio/visual recording – ability to assess conditions, demeanour, etc
* Cross-ex at trial as substitute for contemporaneous cross-ex
  + Difficult when witness lacks memory, uncooperative with trial process
* TJ ultimate discretion to exclude even if reliability indicators met
* Necessity – established b/c recanting W has withdrawn their earlier version of events – only way to get it before the court is admitting prior statement
* Voluntariness – related to reliability, given original underpinnings of this requirement was to avoid unreliable/false confessions
  + Are there any issues in which the voluntariness of the statement being made may be an issue? These will decrease reliability
  + Reliability is more important than trial fairness?
  + But not automatic exclusion if proven involuntary under the confessions rule – must look at all reliability factors together, may still be reliable despite being involuntary
* **Ultimately KGB exception is really just the principled exception applied to a specific fact scenario**

## Past recollections/prior consistent statements

* Testifying witnesses may be referred or wish to refer to their previous out-of-court statements to confirm their accuracy or refresh/revive their current memories
  + If memory is refreshed can testify from current memory prior statement doesn’t go in, not a hearsay issue
  + If memory not refreshed may have to put the statement into evidence – hearsay issue
  + This can come up with witnesses that are being honest, especially court cases years down the line

### Past recollections and principled exception

* **Past Recollection Recorded admissible if:** 
  + Accurate record
  + Then-fresh memory
  + W can presently swear to his/her honesty at time of making the record, even though presently have no memory
  + W is available to testify and be cross-ex’d
* Consistent with principled exception
  + Necessity – no present memory, only way to get evidence in is through past statement
  + Reliability – W’s swearing it was accurate/fresh at the time and being available for present cross-ex

## Testimony given not in the presence of the tof

* Testimony from prior proceedings is hearsay – can’t just use transcript of one trial/hearing and put it into another trial unless (1) all parties consent, (2) prove hearsay exception
  + Common law historically admitted but clear now it is hearsay – not all hearsay dangers are overcome by the fact that the testimony was previously given in legal proceedings/trial

### S. 715 previous evidence in the same matter

#### Exception

* S. 715 – exception to common law – prior testimony admissible if:
  + Given in 3 classes of proceedings (all re same fact pattern, ok if charges get more serious/different post-prelim)
    - Prior trial on same charge
    - In the investigation of the charge
    - In the preliminary inquiry for this charge
* If speaker:
  + Refuses to be sworn/give evidence
  + Is dead
  + Has since become and is insane
  + Is so ill that s/he is unable to travel or testify (not that they would die if travelled)
  + Is absent from Canada
* If evidence was taken in the presence of the AC
* Unless – AC proves that s/he did not have full opportunity to cross-ex
  + Issue is opportunity – not whether AC took advantage of their opportunity, i.e. if AC made tactical decision not to cross-ex on everything at prelim too bad for AC
* Example in the news: Blanchard, crown argued that witness died and they didn’t get a chance to cross x them, but the TJ says well you had your chance too bad so sad

#### Necessity

* Requirements for witness are subset of general necessity
* Party seeking to put evidence in has onus to prove one (or more) of these factors exist on BOP
  + Listed in the section about, i.e. absent from Canada or dead
* Can prove with circumstantial evidence – absent from Canada – can call sufficient evidence about trying to find W that TJ can draw the inference
  + Doesn’t have to be permanent absence
  + Might rely on hearsay requiring its own exception

#### Reliability

* Section provides reliability substitutes
* Evidence taken in presence of AC
* AC must show didn’t have full *opportunity* to cross-ex
  + Focus on opportunity, not how AC used that opportunity
  + New/additional evidence alone not sufficient, would have to be very significant etc
  + Tactical choices to do only limited cross at prelim not enough
* Have to show it is very significant and changes the circumstances materially!

### TJ Discretion

* TJ retains ultimate discretion to exclude evidence that facially satisfies statutory requirements if those requirements don’t guarantee evidence obtained in a manner fair to AC
  + Excluding for trial fairness
    - E.g. if Crown laches (unnecessary delay) prevented getting the evidence, or if Crown knew W unavailable later but didn’t tell AC
  + E.g. Manifest unreliability of W’s evidence combined with inability of defence to cross-ex on new evidence
* Trial fairness does NOT mean excluding evidence likely to convict AC (just like prejudicial evidence isn’t that which tends to convict, just tends to convict on an improper basis)
* TJ must properly instruct jury on how they can and can’t use the evidence

## Videotaped statements by children and other vulnerable witnesses

### S 715.1 and 715.2

* CC amendments responding to consensus that child sexual assault victims had been poorly served by common law approach to evidence/procedure
* 715.1 Originally limited to sexual assault/assault prosecutions now applies to all cases involving victims and witnesses under 18
* 715.1 – re under 18
* 715.2 – re any V/W may have difficulty communicating evidence by reason of mental or physical disability

#### Admissability

* Must prove in voir dire:
* W under 18 (715.1) . Difficulty communicating b/c of mental/physical disability (715.2)
* Statement is a video recording
* made within a reasonable time after the alleged offence
* W describes the acts complained of in video
* W testifies
* W adopts contents of video
  + i.e. “is that you in the video” yes “were you telling the truth” yes, etc
* Unless TJ finds admission of video would interfere with proper administration of justice
* This is also to try and get the best recollection of what happened, getting the fresh evidence + not retraumatizing them

#### Purpose

* Children, more than adults, have better recollection shortly after events occur
  + Video made within reasonable time inevitably is more accurate recollection than testimony at later trial
* Avoid/minimize re-victimization of child having to recall and relate traumatic events in court, particularly where alleged perpetrator is present
  + Less formal/intimidating setting of video interview more likely to minimize further injury upon child

#### A reasonable time?

* Wording prima facie accepts delay – not “immediately”
* Q – considering all relevant circumstances, was the video made within a *reasonable* time?
  + Reasons for delay
  + Impact of delay on memory, has it been enough to impact memory?
* Courts have accepted videos made *years* after
  + Reasons were fear of AC and child’s mother’s failure to take action when child disclosed
  + Child not so young to raise reliability concerns (13yo)
    - i.e. the child was 4 when it happened but they delay the recording to age 5-6 because children are generally more reliable then
  + No leading questions
    - Children are more likely to fall victim to leading Qs
  + No indicia of diminished recollection

#### Adoption of the statement?

* Somewhat different than typical “adoption” of hearsay
* Look at purpose of section
  + W confirms making the statement and that they were trying to be truthful and honest when making it
* Lower threshold than adult statements: more just like “is this you?” and “were you being truthful to the police”

#### TJ discretion to exclude

* **(a)**     The form of questions used by any other person appearing in the videotaped statement;
* **(b)**     any interest of anyone participating in the making of the statement;
* **(c)**     the quality of the video and audio reproduction;
* **(d)**     the presence or absence of inadmissible evidence in the statement;
* **(e)**     the ability to eliminate inappropriate material by editing the tape;
* **(f)**     whether other out-of-court statements by the complainant have been entered;
* **(g)**     whether any visual information in the statement might tend to prejudice the accused (for example, unrelated injuries visible on the victim, the jury may inappropriately assume were caused by the accused);
* **(h)**     whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant;
* **(i)**     whether the trial is one by judge alone or by a jury; and
  + Judge alone more likely to be admissible than the jury, because judge is better at avoiding bias
* **(j)**     the amount of time which has passed since the making of the tape and the present ability of the witness to effectively relate to the events described

## Commission evidence

* Evidence taken out-of-court for use in a particular proceedings – ss. 709-714 CC
  + Only permissible if court is satisfied that for some good reason W is beyond authority of court to compel attendance
  + Usually due to being very sick or out of the country
* Application can be by Crown or AC – must show W not likely to be able to attend trial when held or outside Canada because:
  + Physical disability arising out of illness or
  + Some other good and sufficient cause
* Rarely used but good to be aware of

## Statements of the accused (admissions)

* Confessions Rule – Person in Authority
* Other statements of AC – hearsay rules apply
  + Admissions against interest exception to hearsay
    - Unlikely someone would say something against their own interest unless it was true
    - Adversarial nature of litigation – unlikelihood of AC trying to argue that AC him/herself is unreliable unless speaking under oath or if AC can cross-ex him/herself
    - If you falsely proclaim you did a bunch of bad claims, the other side can call evidence, accused will probably not argue they are full of lies and are an unreliable speaker
* Some query whether this is hearsay at all or just part of the adversarial system – party can’t complain about unreliability of their own prior statements
* Only Crown can tender prior statements of AC
  + But once Crown does it’s evidence for Crown and AC (inculpatory and exculpatory parts are equally admitted)
* SCC – rationale for co-conspirators exception to hearsay looked at “rare case” where fit traditional exception but also had to satisfy principled exception

### Basis of knowledge

* Source of AC’s knowledge for statement usually not relevant for admissibility
* AC’s statement can be based on hearsay if AC adopts
  + Second level hearsay issues not present when AC agrees to rely on hearsay for AC’s own purpose – hearsay issue is no opportunity for opposing party to test it, AC is showing s/he accepts it when relies on it
    - AC voluntarily accepts risk of hearsay statement when AC relies on it – second level hearsay issue obviated
    - If the accused acts on someone else’s statement or relies on someone else’s statement can be used against them

### Operating mind

* Circumstances around which statement were made not relevant for admissibility of non-confession AC statements – unless show no operating mind
  + E.g. AC talking in his/her sleep not admissible
  + No operating mind not probative of anything
* For example: what you are randomly saying while you are asleep and dreaming, is not under operating mind, or like an automatic state of intoxication
* Show that there was a complete lack of operating mind

### Context/completeness

* Statement must be presented with sufficient context to give it real meaning – possible for TOF to determine what AC was actually communicating
  + Not a fragment of a conversation where the TOF wouldn’t be able to determine the full context/meaning
* Admission doesn’t require perfection for completeness and recording – but must have sufficient context to permit TOF to meaningfully assess statement

### Adoptive admissions

* AC may adopt statement of 3P – becomes statement of AC
  + Not just 3P statement made in AC’s presence, AC must adopt
* Possibly where AC is silent when a reasonable could be reasonably expected if AC disagreed with 3P statement
  + Courts split – but must be careful – silence must constitute adoption in circumstances
  + Consider right to remain silent
  + Look at all circumstances to assess whether silence is adoption
* Must instruct TOF still up to TOF to determine if silence was an adoption

### Vicarious/agent statements

* Narrow admissibility for admissions made by agents/employees of AC
  + Statements by agent within scope of agency to 3P during continuance of agency are admissions against principal
    - If admissions made as part of conversation/communication that agent was authorized to have with 3P
* Agent’s narrative of past events not admissible against principal
* Purpose behind this is essentially letting people rely on third party admissions

### Jury instructions

* TJ cannot instruct jury to treat inculpatory or exculpatory parts of AC’s statement differently from the other
  + Once AC’s statement is admissible – it is in for both inculpatory and exculpatory equally – up to jury to decide what to believe
  + Error to suggest believe inculpatory but not exculpatory

## Co-conspirator/common enterprise

* Acts and declarations of a member of a criminal conspiracy/common criminal enterprise, made in furtherance of the conspiracy/enterprise, are admissible against all members
* Rationale – appointed each other as agents for the duration of the common enterprise – act of one is act of all
* Applies to charges of conspiracy or other offences as long as offence committed pursuant to common enterprise that is the subject of preconcert by the participants (i.e. agreed in advance to do it together)
* Applies whether or not co-coconspirator whose acts/declarations are tendered is charged

### Links to other exceptions

* Admissions – same basis for admissibility as admission by party litigants – is it even hearsay?
* *Res gestae* – declarations must be in furtherance of the conspiracy so are really part of the *actus reus*
* To the extent that proof of the *fact* that the statement was made (vs POTOC) is circumstantial evidence of the joint enterprise/accused’s role it isn’t hearsay
* Should assess under necessity/reliability

### Practical concerns

* Protection of this categorical rule stems to some extent from concern for practical realities of prosecuting conspiracies/common enterprise
* Much of the evidence would be normally admissible for some reason so not likely that TOF has to weed through inadmissible/admissible
  + Lots of the evidence that would normally be inadmissible, there is no way to allow prosecutions for conspiracies if you don’t allow this type of evidence
* Hard to prove a conspiracy without the rule
  + Structured/exacting standards of admissibility prevent against factually wrong convictions while allowing the Crown the ability to prosecute conspiracies
* Attempting to prove in other ways would increase delays and difficulties in trial procedure

### 3-stage test

* Threshold reliability for admissibility – but must instruct TOF to use this same process in assessing
* 3-stage test:
  + 1 – Crown proves BRD there was a conspiracy/common criminal enterprise – look to all evidence including acts/declarations made by alleged co-actors
  + 2 – Crown proves on BOP that this AC was a member of the conspiracy/common enterprise – look only at evidence admissible against this AC, not acts/declarations of alleged co-actors
  + If 1 & 2 met, then:
  + 3 – TOF may then apply any act/declaration of any member made in furtherance of the conspiracy/design against all of them (including specific AC) as proof of any charge in indictment
* Howery: this is a difficult test in general to make

### “In Furtherance”

* Rule only allows use of acts/declarations made *in furtherance* of the common enterprise/conspiracy
* Not
  + pure narrative
  + Acts/declarations made before conspiracy/common enterprise
  + Acts/declarations made after purpose of conspiracy complete
    - Unless sufficiently involved in achieving common goals to justify their use in proving the whole transaction – part of successful completion of common purpose
  + Acts/declarations made after AC withdrew not admissible against AC
* **In furtherance**
  + statements made to report back or within the design itself
  + statements/acts taken to preserve/conceal the existence of the design
  + Reassurances/updates between members
  + Instructions/reporting between members
  + Acts to avoid detection/prosecution
* If no conspiracy charge Court must identify the nature/scope of the enterprise before assessing whether statement was in furtherance of it

#### Jury instructions

* TJ must instruct jury on how to deal with acts/declarations of various members of the common enterprise
* Clear instruction on three stages of analysis
  + Conspiracy – is there a conspiracy BRD?
  + Membership – was the AC involved BOP?
    - Must clearly explain to only consider evidence directly admissible against AC whose culpability they are considering
    - If AC’s membership not proven on BOP – AC not guilty of conspiracy
  + In furtherance – if yes and yes can use only statements made in furtherance of the conspiracy

#### Two person evidence

* Different than a multi person conspiracy because the test wouldn’t make sense with a two person
* AC must be found guilty on basis of evidence against AC directly as understood against the background of the other evidence
  + Standard three stage test doesn’t work
    - Finding first stage BRD would effectively convict using hearsay not tested against AC specifically
* Two-person – two-stage
  + BRD – agreement alleged existed
  + BRD – AC entered into or joined that agreement

### Principled exception

* Necessity – Co-AC not compellable, undesirable to charge co-conspirators separately, evidentiary value of contemporaneous declarations made in furtherance of conspiracy
* Reliability – proof BRD of conspiracy and BOP that AC participated in it enhances the general reliability of what was said in furtherance of it
  + Similar to *res gestae*
  + In furtherance req’t provides extra reliability – spontaneous/contemporaneous to events to which they relate
  + Initial tests are put very high compared to other evidence

## Historical or ancient events

* All direct witnesses are dead – can’t prove without hearsay
* Events of general history may be proved by accepted historical treatises on the basis that they represent community opinion or reputation re historical event of general interest
  + Must be historical event that would be unlikely to have living witnesses
    - i.e. it happened 200 years ago, not 10
  + Matter must be of general interest – high probability that it underwent general scrutiny at the time
    - Enough historians and society in general has paid attention to so we have a generally accurate account of what happened
* Expert historian can testify about historical event relying upon material to which any careful and competent historian would resort

### Principled exception

* Necessity – unlikely that a witness to the historical event could be obtained
* Reliability – circumstantial guarantees of trustworthiness, events being of public interest, historic methods used to reach conclusions
* Can apply to oral history in indigenous litigation – *Delgamuukw v British Columbia* (SCC)
  + Must adapt rules to facilitate justice – assess necessity and reliability in the context of how history was kept
  + Oral histories admissible where (1) useful and (2) reasonably reliable – subject to TJ discretion
  + Indigenous histories can be useful
    - Ancestral practices and their significance
    - Indigenous perspective on the right claimed
  + Reliability – does the W represent a reasonably reliable source of the particular people’s history?

## Declarations against interest

* Statement contrary to speaker’s economic interest sufficiently reliable to overcome hearsay dangers
  + If speaker was dead – statement against economic interest was admissible
* Two additional criteria
  + Must have been known to speaker to be against his/her pecuniary/property interests at the time it was made
  + If they think that it was within their interest then its irrelevant, they have to know at the time it was against their interest
  + Content of statement must have been re something within the speaker’s knowledge
* Not clear how mixed statements are dealt with – if one part is against interest, but the rest is not

### Principled exception

* Categorical exception is very mechanical
  + Requires only some modest negative financial impact
* Modification could require such adverse economic impact of out-of-court statement to exclude any reasonable possibility of fabrication
  + Unlikely to make false statement that would cause *meaningful* economic harm

### Declarations against penal interest

* Early cases – same if penal or pecuinary
* House of Lords then found that statement had to be against *pecuniary* rather than *penal* interests
* Canada – declarations against penal interest seem to have become admissible – with great caution
* *R v Demeter* – SCC
  + Declaration made to such person/such circs that declarant should’ve known risked penal consequences
  + Vulnerability to penal consequences must not be too remote
  + Declaration must be considered in its totality on whole weight of its evidence in favour and against declarant
  + Can look at whether other circs connect declarant with the crime, whether or not there is any connection between the declarant and the AC
  + Declarant would have to be unavailable because dead/insane/gravely ill/etc prevents testifying
* Reiterated prior requirements
  + Deceased should have made statement of fact for which he had peculiar knowledge – only statements about acts done by deceased, not 3P, not statements about what others told deceased
  + Fact must be to deceased’s immediate prejudice/against his interest at the time stated, not equivocal for/against his interest or only future interests
  + Deceased must have known fact to be contrary to his/her interest at time s/he made statement – this is the guarantee of truth

#### The ultimate test for declaration against penal interests

* 1.     The statement must be made in circumstances which would have made the declarant believe, at the time he made the statement, that:
  + i.     the statement he was making was contrary to their penal interests; and
  + ii.     he was, by making the statement, exposing himself to penal consequences, in the sense that those hearing the statement might act on it or relate it to those who might act on it.
  + So, for example, if you are making this statement to your co-conspirator it will likely not be contrary to your penal interest bc you wouldn’t rationally perceive a risk of your con conspirator tattling
* 2.     The vulnerability to penal consequences was likely or “not remote”.
* 3.     The overall weight of the statement must be contrary to the interests of the declarant (a statement explaining or defending the declarant’s conduct would likely not be against their interest).
  + i.e. “I killed them in self defence!” you were justifying your conduct, not necessarily saying something directly against your interest
  + maybe applicable if you later say it wasn’t you at all
* 4.     Evidence tending to corroborate the factual accuracy of the statement against penal interest may be considered in a doubtful case.
  + If you have other evidence that corroborates involvement that can help push the admissibility over the edge
* 5.     The declarant would have to be unavailable (but not necessarily dead).
  + i.e. out of the country
* 6.     The statement would have to be with respect to a matter within the personal knowledge of the declarant and about which he would otherwise be permitted to testify.

#### Available declarants

* Declarations against interest are not admissible if declarant can testify – then testifies to his/her own culpability under protection of *CEA/Charter*

## Misc exceptions

* Age – your own age is hearsay to you, but you can testify to it, don’t have to call your mom/others present at your birth
  + S. 658 CC – allows age hearsay to be admitted by person whose age is at issue, their parents, or birth certificate/incorporated society record
* Pedigree (also known as pedigree…..) – family relationships
  + Most often to prove lineage in estate/peerage cases
  + You can testify who your spouse is or your mother is
* Self-identification – you can testify to your own name, to prove that you are who you say you are
* General/public rights – typically of ancient origin
  + Things that it would be ridiculous if you couldn’t explain yourself
  + These things generally don’t ever get argued about because both sides generally except them