EVIDENCE 453 CAN

Evidence
D: the data used by a decision-maker to resolve a factual controversy

Factual Controversy
Ex. Did Nicole commit this murder?

Law of Evidence
D: how the data can be proved and how it can be used

Voir dire
D: "trial within a trial" → a mini hearing to determine a discrete legal issue [*no jury, but with same judge presiding]
Ex. Was confession voluntary?

Identification Evidence
D: ex. Evidence that the accused Nicole was the robber

Dock ID
D: Identifying AC ["accused"] in court ["do you see that person in the courtroom today?"]

Trier of law [jury trial]	Trier of fact [jury trial]
Judge: ensures jury only hears evidence it should + instructs jury on legally permissible ways to use the evidence *[otherwise they've erred in law]*	**Jury**: decides what facts to believe or disbelieve & which inferences to draw
Admissibility Up to trier of law	Weight → depends on how "probative" evidence is [believability {credibility + reliability} + strength of inferences] Up to trier of fact

Note: importance of **quick** objections
- RATIONALE: don't want jury to hear it [regardless if judge says afterwards 'forget that'] + helps if issue is raised on appeal

WHY EXCLUDE EVIDENCE? Because that information is more likely to mislead than instruct

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ADMISSIBILITY

The Golden Rule: info can be admitted as evidence only where it is **relevant** to a **material** issue in the case

- NOTE: necessary, but not sufficient condition for admissibility
  - [IOW, once satisfied info is relevant to a material issue, other rules may still make it inadmissible]

MATERIALITY **Facts-specific!*
D: evidence is material if it is directed at a matter in issue in the case [ASK: what fact is it trying to prove/disprove?]

[ex. Is what Nicole had for lunch material? If fruitloop dust on victim's body, yes]

TYPES:
i) **Primary materiality**:
- Evidence about a primary issue that needs to be decided in the case
  - Ex. eyewitness saw someone of Nicole's physical description in the area

ii) **Secondary materiality**:
- Evidence about other evidence
  - ie. secondary issues like to what extent jury should believe eyewitness [ex. via cross-exa.]

RELEVANCE **Very low threshold!*
D: evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than in the absence of that evidence

[IOW, does the evidence make it more likely that something is true, or not?]

AKA "logical relevance" (*R v Arp* 1998 SCC)

Relevance isn't usually litigated:
- Perhaps with self-represented litigants
- *R v White* 2011 SCC → lack of hesitation relevant to intent? [Majority said yes, so murder]

NOTE: inference must be reasonable, not based on myths

DIRECT EVIDENCE **always relevant*
D: if believed, establishes a material fact without the need for an inference to be drawn

[ex. Video footage of twin A drawing on himself]

CIRCUMSTANTIAL EVIDENCE **requires an inference*
D: evidence that tends to prove a factual matter by proving other events from which the occurrence of the matter in issue can reasonably be inferred

[ex. witness testifies he saw people walking into a shopping mall with wet hair and wearing raincoats → this is circumstantial evidence to draw inference that it was raining … **might go to reliability too**]

EVIDENCE IS MORE PROBATIVE BASED ON:

1) How believable it is +

CREDIBILITY → is witness being honest? Ex. someone who doesn't want to be there and was subpoenaed = likely honest Ex. someone with a grudge against the AC = likely less honest	**RELIABILITY** → how accurate is the otherwise honest witness? ***Most cases won/lost here* [especially he-said/she-said cases] Ex. Was he drinking? Was it late? This happened a long time ago, does he really remember?

2) How strong the inferences it leads to are

EXCLUSIONARY DISCRETION **don't forget this for exam answers → an important last step in admissibility test*
D: Judges can exclude relevant and material evidence **where its *probative value* is outweighed by its *prejudice***

- Applies to EVERY piece of evidence

COST-BENEFIT ANALYSIS **ad hoc*

PROBATIVE VALUE	**PREJUDICE**

Evidence's believability {credibility + reliability}
 	
+
 	
Strength of inferences it leads to
	CONSIDER:
	- practicalities of presenting the evidence [resource question]
	  - ie. takes 5 days to prove point where inference isn't strong = prejudicial to larger system of justice
	- fairness to the parties involved
	  - ***especially the AC,** but also to witnesses and the Crown
	- potential for evidence to distort outcome of the case
	  - ie. **where it causes emotion or bias to drive conclusions, rather than logic**
	  - ex. Murder scene with gruesome pictures: necessary to exhibit 100 of them? Likely no
	NOTE:
	Evidence is **NOT** prejudicial simply because it implies guilt

RULES ABOUT THE ***USE*** OF ADMISSIBLE EVIDENCE [IOW, it's admissible → now what?]

General rule: trier of fact applies common sense + human experience to decide what **USE** to make of each piece of evidence

i) DISCRETIONARY WARNINGS ["*Vetrovec* warning"]

D: judge has determined evidence is admissible, but may have duty to warn the jury of the potential "dangers" of relying on it

WHEN?

If witness is important to the Crown's case + on an objective basis, the Court *should* suspect the credibility of the witness' evidence

- ex. evidence from **accomplices, jailhouse informants,** witnesses of **"unsavoury character"**

HOW?

a) Identify need for special scrutiny + why that scrutiny is required
b) Caution jury that while they can rely on unconfirmed evidence, it's dangerous to do so
c) Tell jury to look for evidence from another source to determine if untrustworthy witness is telling the truth
   - [textbook: independent evidence doesn't need to implicate the AC (*R v Kehler* SCC) & where more than one *Vetrovec* witness testifies, their testimony can serve as confirmatory evidence → but consider collusion!]

NOTE:

- Jury can still accept evidence, just has to be warned it's dangerous to do so
- As a lawyer:
  - address discretionary warnings in your opening statements: *"you should be cautious of this evidence because you will be hearing from unsavoury kinds of witnesses, but for reasons A, B, and C, when assessed in its totality, you should believe them"*

ii) DANGERS OF IDENTIFICATION CASES

Witness doesn't know AC?

- Witness' evidence identifying AC in court ["dock ID'] is of little weight → judge needs to warn jury of this
- People are particularly bad at IDing people of different ethnicities
- Many wrongful convictions have arisen (*R v Henry*)

iii) BURDEN OF PROOF VS STANDARD OF PROOF

BURDEN OF PROOF **calls its evidence first*	**STANDARD OF PROOF**
D: who has the *obligation* of proving the factual matter in issue? - Civil = P - Criminal = Crown* **can shift, depending on legal issues raised → ex. for **establishing breach of a Charter right, AC has burden***	**D:** *degree* to which burden of proof must be satisfied - Civil = balance of probabilities - Criminal = beyond a reasonable doubt* **sometimes shifts to balance of probabilities*

iv) DEFENCE EVIDENCE AND THE "*W(D)* INSTRUCTION"

WHEN?

Where defence presents evidence that would result in an acquittal if believed, judge must give jury a *W(D)* instruction

- Ex. often when AC testifies

HOW?

Make it clear that Crown has burden of proof, not the AC + say:

1. If you believe the evidence of the AC, you must acquit.
2. If you do not believe the testimony of the AC but you are left in reasonable doubt by it, you must acquit.
3. Even if you are not left in doubt by the evidence of the AC, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the AC.

NOTE:

W(D) instruction **DOES NOT** apply to civil cases [RATIONALE: they're determined on a balance of probabilities]

v) PRESUMPTIONS

D: presumed without evidence on the point

TYPES

PRESUMPTIONS OF LAW
D: a legal rule that automatically imposes a presumption on the proceedings
- **Presumption of innocence**
  - [overcome if Crown proves offence beyond a reasonable doubt]
- **Presumption that judges know the law**
  - [overcome if legal error is proven on appeal]
- **Presumption of the absence of mental disorder**
	PRESUMPTIONS OF FACT **Prof: don't worry about these*
	D: If fact A is proven by a party, then fact B can be presumed without further proof
	- **Don't arise automatically**
	- Rebuttable
	- Often dictated by statute
	
	RATIONALE: policy reasons → don't call in expert toxicologist in every case

vi) *PRIMA FACIE* CASE STANDARD

WHEN?
Applicable to **preliminary inquiries** & **applications for a directed verdict** [both in criminal context]

TEST:
Is there evidence on the record upon which a properly instructed jury can convict?

NOTE:
- Low bar
- Evidence is NOT weighed at this stage [ie. no assessment of witness credibility/reliability]
- ALL evidence assumed to be true [ie. judge assessing *prima facie* case isn't doing the job of the latter jury]

In civil context → D may make motion for a non-suit, and judge must determine whether P has established any facts from which liability can be inferred

vii) "AIR OF REALITY"

WHEN?
Before (most) defences can be considered, they must have an "air of reality"

TEST:
Is there evidence on the record upon which a properly instructed jury could acquit?
- If YES → Crown has burden of disproving it beyond a reasonable doubt

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HEARSAY

D: any out-of-court statement that is offered as proof of the truth of its contents = presumptively inadmissible

RATIONALE:
- Difficult to test its reliability
  - Adversarial system relies on calling witnesses who are i) under oath + ii) subject to cross-examination + iii) able to be seen by the trier of fact (to assess their demeanor)
- Difficult to determine if there should be concerns about:

Perception [declarant misperceived]	**Memory** [wrongly remembered]	**Narration** [unintentionally misleading → *ex. W says A was "drunk" but to W, one beer means drunk*]	**Sincerity** [knowingly misleading]

**can be mitigated/eliminated by contemporaneous cross-examination*

["strike while the iron's hot" → SCC in *R v Khelawon*]

NOTE: prior out-of-Court statements made by currently testifying witness = still hearsay [no contemporaneous cross-examination; *Khelawon*]

HEARSAY EXAMPLES

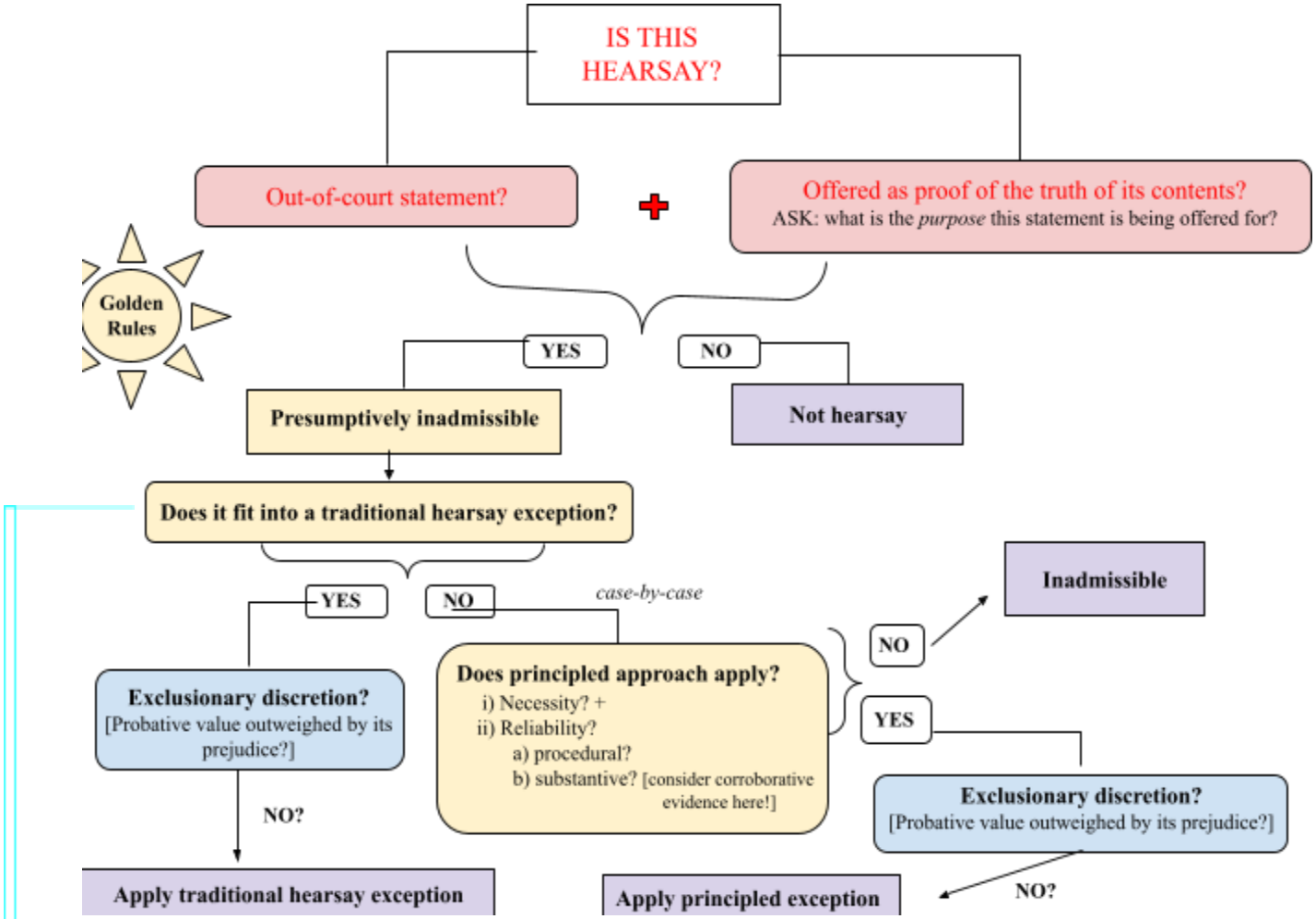
P falls on the steps leading to the D's store and sues for negligence. A delivery driver to the store is called as a witness and testifies that one hour before the accident a customer came into the store. The driver overheard the customer say to the D, "Hey man, your steps are covered in ice. I just about killed myself out there. You should really clear that up before someone gets hurt." Is this hearsay?

- What's the purpose the statement is being led for?
  - If to prove steps were icy → hearsay
  - If to prove D knew that someone told him they were icy [knowledge of a hazard is relevant to negligence] → not hearsay

In a *voir dire*, a police officer on stand says 'my partner saw bottles in the car, etc'. Is this hearsay?

- It can't be used as proof that there *were* bottles in car → hearsay
- Can be used as proof of reasonable suspicion so as to justify why police did search in the first place → not hearsay

ANALYSIS:



**REMEMBER:* even if exception applies, trier of fact chooses how much weight to give it

i) TRADITIONAL HEARSAY EXCEPTIONS

- Prior judicial proceedings
- Prior Convictions
- Admissions by a party
- Declarations against interest by non-parties
- Dying declaration
- Declarations in the course of duty ("Business Records")
- *Res Gestae*

NOTE: must still conform with "principled approach" requiring necessity + reliability

... possible to challenge if you can show it doesn't conform to 2 principles, but rare

PRIOR JUDICIAL PROCEEDINGS

most commonly used when trying to enter evidence from statements made at preliminary inquiries

PRACTICE TIP: *think about who to call at prelims: elderly, ill, Vetrovec witnesses may die, have a change of heart, or leave prison [can't locate them] before trial*

Common Law Rule

Evidence given at a prior proceeding is admissible as truth in a later proceeding **IF**

i) witness is unavailable
ii) parties are substantially the same
iii) material issues are substantially the same; +
iv) person against whom evidence was used had a [FULL*] opportunity to cross-examine witness at the earlier proceeding

**may be tactical reasons to choose not to, but if you don't cross-examine thoroughly at P1 and test is made out at P2, then out of luck*

Criminal Code s 715(1) → codifies common law

715 (1) Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person

(a) is dead,

(b) has since become and is insane,

(c) is so ill that he is unable to travel or testify, or

(d) is absent from Canada,

and where it is proved that the evidence was taken in the presence of the accused, it may be admitted as evidence in the proceedings without further proof, unless the accused proves that the accused did not have full opportunity to cross-examine the witness.

**may* = judicial discretion
**full* = fair opportunity [*Potvin* SCC]

Prof: (c) and (d) interesting with COVID-19

NOT "full" =

i) unfairness in manner in which evidence was obtained?
- ex. Crown could have obtained witness's attendance at trial
- ex. Crown was aware witness would not be available at trial but didn't inform AC or defence counsel
- ex. Witness completely refused to answer questions during cross-examination

ii) admission would not be fair to the AC? [cost-benefit analysis: is evidence crucial or not?]

RATIONALE:
Witness unavailable → necessity
Witness was under oath and available for cross-examination at P1 → reliability

PRIOR CONVICTIONS

*evidence of prior criminal convictions can be used in later civil hearings as ***prima facie proof***
reverse is true for an ***acquittal*

CONVICTION?

Prima facie proof of civil liability

RATIONALE:
General rule against relitigation + higher criminal standard of proof [BRD v BOP]

NOTE: rebuttal possible BUT rarely successful
- must *enhance* rather than *impeach* the integrity of the judicial system

ex. P1 tainted by fraud or dishonesty; P2 has compelling evidence that was unavailable at P1; stakes in P1 were really low and really high in P2 [less effort in defending]

ACQUITTAL?

If criminally acquitted, could still be found liable in civil court

RATIONALE:
Lower standard of proof [BRD v BOP] → so likely will be relitigated

ADMISSIONS BY A PARTY

**"anything the other side ever said or did will be admissible so long as it has something to do with the case"*

EXAMS: *Did opposing party actually make statement? Trier of fact must be convinced on BOP that opposing party actually said it. [IOW is witness credible + reliable?]*

a) To a person in a position of non-authority	b) To a person of authority ("confession") *Crown has onus to prove voluntariness BRD (in a *voir dire*)	c) To a person of authority where it was unknown to the AC that this was a person of authority at the time ("quasi-confession" in Mr. Big operations)

RATIONALE:
Presumed to be true since it's against party's interest

***Does not need to be knowingly made against interest** *[though likely realize it at trial later on]*

- ex. *R v Evans* (1993 SCC) → AC spoke with witnesses who couldn't ID him but testified that a man talked to them about working in chain-link fencing and owning a pregnant dog … added to other evidence

INFORMAL v FORMAL

Informal: not binding, not conclusive proof [open to be contradicted or explained]

Formal: binding → made vis-a-vis Agreed Statement of Facts, Pleadings, Oral Submissions, guilty plea

- Agreed facts
  - ex. this is a finding of fact of where the rooms are placed [accepted as true]
  - ex. "the following is admitted: identity, jurisdiction, date" [criminal]
  - ex. "admit liability but calling evidence for quantum of damages" [civil]
- Agreed evidence to be admissible
  - ex. evidence that can be considered as to where rooms are placed

PRACTICE TIP: be meticulous about what you and other side are putting forward as agreed facts vs agreed evidence to be admissible + that it's clear on the record

DECLARATIONS AGAINST [PECUNIARY/PROPRIETARY] INTEREST BY NON-PARTIES

**usually in civil context [don't worry about penal context]*

MAY BE ADMITTED WHERE:

i) declarant is unavailable to testify [necessity]
ii) statement was made against declarant's interest +
iii) declarant had personal knowledge of the facts stated [**ii* + *iii* = reliability]

RATIONALE:
Presumed to be true since it's against interest

Ex. A borrowed $100 from B and wrote about this in her diary → she never intended to have it used against her, but test is satisfied

DYING DECLARATIONS

offence = **homicide of the declarant*

MAY BE ADMITTED IF:

i) settled, hopeless expectation of death *[near and certain to declarant → likelihood or probability NOT enough]*
ii) statement about the circumstances of death
iii) statement otherwise admissible

RATIONALE:
Declarant dead → necessity
Motivated to speak truthfully when you know you're about to die → reliability

Ex. *R v Nurse* (2019 ONCA) [dying victim's gestures]

DECLARATIONS IN THE COURSE OF DUTY ("BUSINESS RECORDS")

**nurses notes, doctors notes, etc.*

MAY BE ADMITTED IF (common law rule):

i) records made reasonably contemporaneously

ii) in the ordinary course of duty

- *ie. not in contemplation of litigation? [exam question]*
- *This factor most commonly litigated*

iii) by persons having personal knowledge of the matters

- *ie. something **YOU** actually saw?*

iv) who are under a duty to make the record

- *ie. part of job obligations?*

v) no motive to misrepresent the record

- *ie. do you know person on trial?*

RATIONALE:
Written regardless of litigation, so presumed inherently reliable

***Doesn't depend on unavailability of declarant**
"Best evidence rule" because records are written when declarant has memory freshest in mind

- [even better than at trial as a witness years later]
- Inherent reliability + necessity

Ex. *Ares v Venner* (1970 SCC) → medical malpractice & admissibility of nurses notes

*party that created record/initiated report can rely upon this exception too

[FYI provincial *Evidence Acts* have sections on this too]

RES GESTAE

**statement stimulated by condition + made WHILE declarant is personally experiencing said condition*

Statements of **present** physical condition

MAY BE ADMITTED:
Only to prove that the declarant was experiencing the condition at the time

NOTE: past pain not admissible → has to be contemporaneous

ex. with respect to existing illness or physical conditions (during doctor's exam, patient grimaces and cries out whenever back is touched)

Statements of Intention (Statements of **present** mental state)

MAY BE ADMITTED IF:
Declarant's state of mine (emotion, intent, motive, plan) is relevant and statement made in a natural manner and not under circumstances of suspicion

NOTE: past state of mind not admissible

Prof: subjective, so less predictability

Ex. Defence in murder case is that the deceased killed herself. She died of a drug overdose. A few weeks prior to her death she made the following Statements: a) "No one likes me; no one would miss me" and b) "I intend to kill myself". The defence seeks to have these admitted into evidence.
a) isn't being tendered for it's truth, but rather to allow for inference that she was depressed and suicidal [not hearsay, so admissible]
b) is an explicit statement → goes to this hearsay exception and serves as circumstantial evidence

Excited Utterance (related to startling event or condition)

MAY BE ADMITTED IF:
Made while the declarant is under the stress of excitement caused by the event or condition

Ex. *R v Nurse* (2019 ONCA) [dying victim's gestures]

911 audio tape in sexual assault cases most common example of this exception (victim has PTSD and can't testify)

- Admitted if call made right after, maybe not if hours later [ex. *R v Nicholas* (2004 ONCA)]

PROF: can put forward 911 call for purpose of showing complainant's demeanor [evidence of her emotional state, not for proof of the truth of its contents] → remember: is it prejudicial?

RATIONALE:
Contemporaneous with experience, thus less room for fabrication → reliability
No equally satisfactory evidence [it's better than what they could testify to in-person years later] → necessity

i) PRINCIPLED APPROACH:

Hearsay admissible on a case-by-case basis if it is both necessary and reliable (*Khan* (1990 SCC)) [sexually assaulted 3-year-old → big CAN pg 41]

- Framework ("Golden Rules") introduced in *Khelawon* (2006 SCC) [retirement paranoia assault case → big CAn pg 42: not sufficiently reliable to overcome dangers hearsay statement represents]:
  - i) Hearsay is presumptively inadmissible
  - ii) Hearsay may be admitted under a traditional hearsay exception (today's class)
  - iii) Hearsay may be admitted on a case-by-case basis according to the principles of necessity and reliability
  - iv) The traditional hearsay exceptions must still conform with the "principled approach" requiring necessity and reliability

NECESSITY:

"reasonable necessity" to hear evidence in hearsay form?

- does not mean necessary to prove the case
- relates to the particular witness' evidence → *just because there is other evidence from other witnesses on the same point does not make the hearsay evidence unnecessary*

Reasonable efforts must be made to obtain the direct evidence from the witness (rather than rely on hearsay version)

- Declarant dead? *Necessity established*
- Declarant can't be located by police? *Necessity may be established*
- Young child "clammed up"? *Necessity may be established*

Witness available to testify? *Call them → fear of testifying or a mere disinclination to testify [ex. on vacation] not enough*

- **UNLESS** evidence of extreme psychological trauma → *may* establish the necessity of hearsay evidence [rare]
  - ex. *R v Nicholas* (2004 ONCA) → break and enter case; psychologist testified that witness had PTSD making it impossible for her to testify, and that if she did, significant risk she may become suicidal → hearsay deemed necesary

R v Baldree, 2013 SCC (*not reasonably necessary)*

F: AC cell phone seized after being arrested in a residence that had lots of drugs hidden in it [not his residence] → unknown person called the phone to arrange for a drug delivery at a specific address → police took no steps to investigate further

SCC: necessity not established because police did not follow up in any way to locate the witness & did not provide a reason for not doing so [only reason we're stuck with this hearsay statement is because police didn't investigate further, so not reasonably necessary]

+

RELIABILITY:

ii) ULTIMATE RELIABILITY *concerns reliance [for trier of fact to determine]*

i) THRESHOLD RELIABILITY *concerns admissibility [for trier of law to determine]*

- **Hearsay voir dire is about threshold reliability**
- **Established when hearsay is sufficiently reliable to overcome the hearsay dangers** (ie. relating to declarant's perception, memory, narration, or sincerity and lack of in-court cross examination)
  - IOW there should be "no real concern" about whether the statement is true
- **Standard is high** (*R v Bradshaw* (2017 SCC))
- No closed list of relevant factors → every analysis case specific

  TEST:

  1) Adequate substitutes for testing truth and accuracy (procedural reliability)? *and/or*
  2) Sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability)?
- **NOTE:** procedural and substantive reliability may complement each other [not mutually exclusive] (*R v Couture* (2007 SCC))
  - ex. factors present in *Khan*: procedural reliability of statement is 0 but substantive reliability relatively high because of **complainant's age, the corroborative evidence, timing of the statement, spontaneous, natural, no evidence of motive to fabricate, relationship between declarant & receiver of communication, etc.**

TURN OVER THE PAGE TOO

PROCEDURAL RELIABILITY

ASK: are there substitutes for **testing** truth & accuracy?

- IOW, is there a satisfactory basis to *evaluate* the statement?

Relevant factors include:

- Is the statement video recorded?
- Was it under oath?
- Was it given in court on a related proceeding? [preliminary inquiry, overlapping civil proceeding?] → *ie. cross-examined?*

SUBSTANTIVE RELIABILITY **corroborative evidence?* *(Bradshaw)*

ASK: are there circumstantial or evidentiary factors that suggest the statement is **inherently** trustworthy?

- reliability of the statement does not need to be established with absolute certainty [threshold reliability after all]
- BUT there should be "no real concern" about whether the statement is true because of circumstances in which it occurred
- factors are case-specific [previous page *Khan*] → should include all of the circumstances in which the statement was made + any evidence that corroborates or conflicts with the statement

R v BRADSHAW (2017 SCC)

F: Mr. Big operation on T as suspect involved in killing of two people → T once said he shot both victims and then later said he shot one victim and Bradshaw shot the other → T arrested & provided statements to the police that implicated Bradshaw in both murders → T and Bradshaw jointly charged with two counts of first degree murder → T pled guilty to second degree murder and Bradshaw continued to trial → T refused to testify against Bradshaw

I: Were T's statements that implicated Bradshaw in the murders admissible?

SCC: statements should not have been admissible → new trial ordered

- Corroborative evidence should be examined under the substantive reliability branch of the threshold reliability analysis
  - corroborative evidence must go to the truthfulness or accuracy of the material aspects of the hearsay statement
    - In this case: T's statement proved T was there, but it was not corroborative of fact that Bradshaw did the killing
  - corroborative evidence must itself be trustworthy
    - In this case: T had ulterior motive to ensure he wasn't the one being convicted for the murders

LEADS TO…

THE NEW FRAMEWORK FOR HEARSAY & CORROBORATIVE EVIDENCE (*Bradshaw*)

To determine whether corroborative evidence is of assistance in the substantive reliability inquiry, a trial judge should:

- 1. identify the material aspects of the hearsay statement that are tendered for their truth;
  - ***Ie. up to trial judge to ask what hearsay statement is being offered for (what's its purpose?)***
    - *In Bradshaw: material aspect is T's assertion that Bradshaw participated in the murders*
- 2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;
  - *In Bradshaw: specific danger was inability of trier of fact to assess whether T lied about Bradshaw's participation (he couldn't be cross-examined because he refused to be sworn in as a witness)*
- 3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; +
  - *In Bradshaw: T is just lying (that's the alternative)*
- 4. determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the **ONLY LIKELY EXPLANATION FOR THE HEARSAY** is the declarant's truthfulness about, or the accuracy of, the **MATERIAL ASPECTS OF THE STATEMENT**
  - *In Bradshaw: given hearsay dangers presented & alternative explanation, corroborative evidence doesn't meet standard for establishing substantive reliability*

THE *KGB* STATEMENT

A prior inconsistent statement of a non-party witness may be admitted for its truth on a case-by-case basis using the principled approach (*KGB* → changed previous common law)

- i) Necessity established when a witness recants his or her earlier out-of-court statement
  - *IOW gives a different version of events or says "no idea what you're talking about" [common of people who don't want to "snitch"]*
- ii) Reliability is established when:
  - i) out-of-court initial statement is made under oath following an explanation regarding the consequences of lying under oath
  - ii) statement is videotaped
  - iii) opposing party has the opportunity to cross-examine the witness regarding the out-of-court statement
    - *Remember → witness is there at trial, so can be cross-examined on*

NOTE: under oath + videotaped represent the optimal conditions for a *KGB* Statement, but SCC has confirmed they're not prerequisites to admissibility

HEARSAY EXAMPLES

Civil example: Adam bought a painting from Beth & Cam claims ownership of the painting, alleging that he had temporarily lent the painting to Beth and she had no right to sell the painting to Adam → Beth claims Cam gave her the painting as a gift & Adam claims he had no knowledge of Cam's alleged interest in the painting when he bought it from Beth [ie. saying he's a BFPV] → the painting has a card attached to the back of it that reads "Property of Cam – Keep your dirty hands off!"... Is the card hearsay?

It depends:

- What if the card is being used to support the inference that Cam is the true owner of the painting? *Yes (purpose card is being tendered for is proof of the truth of its content)*
- What if the card is being used refute the claim that Adam had no knowledge of Cam's alleged interest in the painting? *No (purpose card is being tendered for is to show that Adam was not a BFPV because he should have known of some possible interest C had in the painting)*

Criminal example: Nicole is charged with the murder of John & the Crown wants to alleged post-offence conduct that Nicole fled to Mexico shortly after the murder → when Nicole's home is searched by the police, a plane ticket in her name from Edmonton to Cancun is found: the ticket says the flight left 8 hours after the time of the murder…

- Is the plane ticket hearsay if it is used to prove that Nicole flew to Mexico 8 hours after the murder? *Yes (being used for purpose of proving Nicole fled to Mexico) → but likely admissible as a piece of evidence under business record exception*
- Does your answer change if another witnesses has already testified in the trial that they saw Nicole on the plane? *Yes (just because there's other non-hearsay evidence on whatever point, that doesn't make hearsay evidence no longer hearsay) → may impact admissibility of evidence (think Bradshaw & corroborating evidence + hearsay)*

RULES AGAINST SELF-INCRIMINATION / RIGHT TO SILENCE

RATIONALE: choice [voluntariness] is key → presumption of innocence

COMPELLABILITY

D: if the law *could be* used to force a person's testimony = compellable witness [ex. if subpoenaed to be a witness]

WHO'S COMPELLABLE?

Almost everyone [including D's in civil proceedings] BUT NOT accused persons ["AC"] → always have choice not to testify

BUT IF AC takes the stand → he's obligated by law to answer all questions put to him [even incriminating ones]

- Serious consequences if AC refuses to answer → ie. contempt of court (different from USA "pleading the fifth")

LEGISLATION:

Charter s 11(c): Any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence.

- *Canada Evidence Act* s 4(1) → essentially same rule // Provincial acts vary depending on province

NOTE:

- s 11(c) doesn't apply to corporations [not a "person" for compellability] → senior officers are compellable against that corp
- "Offence" → ASK: are the nature of the proceedings penal?
  - INCLUDES: criminal offences, quasi-criminal offences [ex. Liquor or COVID bylaws, police officer facing professional disciplinary hearing, appealing an intoxicated driving non-criminal offence]
  - DOESN'T INCLUDE: parallel civil proceedings [ex. where D is civilly liable for damage to vehicle and owes P money]

GENERAL RULE: Accused ["AC"] at own…

i) criminal trial?

- **cannot** be compelled to testify against themselves

ii) other proceedings? [ie. civil]

- **can** be compelled to testify, even if proceedings concern same subject matter as accused charges

QUESTION

If AC testifies at a civil P1 (or some sort of hearing), can that be used against them at criminal P2? *Depends on compellability and use immunities, but general rule: AC testimony from civil P1 can't be used in criminal P2 (rationale → quid pro quo, we want to encourage D's to be honest when they're a compellable witness)*

MULTIPLE PROCEEDINGS [USE IMMUNITY]

i) **Use Immunity (Statutory)**
s 5 (*Canada Evidence Act*): AC compelled to give evidence at civil P1 may be *immune* from it being *used* against them at criminal P2

RATIONALE: want full and frank testimony

NOTE: relates only to statements that amount to self-incriminating admissions at the time P1 testimony is being given
- "I shot Bill" recognizable as incriminating as soon as it's given → qualifies for use immunity
- "Bill refuses to pay me the money he owes" isn't incriminating at the time it's given → doesn't qualify

ii) **Use Immunity (Constitutional)**
s 13 (*Charter*): A witness who testifies in any proceedings has the right not to have any incriminating evidence given used to incriminate that witness in any other proceedings.

EXCEPTION: in a prosecution for perjury or for the giving of contradictory answers

ONLY APPLIES: in criminal cases or prosecutions [not regulatory inquiries, civil cases, administrative hearings]

"Any Other Proceedings" defined broadly:
- Bail hearings
- Preliminary Inquiries
- *Voir Dire*
- Criminal trials (ie. a first criminal trial, criminal trial of co-accused, a criminal trial of a different accused)
- Civil trials
- Administrative Hearings

Informal statements outside of formal "proceedings" do not qualify for immunity
- ie. an answer during police questioning

WHEN IS AC ENTITLED TO USE IMMUNITY (s 13 *Charter*)?

1. AC does not testify at current trial (P2) ⇒ *complete use immunity* (*R v Dubois*)

- testimony from P1 CANNOT be used for impeachment or incrimination at P2

FYI:
Impeachment = to challenge credibility or reliability of witness during cross-examination

Incrimination = to help prove elements of the offence

2. AC testifies at current trial (P2) + NOT compellable at P1 where he testified [ie. an AC in P1] ⇒ *"choice + choice" to testify = usable* (*R v Henry*)

- testimony from P1 CAN be used for impeachment or incrimination at P2

3. AC testifies at current trial (P2) + compellable at P1where he testified [ie. not an AC in P1; perhaps a D in civil proceeding] ⇒ *quid pro quo* (*R v Nedelcu*)

- testimony from P1 CAN be used for impeachment** BUT CANNOT be used for incrimination at P2

** impeachment evidence can't contain *any potentially* incriminating evidence, even if Crown does so unintentionally (ie. proof of guilt) → [exception: perjury/giving contr. answers]

DERIVATIVE USE IMMUNITY [ie. evidence derived from or found as a result of AC's testimony]

s 7 (*Charter*): If AC is a compellable witness in P1 + their testimony leads to the discovery of evidence [ex. "the gun is in the lake"] → testimony CANNOT be used against the AC at P2 if the evidence would not have otherwise been found

Burden of Proof:
- Initial burden on AC to show a plausible connection between P1 testimony and discovery of the evidence [ie. the gun]
- If successful, Crown must prove on a BOP that the evidence would have been discovered even without the testimony

LOOPHOLE WITH IMMUNITY?

Technically people can abuse "use immunity" by falsely admitting at a trial of an AC that they (not the AC) committed the offence, and avoid having their admissions used against them if they are later charged and tried

- **General Rule**: SCC says Crown cannot cross-examine a witness about his knowledge that s 5 or 13 can be used to shelter incriminating admissions from later being used against him [issues of solicitor-client privilege + right to silence]

FAILURE TO TESTIFY

i) **ADVERSE INFERENCES** [inculpatory inference against AC]

AC not testifying CANNOT be used as evidence of his guilt

EXCEPTION #1: in some cases it may be considered/commented on

- [ie. if AC found guilty BRD, trier-of-fact can note AC's failure to testify shows AC has no explanation that could raise a reasonable doubt]
- Prof: this is silly → pretty difficult to not make impermissible adverse inference when this is done

EXCEPTION #2: adverse inferences can be drawn against the credibility of an alibi if the AC does not provide reasonable notice of the alibi to the Crown in advance of the trial, or if the AC does not testify in support of his alibi

- Prof: true exception

NOTE: often inadvisable for the AC to exercise right to silence, especially in jury trials [ex. sexual assualt he-said/she-said cases], and for appeal [less concerned with presumption of innocence if convicted at trial]

ii) **TACTICAL COMPULSION** [ie. AC feels they have no choice but to testify in their defence given the strength of the case against them]*

*NOT legal compulsion → s 7 and s 11(c) DO NOT apply unless it's legal compulsion [even where Defence is called to meet an evidentiary burden]

- ex. s 276.1 application → where some legitimately relevant evidence concerns something that happened prior to date of the sexual assualt, Defence can make this application [ex. H and W previously participated in BDSM, so make application to ensure jury knows this was a normal facet of their relationship and can focus on question of consent]
- ex. Defence of automatism

CONFESSIONS & VOLUNTARINESS

RIGHT TO SILENCE: *pre-trial*

- stems from common law + s 7 → s 7 redundant to common law voluntariness rules EXCEPT for 2 s 7 exclusionary rules [pg 15 of CAN]
  - Prof: easier as an AC to argue voluntariness, rather than bring s 7 challenge [burden of proof placed on AC for *Charter* challenges vs voluntariness BRD on the Crown]
- applies anytime AC interacts with a person in authority, whether detained or not [*s 7 only applies if detained]
- adverse inferences CANNOT be drawn from AC exercising "right to silence" (ie. in police interview) → EXCEPTIONS:
  - Partial disclosure for narrative [ie. impossible for Crown to prove admissible voluntary statements without narrating whole conversation, including where AC refused to respond]
  - Rebuttal evidence [ex. AC claims he answered every question, but police can show videotape that he was completely silent]
  - Alibi evidence [need to send notice of alibi and what it is, which technically goes against pre-trial silence, but don't have to do it right away]
  - Co-AC [AC can cross-examine testifying co-AC about co-AC's failure to tell their story to the police → but only to challenge credibility]
- suspect can provide some, none or all of the information she has (*R v Turcotte* SCC)
  - Ex. AC can tell police that he was at scene of the crime and spoke with the complainant but won't say anything else → can't make any adverse inferences or assumptions from that

CONFESSIONS RULE (*Oickle* SCC)

If AC speaks to a person in authority [or someone he reasonably believes to be a person in authority], his confession must be **voluntary** to be admissible

ASK: was AC given "a meaningful choice to speak"? Was AC's will overborne by inducements, oppressive circumstances or the lack of an operating mind? Was there police trickery so appalling that it would shock the community? ***GO TO NEXT PAGE***

"PERSON IN AUTHORITY" = those formally engaged in the arrest, detention, examination or prosecution of AC

- Ex. Police, prison guards, or anyone AC reasonably thinks might be [ex. *R v Wells:* dad of victim asking AC right after meeting police]

ASK: does the person have the ability to influence or control the prosecution and is allied with the police / prosecution?

- Analysis differs depending on whether the voluntariness concern is with:
  - 1) Police trickery
    - Actually need to be a state agent to be a concern for voluntariness
  - 2) Inducements or oppressive circumstances
    - Subjective → person of authority if AC thinks so, not person of authority if AC doesn't think they are
  - 3) Operating mind
    - Pure or Inhibited Operation? [pg 15 of CAN]
      - Pure → "person in authority" requirement doesn't apply [concern is with the effect that AC's mental state may have had on voluntariness, not with person in authority aspect]
      - Inhibited → AC subjectively knows they're dealing with a person in authority? [concern is partly on the impact this authority can have on the decision of the vulnerable AC to speak]

TO WHAT DOES CONFESSIONS RULE APPLY?

- Full confessions ["I was driving the car and left the scene of the accident to avoid liability"]
- Less complete admissions ["I own the car that was in the accident"]
- Applies whether statements are inculpatory or exculpatory // offered for POTOC or simply to cross-examine AC to bring out incons.

DERIVED CONFESSIONS RULE

Excludes subsequent confessions that are:

a) derived as a result of an earlier involuntary confession
   - [ie. where first confession is deemed involuntary by the court, but police had said 'no point in remaining silent, tell us more' → the "more" is inadmissible]

b) where the circumstances that made the initial statement involuntary continue to exist
   - ASK: are the factors that made the first confession involuntary still present?

HOW TO SATISFY VOLUNTARINESS:

Crown must establish BRD that in all the circumstances, the will of the AC to remain silent was NOT overborne by one of or a combination of:

1) Inducements
2) Oppressive circumstances
3) The lack of an operating mind

((4) police trickery so appalling it would shock the community") → high standard; rare [ex. police pretending to be legal aid lawyer/priest taking AC's confession]

NOTE: not all efforts to persuade an AC to speak are improper → police investigation just needs to be done carefully and fairly
Prof: more likely than not, confession will go in (but it depends on the judge due to contextual approach)

EXAMS: look at whole picture [not just each factor in a vacuum]... identify rule + **analyze**
[What in that interview led you to believe AC didn't have an operating mind? And if that high standard isn't made out, did the fact AC had a few drinks lower his inhibitions to the other factors?]

INDUCEMENTS

ASK: when looking at circumstances as a whole, was the will of the AC overborne?

NOTE: what's an inducement to one is not an inducement to another [ie. first time AC vs hardened criminal] → contextual analysis

WHAT DO THEY LOOK LIKE?

- *Quid pro quo* promises [hope of advantage inducements]
  - ex. Obvious → "I promise you bail if you confess"
  - ex. Subtle → "I know that you want to get home to see your family, so let's get talking"
- Threats [fear of prejudice]
- Can be related to AC or someone close to AC → ex. "Confess and we'll go easy on gf"

LIKELY INVOLUNTARY IF: (*Oickle*)

- Violence
- Veiled threats
- Lenient treatment

OPPRESSIVE CIRCUMSTANCES

ASK: was AC deprived of food, clothing, water, sleep, medical attention, access to counsel? Was there intimidating or prolonged questioning? Did the police lie and claim to have evidence they don't? [look at circumstances overall]

NOTE: NOT what AC thinks is oppressive (he could just be an extra thirsty person) → need actual oppressive circumstances
- [but can consider his subjective opinion as part of the whole contextual analysis regarding his vulnerability]

OPERATING MIND

ASK: did AC lack an "operating mind" sufficient to enable them to make a meaningful choice whether to speak?

An AC will fail to have an operating mind if he or she does not, because of:
- Intoxication
- Mental illness
- Injury, or
- Other cause

possess the limited degree of cognitive ability necessary to understand:
- a) what he or she is saying, or
- b) that his or her statements may be used against them

high standard → *if AC still understands this is a police officer and the words they're saying, then diminished capacity not enough*

PURE INOPERATIVE MIND	**INHIBITED OPERATION OF THE MIND**
Operating mind is made out = statement involuntary	Operating mind not made out BUT still vulnerable to police trickery, oppressive circumstances, inducements [as compared to someone who's sober] → might render statement involuntary

DIFFERENCE FROM INDUCEMENTS/OPPRESSIVE CIRCUMSTANCES: not generally related to police conduct → look at AC's mental state

CONFESSIONS: s 7 PROTECTIONS

While a confession may be admissible under the common law voluntariness rule, it MAY be excluded under s 7 if:
a) It is actively elicited by an undercover state agent while detained; or
b) It is statutorily compelled

a) **UNDERCOVER STATEMENTS**

ASK: is statement surreptitiously and actively elicited from a detained suspect by an undercover state agent? *Yes?* → *may be excluded under s 7 (Hebert* rule)

RATIONALE:
Don't want to encourage police to circumvent rules of interview process & deprives suspect of choice to speak

DOESN'T APPLY TO:
- Mr. Big Operations → suspect not charged or detained yet
- Voluntary confession as part of natural conversation → AC is stupid & s 7 only applies to active elicitation

WHAT IS "ACTIVE"?
Look at nature of relationship between undercover agent & AC:
- ie. if state agent forms a relationship with AC such that AC thinks his statements won't end up in the hands of the police, that's considered an active elicitation

b) **STATUTORILY COMPELLED STATEMENTS**

ASK: is AC obliged by law (statutorily compelled) to make a statement in proceedings that incriminate them? *Yes?* → *may be excluded under s 7*

EXAMPLE:
R v White: AC must fill out MVA report if damage from accident is a certain amount → this information can't be used in subsequent criminal trial [use immunity under s 7]

DOESN'T APPLY TO:
- Border agent confessions → no one expects to be unchallenged crossing the border, so not protected by s 7 (*R v White*)

USE CONTEXTUAL APPROACH + *BADRUDIN* FACTORS
[*factors not on exam*]

CONFESSIONS: s 9 & 10(b) PROTECTIONS [*Prof: not on exam in any great depth*]

Statement voluntary but AC establishes on BOP that it was obtained in violation of s 9 or s 10? → *might be excluded under s 24(2)*

s 9 = arbitrary detention // s 10 = right to counsel

s 10 COMPONENTS:

- i) Informational – right to be informed of the right to retain and instruct counsel without delay
  - Consider language [do they speak English], timing [police can't wait for hours before telling AC], no belittling of AC's lawyer
- ii) Implementational – provide a reasonable opportunity
  - ie. Talked with counsel in private? Did police wait to elicit info until after? Some ability to choose counsel? If change in the charge/circumstances, was 10(b) warning given again? (Exception for roadside intoxication and subsequent charge if blowing over .80 at the police station)

NOTE: detainee can waive their rights to counsel + provide self-incriminating info without exercising opportunity to contact counsel

- High standard → almost always has to be express ["Do you want to contact a lawyer?" "I'm not sure" → not good enough waiver]

CONFESSIONS: *CHARTER* BREACHES + DERIVATIVE EVIDENCE

If confession found involuntary, all otherwise undiscoverable evidence is excluded too

- Includes real evidence derived from statements obtained in violation of s 9 or s 10

MR. BIG INVESTIGATIONS

D: targeted police investigation on someone suspected of a crime [almost exclusively murders]

BASICS:

Fictitious boss of fictitious criminal organization that target is led to believe is real to induce a confession intended to reveal what target's involvement is, if any, in the offence [presumption of innocence]

Cover person writes script of scenarios to develop trust & reputation for organization, then operators play out scenarios

- Don't know much of the facts of the real life case → want to protect integrity of investigation & look for truth [don't want confirmation bias] → ex. *R v Hart* → confessed but not truthful

Common final scenario: "truth verification method" with a dying uncle → in target's best interest to tell an accurate story [vs. *Hart* → 'prove your worth to the organization' method]

COURT'S CONCERNS:

- Possibility of a false confession
- Inevitably that it involves bad character evidence
- "Tactical inevitability" that AC will be forced to testify to explain why they made the statement
- Mr. Big *voir dires* are very time consuming
- Mr. Big operations risk becoming an abuse of process

Police **NEED ONE-PARTY CONSENT [pre-approval from a court or justice] before they can record the confession

EVIDENCE FROM MR. BIG LED IN A *VOIR DIRE*

- Cover person talks about purpose behind each scenario + what safety valves were put in place + why it was deemed necessary & reasonable
- Play recordings obtained with confessions
  - Operators testify under ID tracker & give summary of what happened to get the statements using their crib notes
- Sometimes confession recordings aren't admissible, but officers' crib notes can be

TO BE ADMISSIBLE

1) Define this as a Mr. Big Operation situation
   - RATIONALE: need to protect system and accused from concern of unreliable confessions + prejudicial evidence going before trier of fact … biases may come up if jury learns this person was willing to be in a gang
2) Evidence is presumptively inadmissible
   - Crown must prove the statement should be admitted on BOP → TEST (*Hart*): does the probative value outweigh its prejudicial effect? *NEXT PAGE*

- Probative value → context specific… CONSIDER:
  - Atmosphere of coercion?
    - Target's age? Sophistication? Mental health/addiction issues?
  - Evidence of operating mind? [ex. *Klaus* calling the operator out for being a cop right before his confessions]
  - Length of operation?
  - Number of interactions between police and AC?
    - Lots of simulated violence?
  - Nature of relationship between police and AC?
    - Lots of $ given to target? [ex. *Hart*]
- Prejudicial effect → "potential for prejudice is a fairly constant variable in this context"
  - Moral prejudice [from bad character evidence]
    - AC is shown to be a willing participant in the simulated crimes of fictitious gang
  - Reasoning prejudice
    - How distracting will this be for the jury?
  - "Tactical inevitability" that AC will be forced to testify to explain why they made the statement
- Corroborating/confirmatory evidence?
  - Interactions audio/video recorded?
  - Consistent, detailed version of events in retellings? [ex. *Klaus* vs *Hart*]

3) If Crown proves probative value outweighs prejudicial effect → can AC establish on BOP that to admit the evidence would amount to an abuse of process?

- Does what the police did offend a reasonable member of the public? Was what police did reasonable given the allegation or charges before the court?
- Generally focus on: (see *R v Yakimchuk*, 2017 ABCA)
  - 1) the use of violence +
  - 2) target's vulnerability [ie. age, mental health problems, addictions]

**though other things could lead to a finding of abuse of process*

NOTE: more admissions where it's judge-only trial vs jury

IMPROPERLY OBTAINED EVIDENCE

FYI polygraph results or submitting that AC denied to take a polygraph is inadmissible

Charter s 24(1)

Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

3 PRECONDITIONS

1) An application;
2) To a court of competent jurisdiction;
3) Brought by anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied

NOTE: *Charter* breach must be established by AC on BOP + must be AC's rights that are violated + violated by a state agent

Charter s 24(2)

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

EXAM: we'll be told if *Charter* right has been infringed or not

TO EXCLUDE [presumptively admissible] AC MUST ESTABLISH ON BOP:

1) Evidence was obtained in a manner (that infringed or denied her *Charter* rights); +
2) The admission of that evidence would bring the administration of justice into disrepute

1. "Obtained in a manner"

- Direct causal connection between *Charter* breach & discovery of evidence sufficient, but **NOT** required
- If *Charter* breach didn't cause evidence to be discovered, look to other sufficient temporal, contextual, and causal connections:
  - Use purposive and generous approach to determine if evidence is "tainted" (*R v Wittwer*, 2008 SCC)

ASK:

- Is it part of same transaction or course of conduct?
  - [ex. *Wittwer*: second statement also "obtained in a manner" because temporal + contextual connection from first tainted subsequent]
- How close in time was *Charter* breach to evidence obtained?
- In what context did *Charter* breach happen and evidence was discovered?

2. "Administration of justice into disrepute"? → ***GRANT* FACTORS**: **look up "Grant test in action"*

i) seriousness of *Charter*-infringing state conduct
ii) impact of *Charter* breach on the *Charter*-protected interests of AC +
iii) society's interest in adjudicating the case on its merits

ASK: after weighing three factors, would reasonable person, informed of the circumstances and values underlying the *Charter*, conclude that the administration of justice would be brought into disrepute if evidence is admitted? [Up to trial judge to determine]

i) Seriousness of the *Charter*-infringing state conduct [how badly did the police behave?]

CONSIDER:

i) The blameworthiness of the conduct; +

- Was breach in "good faith"? [ie. officer trying their best to abide by *Charter* but didn't?]
- Ambiguity in law over a certain issue? Or has law changed since? → reduces seriousness
- Flagrant or wilful disregard? → increases seriousness
- Evidence of institutional/systemic problem? → increases seriousness the most

ii) The degree of departure from *Charter* standards; +

- Was breach "technical"? [ie. wordy statute with technical aspect that wasn't followed perfectly → reduces seriousness]
- AC vulnerable and vulnerability exploited? → increases seriousness

iii) The presence of "extenuating circumstances"

- Public safety issue? [ex. active shoot-out happening?] → reduces seriousness

The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for courts to disassociate themselves from that conduct, by excluding evidence linked to that conduct (*Grant*)

ii) Impact of *Charter* violation on AC's *Charter*-protected interests [how significantly did police behaviour impact AC?]

CONSIDER:

i) What type of evidence is obtained?

- bodily interests [ex. blood sample, penal swab, etc.] → intrusive, so higher end of seriousness
- property interests → lower end comparatively

ii) Where is the evidence (unlawfully) found? → *context-specific*

- More serious: home [higher degree in bedroom vs Flur], body, electronics [computer/cell phone]
- More middle: car
- Less serious: storage locker rented at bus station, school locker, etc.

iii) Society's interest in adjudicating the case on its merits [weighs in favour of admitting the evidence → how heavily depends]

CONSIDER:

1) Reliability of the evidence +

2) Importance of the evidence to the Crown's case +

3) Seriousness of the charge *(*this factor "cuts both ways" → want truth to come out in serious cases, but AC wants Charter rights protected)*

OPINION EVIDENCE

D: "opinion" = an inference from observed fact

GENERAL RULES:

Witnesses cannot give opinion evidence [IOW opinion evidence is presumptively inadmissible, whereas mere observations of fact are generally admissible]

2 EXCEPTIONS: *to decide which it is, it's the substance of the evidence that matters, not the status of the witness*

1) for lay opinion evidence
2) for "expert witnesses" → an expert is someone who has "special knowledge or experience beyond the understanding of the average juror"

"Ultimate issue rule"

- The closer an opinion comes to the "ultimate issue" of a case, the more scrutiny the trial judge should apply in determining if the opinion is admissible
- Applies to both lay opinion & expert witness evidence

No witness can provide an opinion on a pure question of domestic law

- Occasionally allowed if question of international law in another jurisdiction

No witness can provide an opinion about whether another witness is telling the truth [judges/juries assess credibility/reliability]

- ex. "I heard B say this, why would they lie?" or "my opinion was verified by ten other colleagues" is hearsay [*R v Ranger*]

EXCEPTION:

- a properly qualified expert witness can offer opinion evidence that is relevant to assessing credibility and reliability of a witness generally → ie. offers background information that the trier of fact can use in their own assessment about a given witness

Ex. N says she observed all these things, but it's an accepted fact that she consumed a lot of drugs in relatively known quantities that night → opposing side can call an expert that would talk generally about what that might do to someone [just not specifically about N]

LAY OPINION EVIDENCE RULE → *'is this an opinion that someone without any special experience could identify?'*

*consider "experiential capacity" → ie. a young child won't have ordinary experience needed to comment on speed of car

Lay witnesses can provide opinions **IF**:

- They are in a better position than the trier of fact to form the opinion;
- The opinion is one that persons of ordinary experience are able to make;
- The witness has the experience to make the opinion; +
- The opinion is an easier way of communicating facts that are too difficult to be narrated as effectively without resort to the opinion

  - ex. lay people can offer opinions on intoxication
  - ex. footprints in snow leading meant AC ran this way

EXPERT OPINION EVIDENCE → *can be dangerous: jury may say it's easy to defer to expert opinion* [ex. "*Goudge Inquiry*" big CAN]

TEST FOR ADMISSIBILITY OF EXPERT OPINION EVIDENCE *[same test for civil and criminal]*

1) Presumptively Inadmissible

2) Party calling the evidence must satisfy a two-stage test on a BOP in a "*Mohan voir dire*"

- **a) Stage 1 – 4 *Mohan* "Threshold Requirements"** [yes/no on a BOP → must be met to go to stage 2]
  - i) The evidence must be necessary
  - ii) The evidence must be relevant
  - iii) The expert must be properly qualified
  - iv) The evidence must not be not be caught by a different exclusionary rule
- **b) Stage 2 – The gatekeeper balancing** [judge has discretion to exclude, unless a statute says otherwise]
  - Probative value > Prejudicial Effect [AKA "cost-benefit analysis"]

STAGE 1: 4 *Mohan* "Threshold Requirements" [yes/no on a BOP]	**STAGE 2**: The gatekeeper balancing
i) evidence must be **necessary** **not admissible just because it's helpful* ASK: does the expert deal with subject matter that ordinary people are unlikely to form the correct judgement about without assistance? - ex. DNA analysis and what it means = yes - ex. expert in to discuss how throwing knives is dangerous = no ***NOTE:** *doesn't mean necessary to case or to defence*	ASK: is the probative value [case-specific] > the prejudicial effect [usually consistent] Prejudicial effect → CONSIDER: - Impenetrable jargon? - Expert appears impressive? - Difficult to expose weaknesses in the evidence? - Juries defer? - Undue consumption of time? - How distracting is it from real issue of case?
ii) evidence must be **relevant** ASK: is it logically related to an issue at trial? ***NOTE:** *same definition of relevant as always*	
iii) expert must be **properly qualified** [usually contentious spot] ASK: does the expert have the training or experience needed to acquire the information that would be **beyond the understanding of the average juror?** **also are they impartial/independent?*	**POTENTIAL REMEDIES**: ● Dismiss expert's opinion entirely ● Dismiss part of expert's opinion ● Narrow the scope of expert's opinion ● Edit the language of expert's opinion **NOTE:** not exhaustive → judge has discretion to ask for these alterations to make it more probative than prejudicial
iv) evidence must **not be not be caught by a different exclusionary rule**	
[v] novel or challenged science? → LOOK BELOW	

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

F: expert called is from corp's current auditor → challenged on grounds that expert evidence is not impartial and independent

SCC: expert evidence should have been admissible

ANALYSIS: impartiality assessed at Step iii) of the *Mohan* factors + at the gatekeeper stage + weight at closing stage:

1) **Experts are assumed to be impartial**
2) Burden on party alleging the expert is not impartial to show there is a "real concern" with impartiality
3) If successful → onus switches to other party to establish on a BOP that the expert is impartial

NOTE:

- Exclusion for impartiality should only occur in "very rare cases"
  - ex. Financial interest in outcome of case = excluded
  - ex. Close familial connection to one of the parties = heavily scrutinized
  - IOW, impartiality is a pretty high standard to get evidence excluded on, but still needs to be examined
- Impartiality relevant to BOTH admissibility and weight
  - IOW, even if you lose admissibility argument, can argue about its weight

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NOVEL OR CHALLENGED SCIENCE → almost a 5th *Mohan* factor

D: no established practice among courts of admitting evidence of that kind OR an established scientific theory being used for a new purpose

TO BE ADMISSIBLE, IT MUST BE:

- Essential [not to case, but essential in that someone with ordinary knowledge couldn't understand it]
- Subjected to special scrutiny regarding its reliability; +
  - Consider:
    - whether the theory or technique can be & has been tested;
    - whether the theory or technique has been subjected to peer review & publication;
    - the known or potential rate of error or the existence of standards;
    - whether the theory or technique used has been generally accepted
- Subject to even stricter scrutiny if the novel expert opinion approaches the ultimate issue in the case

ex. *R v Trochym* 2007 SCC → novel science test met: technique of hypnosis "not generally accepted" → inadmissible

ex. *R v JLJ*, 2000 SCC → novel science test met: of penile plethysmography "not generally accepted" → inadmissible

THE "RULE IN ABBEY" → *practical tip: usually best way to* ***attack an expert's opinion***

Before any weight can be given can be given to an expert's opinion, the facts upon which the opinion is base must be proven to exist

R v Abbey, 2009 ONCA ***not the same Abbey as "The Rule in Abbey"***

- **F:** AC gets teardrop tattoo on face & Crown brings in expert on Canadian street gangs
- **I:** is Mr. T's [the expert] opinion evidence admissible?
- **TJ:** should be excluded at gatekeeper stage
- **ONCA:** 1) meets *Mohan* threshold requirements + 2) should NOT be excluded at gatekeeper stage and sends it to retrial … discusses prejudicial effects to consider

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CHARACTER EVIDENCE & THE SIMILAR FACT EVIDENCE RULE ("SFR")

D: proof of the personality, psychological state, attitude, or general capacity of an individual to engage in particular behaviour

BASICS:

- Can be good or bad
  - ex. always shovels the walks vs owns prohibited weapons
- **NOT** a habit
  - **NOTE:** tendency of someone to repeat a certain conduct over and over doesn't necessarily tell you about their character [use common sense]
    - ex. someone who yells a lot = character of violence vs. someone who eats popcorn and watches netflix every night = habit
- Goes to primary materiality**
  - ie. goes to an actual fact-in-issue: the *actus reus* or *mens rea*
    - [vs secondary, which goes to credibility/reliability]
- PURPOSE: to show that a person tends to act consistently with their character
  - ie. because AC has *this* characteristic [violent], AC is more like to have committed the *actus reus* of *this* offence

ANALYSIS:

1) Does the evidence colour your impression about the AC? Does it lead you to think about what kind of person AC is?
2) Is the evidence relevant to a material fact-in-issue?
   - ex. J caught looking at porn at work NOT relevant to the question of whether he's guilty for a dangerous driving accident vs. J caught looking at porn *while driving* IS relevant
3) Is it 'bad character' evidence about AC? → SFR TEST [pg 22 (turn over)]

HOW DO YOU PROVE CHARACTER EVIDENCE?

1. Direct opinion
   - "I believe J is violent"
2. Expert
   - Expert says J has a psychotic disorder that makes him violent
3. Reputation
   - "J has a reputation for violence"
4. Circumstantial – witness, admission, certificate
   - Witness → "on one occasion, I saw J hurt someone" [inference of violence]
   - Admission → "on one occasion, J admitted he hurt someone" [admission of violence]
   - Certificate → on one occasion, Crown entered certificate of conviction against J for assault

WHAT QUALIFIES AS "**BAD** CHARACTER" EVIDENCE?

TEST: would the ordinary person disapprove of the conduct or character revealed?

If ... morally objectionable, contemptible, reprehensible, or stigmatizing

- Does **NOT** need to be criminal conduct
  - ex. shouting at your computer when it breaks down
- Changes with attitudes
  - ex. used to be that LGBTQ relations or adultery were evidence of bad character

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PRIMARY RULE OF EXCLUSION: Prohibited Reasoning (*R v Handy*)

Crown CANNOT call general bad character evidence that is **ONLY** meant to show that the AC is the "sort of person" likely to commit the offence charged

- = "propensity" or "general disposition" reasoning

If evidence is admissible for other purposes BUT incidentally exposes the general bad character of the AC, the trier of fact CANNOT infer that AC might be guilty because he is the "sort of person" likely to commit the offence charged

- = prohibited inference
- IOW it might be able to go in, even with a risk of moral prejudice, but it can't be relied on by the trier of fact

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SIMILAR FACT EVIDENCE RULE (SFR) → *similar fact evidence is just a type of bad character evidence Crown is trying to get in*

In practice: not used often [Crown and Defence agree on outset what can/can't go in, so rare to have a SFR application go to trial] … if not sure, it doesn't go in

Where the Crown leads evidence to establish the guilt of the AC that either directly or indirectly reveals bad character of the AC, the Similar Fact Evidence Rule (SFR) must be satisfied:

- 1) Presumptively Inadmissible
- 2) Onus on Crown
  - TEST: **more probative than prejudicial to a material fact-in-issue on a BOP?** **high standard*

ANALYSIS:

0. Identify the fact-in-issue
1. Consider the 3 Steps when weighing probative value:
   - What is the strength of the evidence that the similar acts occurred?
   - Connection between the SFE and the Fact-in-Issue? [is it an ID case?]
   - Materiality of the Evidence?
2. Consider the 2 types of prejudice when weighing prejudicial value
   - Moral prejudice?
   - Reasoning prejudice?
3. Balance: Is the SFE sufficiently probative to justify running the risks of prejudice?

*EXCEPTION: evidence about offence itself is technically bad character but doesn't need to go through the test

[ex. J charged with robbery, evidence he completed robbery is not going to be bad character evidence that has to go through this test]

i) SFR – WEIGHING PROBATIVE VALUE [3 STEPS]

0. What is the material fact-in-issue?

1. What is the strength of the evidence that the similar acts occurred? → *the more likely it occurred, the more probative it is*

*Evidence needs to be reasonably capable of belief

WITNESSES: usually introduced by witnesses [ex. "yes I was robbed, I was on this street, etc. etc."]

- more credible = more probative

EVIDENCE OF CONVICTION? = assume very Probative

- Rationale: another trier-of-fact determined beyond a reasonable doubt that this did occur

EVIDENCE OF ACQUITTAL? [Court finds AC not-guilty] = **CAN'T** be used

- **EXCEPTION**: if the fact of the prior charge is relevant — **whether to AC's state of mind or any other live issue in the case** — then the Crown can lead evidence about it even if there has been an acquittal on that charge (*Ollis*)

> - *Ollis*: AC claimed he honestly thought there was $ in his account and that he wasn't cashing a cheque under false pretenses → Crown used his acquittal from last time to prove that this time he *should* have known
> - ex. Reasonable steps taken by someone who slept with a second 16-year-old, even if he was told that this second girl was also 16

- **EXCEPTION**: **if a multi-count indictment** [AC tried at same time for 2+ acts of alleged misconduct] **+ SFE rule is satisfied** → Crown can rely on evidence about one charge as SFE that helps to prove another charge **EVEN IF** AC may ultimately be acquitted on one or more of those charges (*Arp*)
    - ex. second murder is very similar to first murder, and DNA evidence makes it clear it was AC for the second murder, but there's none on the first, so acquitted on first but can use that evidence to convict on second
    - **NOTE:** judges are required to direct jurors not to use counts on which they have already decided to acquit as SFE on the remaining charges

EVIDENCE OF STAY? [Crown directs Court to enter a stay of proceedings] = maybe rarely used, but likely not

EVIDENCE OF COLLUSION? *Argued in admissibility + in weight stages → ie. "jury don't put too much weight on it because of tainting of evidence"*

- More likely there is collusion = Less probative
    - Where it's deliberate = collusion and not probative
    - Unintentional/inadvertent tainting = probably still collusion and not probative, but not as bad as if deliberate
- **TEST**: need more than simple proof of an opportunity for there to be an air of reality
    - IOW just because they were sitting outside waiting for trial to start and *could* have talked about it, doesn't mean they *did* talk
- Where there is an air of reality of collusion, burden on Crown to show on a BOP that the SFE is *not* tainted by collusion

2. Connection between the SFE and the Fact-in-Issue

- (a) Connection of the previous act to the AC → ASK: how likely is it that AC did the act being sought to be admitted as SFE? → usually likely, otherwise probative value would be too low [IOW if yes to #1, then yes to #2(a) too]
    - More likely = more probative
    - Necessary condition to admissibility BUT not always necessary to link the AC to all of the similar acts
        - ex. *Sweitzer* → same MO in 14 sexual assualts, but no evidence linking AC to 11/14 → if that was the same for all 14, there is no SFE application BUT AC could be linked to 3, and because those 3 were super similar to other 11, it was pretty likely and thus probative → he was convicted on all

- (b) Connectedness to a properly defined fact-in-issue → ie. the nexus between the SFE and the offences alleged in *this* trial
    - *Handy*: principal driver of probative value
    - ASK:
        1) what is the fact-in-issue that we are using the SFE for? [do that in step 0 already]
        2) what are the inferences the Crown is seeking to use to inform that issue? [ex. Because AC played with fire at a party last year, he started the fire this year]
        3) how persuasive are those inferences? [key question] → [ex. in arson example above, it's not very persuasive, just propensity reasoning]
            - **7 non-exhaustive factors:** (*Handy*)
                1. Proximity in time of the similar acts *[years apart?]*
                2. Extent to which the other acts are similar in detail *[five sets of identical facts, or different?]*
                3. Number of occurrences of the similar acts
                4. Circumstances surrounding the similar acts *[what happened before? after?]*
                5. Any distinctive features unifying the incidents *[what makes this unique? How can you say there's no way two different people did these offences? (ex. Red string around every victim's finger)]*
                    - **NOTE:** signature MO not required → just need to eliminate possibility of chance
                    - *be careful of generic similarities → could be easily replicated
                6. Intervening events *[wrote apology letter/reconciled/rehabilitated?]*
                7. Any other factor which would tend to support/rebut underlying unity of similar acts

IS IT AN IDENTITY CASE? ***Yes*** **→ higher degree of similarity + connectedness required** [*Arp*]

- ie. *who* committed this robbery → apply *Arp* standard VS. sexual assualt case between H and W, where question isn't identity but consent → don't need higher standard
    - RATIONALE: SFE effectively decides entirety of ID cases & don't want wrongful convictions

3. Materiality of the Evidence

ASK: is the SFE material to a fact-in-issue? And how important is the fact-in-issue?

- If ID case → probably important
- *be aware of shifting facts-in-issue (ie. initially about ID, but now about consent?)

If admitted by the AC, no need for the bad character evidence to be admissible in this way

- IOW, where prejudicial evidence offers little gain, why admit it?

ii) SFR – WEIGHING PREJUDICIAL VALUE [2 TYPES] → EXAMS: *shorter, but still requires analysis, not just definitions*

1. MORAL PREJUDICE

D: trier of fact has emotional or gut reaction to what they hear about AC's character [so need probative value to outweigh this]

- More repugnant SFE = more prejudicial, especially if worse than the alleged crime
    - requires corresponding higher probative value to overcome it
- Strong jury instruction required against propensity, especially where the SFE is reprehensible

NOTE: Judge-alone = less concern for moral prejudice

- RATIONALE: we give them more deference about what they can/can't consider

2. REASONING PREJUDICE

ASK: *is it…*

- going to make trial more expensive?
- unnecessarily confuse jury?
- make trial go longer to consider whether SFE actually occurred?
    - often SFE more difficult to prove than the actual issues at trial

NOTE: important for both jury and judge-alone

TO LESSEN PREJUDICE:

- edit SFE to make it less prejudicial
    - ex. hear about previous cell-phone usage without including the fact that they were looking at pornography
- if admissible in another way, degree of prejudice reduced
    - RATIONALE: it's already going in, so less worried about moral prejudice because judge/jury will hear it anyways

***NOTE:** *bad character evidence is inherently prejudicial, so you'll never have no prejudice*

iii) SFR – BALANCING PROBATIVE v PREJUDICIAL → error of law to skip balancing

- Factual inquiry warrants "substantial deference" → IOW if at appeal, lots of deference to TJ's decision unless they forget to balance
- Mandatory Jury Direction → when SFE is admitted, its use is restricted and jurors must be trained

SFR – MULTI-COUNT INDICTMENTS/INFORMATIONS

High risk of prejudice where the multi-count indictment alleges *separate incidents* [ex. sexual assualt with four different complainants vs. robbery, where incidents are all related to the robbery] → so both Crown and Defence must consider severance & SFE

SCENARIOS: *have to make an application for severance: is it worthwhile?*

1) Severance [no compelling reason to keep the counts together]
    - less likely if the counts can be used as SFE
        - RATIONALE: they're going to hear about it anyways
    - likely removes AC's ability to choose whether to testify [tactically, must testify in multiple proceedings]
2) No severance → there was a successful SFE application or don't put SFE forward BUT restricted admissibility with limiting instructions to reduce risk of prejudice

BAD CHARACTER EVIDENCE ABOUT AC: WHAT USE?

If bad character evidence is properly admitted…	
… as proof of what happened [ie. primary materiality], it can also be used to assess credibility, if the AC testifies ex. *Dorfer* 2010 BCCA: sexual assault + break and enter → no other evidence but AC's testimony, so have to assess his credibility	… for the purpose of assessing credibility [ie. secondary materiality], it can only be used for assessing credibility RATIONALE: didn't go through stringent SFE test, so can't use it for a primary material issue • ex. if AC says he's never robbed someone and J brings forward evidence that he's committed robberies in the past, that can only go towards his credibility

PROF: if AC testifies, in cross-examination, you can put prior criminal record to them [otherwise never] because it's being used to show they're less credible, not because they're a bad person

- Limited to: what they've been convicted for; when it happened; what sentence they received

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GOOD CHARACTER EVIDENCE ABOUT AC

D: any exculpatory evidence presented by the AC to suggest that he is not the type to have committed the offence

- ex. allegation that male AC sexually assualted another male and AC leads evidence that he's homophobic [not a good character trait, but it is exculpatory trait, so rules kick in]

BASICS:

- Generally considered relevant and admissible → lower standard to meet
  - RATIONALE: it's the AC leading the evidence, so there's limited moral prejudice to AC

> TO EXCLUDE "GOOD CHARACTER" EVIDENCE: prejudice must substantially outweigh probative value
> - stricter than other test & not much judiciary discretion

- AC is NOT permitted to lead any/all good character evidence
  - RATIONALE: reasoning prejudice concerns + is it relevant?
- Where good character evidence is admitted, the trier of fact must consider it [but can also give it no weight]
- Up to AC to decide whether to put character into issue
  - Don't want to get in their way of putting forward a defence BUT tell client not to

If AC places his character into issue in a PROPER way, Crown is entitled to call evidence to the contrary (rebuttal evidence)

- DOESN'T mean all bad character evidence is fair game; only that which might rebut the assertions made by AC
  - [ex. "I'm a good parent" → Crown can only offer evidence that rebuts that]
- the broader the statement ("I'm a good person") the more the Crown can use to rebut
- goes to AC's credibility as a witness, NOT "he's the sort of person to commit this offence"

NOTE: if AC's character put into issue IMPROPERLY [ex. while cross-examining a Crown witness], Crown cannot call rebuttal evidence

WHEN IS AC's CHARACTER PUT INTO ISSUE?

- Judicial discretion to decide whether AC put his character into issue
  - often court ignores it, unless there's something that obviously puts it into issue
  - very subjective

Character is NOT put into issue by simply:

1. Denying the allegation / defending against the Crown's case
2. Good character evidence about AC from defence witnesses under cross [not AC's fault if Crown asks those questions]
3. AC asserting his good character to police outside court [ex. In police statement]

4 WAYS TO PRESENT GOOD CHARACTER EVIDENCE ABOUT AC:

1. Reputation Evidence
   - witnesses called who are familiar with AC and share a relevant circle of acquaintances (Prof: but this is more a factor to be considered at sentencing, once convicted) … so not super common
2. Opinion Evidence
   - reliable expert evidence [ex. expert called that AC can't get an erection for 10+ years] … a little more common than reputation evidence (but still not seen that much)
3. Testimony of AC
   - AC asserts their own character as saying they haven't had run-ins with the law or are a good person (Prof: usually a bad idea because it opens door to Crown) … most common
4. SFE Indicative of Innocence
   - AC can rely on exculpatory SFE as long as it reveals that he couldn't have acted like this in this situation (question: is it relevant? Are they not trying to just prove a character trait?)
     - ex. *Morsi* → AC charged with murder was allowed to support his claim that he accidentally shot gf while attempting suicide by proving that he previously attempted suicide after breaking up with other gfs

5 WAYS TO REBUT GOOD CHARACTER EVIDENCE ABOUT AC:

1. Cross-Examine AC in a way that suggests they don't possess the specific good character traits they claim
2. Reputation Evidence
   - ie. show bad reputation evidence
3. Section 666 of the *CCC*
   - allows previous convictions of AC to be proven whenever good character is put into issue & can question AC about specific underlying those convictions ["I'm not the type of person to commit this offence"
4. Expert Evidence
   - ex. psychiatrist who can medically rebut that AC is not the type of person who would commit this sexual assualt by providing report on their sexual tendencies
5. Prior Inconsistent Statements
   - if AC has said something to the contrary to someone else who's prepared to be a witness for rebuttal evidence [but remember: is that witness credible?]

BAD CHARACTER EVIDENCE BY AC ABOUT OTHERS → 4 types

1. AGAINST A CO-AC *[ie. pointing fingers at co-AC]*

- Almost always admissible unless CLEARLY more prejudicial
- AC1 puts his character into issue by doing so
  - RATIONALE: because of the inference that co-AC is type of person who would have committed the offence and the AC1 is not
- CANNOT be used by the Crown to prove guilt of the Co-AC
  - Can only work in AC1's defence

2. AGAINST THIRD PARTIES (in non-sexual prosecutions)

ex. self-defence murder cases [most common] → alleging that victim/TP was the aggressor

- *Prima facie* admissible, unless SUBSTANTIALLY OUTWEIGHED by prejudice or irrelevant
- Opens door to Crown rebuttal re (1) against the AC and (2) good character of TP
  - ie. in self-defence cases, Crown can try to show why victim would not have been the aggressor (but only if AC has already suggested victim had this character)

3. AGAINST UNKNOWN SUSPECTS VIA SFE

- AC can present relevant SFE about other unknown suspects to try to cast doubt on their own guilt
  - ex. *Grant* → AC charged with murder of girl that occured many years earlier because of DNA evidence → AC wanted to present evidence that a strikingly similar murder happened while he was in prison → CofA said he should have been allowed to present that evidence

4. COMPLAINANT IN SEXUAL ASSAULT CASES

- s 276(1) *Criminal Code* prevents AC from raising evidence about CO's sexual activity outside of charge unless judge allows it vis-a-vis s 276(2)
  - **NOTE:** Crown uses *R v Seaboyer; R v Gayme* common law scheme to get sexual activity evidence in, NOT s 276

Purpose of evidence to support an inference relating to CO's consent or credibility? *Not admissible* [to combat twin myths]

NEXT PAGE FOR 276 TEST + COMMON LAW SCHEME

s 276(1)

Evidence that CO has engaged in sexual activity, whether with the AC or with any other person, is NOT admissible to support an inference that CO

- (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.

Duckett: s 276 is very broad → applies to offences simply connected to sexual assault too (ex. *Barton*)

s 276(2): Conditions for admissibility [TEST] → *for defence introducing evidence* **[*judge decides]**

Evidence…

- (a) is not being adduced for the purpose of supporting a twin myth inference
  - [ie. not for CO's credibility or consent]
- (b) is relevant to an issue at trial; +
- (c) is of [sufficiently] specific instances of sexual activity; +
  - [ie. not CO's sexual reputation overall]
- (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

s 276(3): Factors judge must consider:

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

COMMON LAW SCHEME (*R v Seaboyer; R v Gayme*) → *for Crown introducing evidence*

Evidence that CO has engaged in consensual sexual conduct on other occasions (including past sexual conduct with AC) is **NOT** admissible solely to support the inference that CO is by reason of such conduct:

- (a) more likely to have consented to the sexual conduct at issue in the trial;
- (b) less worthy of belief as a witness.

Evidence MAY be admissible where:

1) It possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence
2) Not used for purposes of an inference relating to consent or credibility of CO
   - Examples (*R v Seaboyer; R v Gayme*):
     - (A) Evidence of specific instances of sexual conduct tending to prove that the person other than AC caused the physical consequences of the rape alleged by the prosecution;
     - (B) Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of CO;
       - Ex. father [AC] says daughter made the allegation because he caught his kids sexually touching [276 would bar this evidence]
     - (C) Evidence of prior sexual conduct, known to AC at the time of the act charged, tending to prove that AC believed that CO was consenting to the act charged (without laying down absolute rules, normally one would expect some proximity in time between the conduct that is alleged to have given rise to an honest belief and the conduct charged);
       - Ex. a code word in friends-with-benefits situation [need to know about the code word]
     - (D) Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence, bearing in mind that such evidence cannot be used illegitimately merely to show that CO consented or is an unreliable witness;
       - Ex. woman and man make arrangement to have sex and she later tells him that if he doesn't pay her another $100, she'll cry rape → in her extortion trial, evidence of her doing this to other men is admissible, but in his rape trial, that evidence isn't admissible
     - (E) Evidence tending to rebut proof introduced by the prosecution regarding CO's sexual conduct

TWIN MYTHS

1) **consent/promiscuity myth** [ie. that women who consented to sex before are liable to consent again]
2) **credibility myth** [that women who are loose in their morals are more likely to breach other moral expectations]

**prohibited reasoning* → CAN'T draw inferences from stereotypes or ungrounded prejudicial generalizations → need evidence!!

- ASK: what is purpose for adducing this evidence?
  - [ex. What were you wearing? → About provocative dress or about another witness who's going to identify her?]

RAPE MYTH EXAMPLES:
Women who say no don't really mean it // women who don't want sex will physically resist // passivity is consent // women who do drugs/drink are more likely to consent // victims will report assault immediately // victims will avoid perpetrator // women are not likely to be sexual aggressor // young man not likely to lose his erection, causing condom to fall off

CHARACTER EVIDENCE IN **CIVIL** CASES

GENERAL RULE: good character evidence cannot be called

- RATIONALE: stakes are not as high as in criminal + generally not considered relevant + reasoning prejudice pretty high

EXCEPTIONS:

- The character of a party in the proceeding is directly in issue
  - [ie. defamation cases]
- The civil case raises allegations of a criminal nature
  - [ex. P suing insurance company and insurance company claims arson → opens door for P to use good character evidence about themselves]

GENERAL RULE: bad character evidence is only admissible via SFR

- No presumption of inadmissibility
- In practice, easier standard to meet than in criminal
  - ie. proof of speeding
    - RATIONALE: stakes higher in criminal + higher burden of proof + no presumption of innocence in civil

*Admissions in civil cases turn almost wholly on relevance to a FII [is it relevant?] rather than probative vs prejudicial analysis

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CHECK BIG CAN FOR SME APPLICATIONS vs. CORBETT APPLICATIONS [not at all related to each other]

PRIVILEGE → *a few specific criminal privileges, but mostly the same between civil & criminal law*

D: an exceptional right to "confidentiality" → a witness can refuse to answer questions or produce documents

- Owned by the WITNESS/"holder"
- Different from compellability
  - [ie. witness may still be compelled to come to court to give evidence, but can assert privilege over certain specific evidence]
- Different from most rules:
  - Most rules exist to further the truth-seeking function of court
  - Privilege rules exist to exclude evidence that may be very probative or helpful to the trier-of-fact [thereby hindering the truth-seeking function of the court]

TEST: DOES A PRIVILEGE APPLY? (Wigmore)

1) Communications originate in a confidence that they will not be disclosed?
2) Is this element of confidentiality essential to the full and satisfactory maintenance of the relation between the parties?
3) Is the relation one which in the opinion of the community ought to be zealously fostered?
4) Is the injury that would happen to the relation by the disclosure of the communications greater than the benefit thereby gained for the correct disposal of litigation?

**balancing one, most important*

CLASS PRIVILEGE → *prima facie presumption that the communications…* ARE privileged + INADMISSIBLE	**CASE-BY-CASE PRIVILEGE** → *prima facie presumption that the communications…* are NOT privileged + ADMISSIBLE
Onus on party urging admission to show why the communications should *not* be privileged	Onus on party urging exclusion to show why the communications *are* privileged
NOTE: every privilege needs to meet the *Wigmore* criteria, but all class privileges have been recognized as having met these requirements	**NOTE:** need to apply 4 *Wigmore* criteria

WAIVER OF PRIVILEGE → *only by "holder" + must be clear & done in complete awareness of the result*

EXPRESS WAIVER:	IMPLIED WAIVER:
• holder (1) knows of the existence of the privilege + (2) voluntarily expresses an intention to waive it	• governed by fairness and consistency • courts hesitant to use this **NOTE:** can't use it as a sword and shield [ie. waiving privilege to talk about *this* part of the conversation only = not allowed]
NOTE: if intentionally waiving one part, impliedly waiving the whole thing → need full context of conversation: can't cherry-pick ex. "I didn't provide sample because I was acting in good faith on advice of my legal counsel" = waives SCP because you need to disclose what that advice was	

UNINTENTIONAL DISCLOSURE → *no waiver but inadvertent or unintentional disclosure?* [ex. "Reply all"]

CRIMINAL = privilege likely pierced	**CIVIL** = privilege upheld
RATIONALE: need for full answer & defence	RATIONALE: protect confidentiality of privileged communications as much as possible
EXCEPTION: solicitor-client privilege not pierced	EXCEPTION: (1) If the communications are important to the outcome of the case + (2) there is no reasonable alternative form of evidence that can serve the same purpose

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SOLICITOR-CLIENT PRIVILEGE

TEST: a confidential communication between a professional legal adviser [in her capacity as such] and a client, that is related to the purpose of seeking, forming, or giving of legal advice ["Wigmore's definition of"]

(1) Where legal advice of any kind is sought
- Agent? ASK: is what's being requested an extension of what the lawyer is doing but just is not in a position to do?
  - ex. lawyer hires an expert to do some investigating OR legal assistants/staff → covered by SCP
  - ex. private investigator who has little to no communication with client → no SCP *[*but litigation privilege applies]*
- Applies immediately [even if no retainer yet]

(2) from a professional legal adviser in her capacity as such

(3) the communications relate to *that purpose* [ie. legal advice]
- SCP does **NOT** apply to physical objects
  - ex. murder weapon brought into office → not protected [BUT conversation that AC *used* it is]
  - ex. videos of sexual assault sent to lawyer → not protected [BUT conversation that it happened is]
  - ex. *Bernardo* case: documents relating to tax fraud → not protected
- communications vs pure facts
  - ex. TP watching client walk into lawyer's office
- SCP does **NOT** apply to documents that pre-existed the solicitor-client relationship

(4) made in confidence
- ex. room full of other people?

(5) by the client

(6) are at client's instance permanently protected
- even after death of client *[vs. litigation privilege, which ends after litigation ends]*
  - EXCEPTION: solicitor-client communications about a will where validity of will is in dispute

(7) from disclosure by himself or by the lawyer

(8) except if the *client* waives the protection

3 SCP EXCEPTIONS → *SCP does not apply **BUT** onus on party seeking to set aside SCP to show elements*

1) **CRIME EXCEPTION** → *no SCP in the first place*

- No SCP for communications that
  - (1) are in themselves criminal; or
  - (2) are made to obtain legal advice to commit a crime.

NOTE:

- *any* unlawful conduct
  - [ex. how to breach a contract or commit a tort]
- but can talk about *past* crimes → protected by SCP

Key = client's "purpose" or subjective state of mind [determined later in court]

- ex. client comes in asking N for legal advice about a crime they already committed, but later it's determined that they used that legal advice to commit the crime

2) **INNOCENCE AT STAKE EXCEPTION** → *ONLY FOR CRIMINAL PROCEEDINGS

[rare: normally wouldn't even know that this info exists]

McClure Test (*R v Brown*)

STEP 1: Threshold Test

- (a) Information sought from the S-C relationship is not available elsewhere; +
- (b) AC otherwise *unable* to raise a reasonable doubt

STEP 2: Innocence at Stake Test

- (a) Is there an evidentiary basis to conclude that a communication exists that *could* raise a reasonable doubt?
  - [lower standard than Step 1(b)]

IF YES, then…

- (b) Trial judge can examine the communication to determine whether it is *likely* to raise a reasonable doubt.
  - done *ex parte* and *in camera* so no one else is present except judge, Crown, and likely lawyer for holder of privileged information [but AC and his lawyer *not* allowed to be there]

NOTES:

- Absolute Necessity Standard [ie. very high]
  - ex. SCC in *R v Brown* said evidence from Benson's gf could have come through hearsay exception, so waiver of SCP shouldn't have happened because Brown's defence didn't depend on it [Step 1(a)]
- IF SUCCESSFUL:
  - only the portions of the communications that are *necessary* to raise a reasonable doubt are disclosed
  - communications go to the AC, NOT the Crown
  - if AC uses communications → the privilege holder's communications CANNOT be used against them in a subsequent case
    - ex. can be used to acquit Brown [want him to have full answer and defence], but can't be used to convict Benson [concerned with Benson's presumption of innocence and want him to be able to have SCP in his trial]

RATIONALE for this exception: don't want wrongful convictions

3) AVOIDING A PUBLIC SAFETY RISK EXCEPTION

TEST:

1. Is there a clear risk to an identifiable person or group?
2. Is there a risk of serious bodily harm or death?
3. Is the danger imminent?

NOTE:

- Absolute Necessity Standard [ie. very high]

ex. *Smith v Jones* → psychiatrist giving report for lawyer wanted to breach SCP because AC told him he was planning to kill and rape other sex trade workers [successful exception]

RATIONALE for this exception: when public safety is involved and death or serious bodily harm is imminent, SCP should be set aside

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LITIGATION PRIVILEGE → *remember: there is "no privilege in a witness" [both parties can go to a third person for a statement]*

TEST: communications between a lawyer and third persons are privileged **IF**, at the time of making the communication, litigation was commenced or anticipated and the dominant purpose for the communication was for use in, or advice on, the litigation

"LITIGATION"	"DOMINANT PURPOSE"
includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action **__BUT__ litigation privilege arising from a criminal case is not protected in a civil case arising from the same incident and *vice versa* • ex. AC acquitted of charges and wants to sue gov't can obtain docs that gov't had for criminal trial that were under litigation privilege for his civil trial because different cause of action, different judicial source, and criminal trial has ended (SCC in *Blank v Canada* 2006) • ex. docs from completed civil case can be used in corresponding criminal case * common in family law cases or major fraud cases	ASK: was the information made with the dominant purpose of commenced or anticipated litigation? • **Yes** → litigation privilege applies • **No** → litigation privilege doesn't apply ex. *Waugh v British Railways Board* → railway report's dominant purpose was for railway safety and operation, so while litigation was *one* purpose, it was not the *dominant* purpose

COPIES OF DOCUMENTS?

Applies **IF** copies have selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor

- ex. highlighting the important information on an otherwise admissible document = litigation privilege
- ex. case law research for arguments in court = litigation privilege
- ex. corporate search records = NO litigation privilege [**if nothing additional is done to that corporate search record*]

IMPLIED UNDERTAKING RULE

Documents exchanged on discovery are subject to an "implied undertaking" that they are only to be used in the present action

- ie. whatever is disclosed in the discovery room stays in the discovery room, unless eventually revealed in the courtroom or disclosed by judicial order

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SPOUSAL PRIVILEGE

s 4(3) *Canada Evidence Act*: No husband is compellable to disclose *any communication* made to him by his wife *DURING* their marriage and vice versa.

**IN ALBERTA? *Includes AIPs*

NOTE:

- privilege belongs to spouse/AIP → up to witness spouse/AIP to decide whether to assert or waive it
  - must assert it in the presence of the jury + judge must provide a special instruction
- if a communication before/after marriage = no spousal privilege

HYPOTHETICALS: AC charged with murdering his 12-year-old niece. Which of the following are protected by spousal privilege?

- 1) On the day of the murder, AC *tells* his wife that he was going over to his sister's house after work.
  - protected under spousal privilege → s 4(3) is stricter than Wigmore test
- 2) Wife *observes* AC return home around 6:00 pm and *observes* his clothes were covered in blood. She *observed* him go to the laundry room and wash his clothes.
  - not protected → a fact, not a communication
- 3) AC *confessed* to his wife: "I killed my niece Sally, but don't tell anyone".
  - protected under spousal privilege

SETTLEMENT NEGOTIATION PRIVILEGE → *to encourage settlement & honest/frank/full discussions*

TEST: discussions made during the course of settlement negotiations, *for the purpose of settlement* & not intended to be disclosed or used against the parties should the negotiations fail, are privileged

3 PRECONDITIONS *[substance over form → just because it doesn't say "without prejudice", doesn't mean it's not protected]*

1) litigious dispute exists or is being contemplated?	2) communication made with the express or implied intention that it would not be disclosed to the Court in the event that negotiations failed?	3) purpose of the communication to attempt to effect a settlement?
+	+	

APPLIES TO:

- parties [P/D, Crown/Defence]
- communications disclosed to TPs
  - [ex. if there are multiple Ds or multiple ACs, conversations had with one D or AC should not be disclosed to counsel for another D/AC without waiver]

3 EXCEPTIONS → *the privilege may be overridden IF:*

a) A settlement agreement or its terms are at issue;	b) The negotiation discussions give rise to a cause of action;	b) There is a compelling public interest to do so

CONSIDER: relevance & prejudice

- competing public interest must outweigh public interest in encouraging settlement

PARTIES CHOICE:

- parties can contract out *OR* agree that settlement negotiation privilege will not apply *OR* agree that it applies more rigorously
  - ex. if civil lawsuit is something neither party wants the public to know about

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PROTECTING INFORMANT'S IDENTITY

D: informant privilege = guarantee of protection and confidentiality in exchange for information

- informant = tipster , NOT police agent
  - passive & provides info in exchange for anonymity VS. paid by police to actively investigate
- common law protects an informant's ID from disclosure in BOTH criminal or civil proceeding
  - includes direct or indirect information
- protected absolutely → ONLY subject only to…

McClure's Innocence at Stake Test:

1. AC must show some basis to conclude that without the disclosure sought, his innocence is at stake
2. If yes → court reviews the information to determine whether in fact the information *is* necessary to prove AC's innocence
3. If yes → court will only reveal as much information as is essential to allow proof of innocence
4. Before giving the info to the AC, Crown has the option to stay the charges
   - **NOTE:** Crown almost always stays the charged → in big drug investigation, if you out someone as an informant, they'll get killed

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FIRST-PARTY RECORDS

CROWN DUTY TO DISCLOSE:
Police have obligation to give "**fruits of the investigation**" to Crown → Crown has duty to turn over to the defence all *relevant* information

- Can only withhold IF:
  - clearly irrelevant or privileged no obligation to disclose **high standard*
  - Privileged
  - TP records in context of sexual assualt allegation

DUTY TO INQUIRE:
Where Police/Crown are aware that relevant information exists, they should get it (*McNeil*)

- BUT AC can't dictate the investigation, so Police/Crown don't have to investigate all theories of AC (*Darwish*)

MATTERS OF OPINION vs MATTERS OF FACT:

- What Crown does alone to prepare for trial (opinion) = NOT disclosable
- Matter of fact = disclosable

THIRD-PARTY RECORDS → *TP = not police/Crown, but has records relevant to the charges against AC*

ASK: sexual assault prosecution?
- No → *O'Connor* test
- Yes → *Mills* test

- TP NOT under a duty to disclose (ie. can't be compelled by Crown or police to provide documents)
  - AC must apply to the court for the production of TP records

O'CONNOR TEST [look up "potential privacy interest" in big CAN for **application procedure**]

a) AC must show [through affidavit evidence] that the information sought is likely relevant
   - **lower standard than McClure's innocence at stake test* → *"likely relevant" vs "likely to raise a reasonable doubt"*

IF TRIAL JUDGE CONVINCED:

b) Judge will review the TP record on their own and decide whether and to what extent it should be produced based on balancing TP's right to privacy vs. AC's right to full answer and defence
   - ie. can order disclosure of everything, some of the document, redacted document, etc.

***NOTE:** if record-holder can show the doc is privileged, application usually fails UNLESS AC's innocence is at stake

MILLS TEST → *stricter at both levels* [added (b) in Step 1 [compared to *O'Connor*] increases difficulty of satisfying test → rationale: want to increase reporting of sexual assaults]

STEP 1: GETTING INSPECTION

a) AC must show the record is *likely relevant* +
   - s 278.3(4) → 11 insufficient grounds for relevance

b) Production of the record to the judge for inspection is "necessary in the interests of justice"
   - consider s 278.5(2) → 8 factors
     - when in doubt, move to Step 2 and inspect

STEP 2: INSPECTION

- Judge looks at record and decides what (if anything) can be disclosed to AC
- consider s 278.5(2) → 8 factors

… AC must comply with ss 278.1-278.97 of *CC* before a trial judge can order a complainant or witness to produce TP records in a sexual assault case

- s 278.1: Record = any form of record that contains personal information for which there is a reasonable expectation of privacy

Records already turned over to Crown?

- NOT to be disclosed to the AC UNLESS:
  - (1) the complainant or witness waives their protection OR
  - (2) the trial judge orders production
- Crown has a duty to notify the AC

EXAMINATION IN CHIEF ("EIC") or "direct examination" → *ANSWERS are evidence, not the questions*

D: testimony of a witness being questioned by the side that called her [VS. cross-examination by other side]

- Ask follow-up confirmatory question if needed
  - Only audio recordings, no video [so: "let the record reflect, the witness just nodded her head"]
- Witness not denying ≠ an answer
- Problem: when witness needs to say something specific because it's an element of the offence
  - Ex. officer has to say words "reasonable and probable grounds that person was impaired" in *voir dire* on *Charter* grounds → if they don't get there, don't have it for what Crown needs to win application

LEADING QUESTIONS [EIC]

GENERAL RULE: open-ended, NOT leading questions

- We want witness to tell story, not the lawyer
  - ex. "Where were you on the night of the incident?" VS. "On the night of the incident, you were at Tommy's house, correct?"
- Most yes/no questions will be leading
  - But does an exception apply? [look below]
- Directly or indirectly suggests answer? = can be leading
  - ex. "I take it you checked your review mirror before changing lanes" [direct] vs."Did you check your review mirror before changing lanes" [indirect] vs. "What if anything did you do before changing lanes?" [open-ended]

CONTEXT-BASED:

Some leading questions are *never admissible:*	**Some leading questions *are sometimes admissible*:** [can argue weight]

*Where the question presupposes the existence of a fact in issue that was not presented by that witness
- [ie. if question itself is giving the evidence vs the witness volunteering the info first]
	• Introductory/undisputed matters
	  ○ Ex. "I understand that you're John's mom"
	• ID of persons/things
	  ○ Ex. using someone's name or referring to an object [can refer to it as a gun, rather than asking "what am I holding here?"]
	• Complicated/technical matters
	  ○ Ex. witness needs to understand how car brakes work before you can ask them about the MVA
	• Adverse/hostile witness
	  ○ 9(2) applications → not for exam, but means John has called witness to testify for Crown and they are giving evidence that they don't want to be there, or are recanting
	  ○ Make special application to ask leading questions
	• Alleviate difficulty in answering the question
	  ○ common with someone with mental health issues or with children
	• Refresh memory [look below]

OBJECTIONABLE LEADING QUESTIONS? *Assume this goes to weight, not admissibility [for this class]*

- Q:"Are you sure Tommy wasn't there?"
- A: "Well, now that you say it, yes he was."

Prof: theoretically make objections as soon as possible [ie. when you hear the question] … in practice, most lawyers let some leading questions in before they object [because they're not questions you have an issue with]

REFRESHING MEMORY [exception to leading questions]

1. **Prior to Trial**
   - Generally free to use whatever means a witness wants to to refresh their memory
     - BUT the means used might affect weight of evidence
       - ex. having conversation with someone biased against AC = affects weight
       - ex. reading original statement, or hearing 911 call = generally okay
     - Opposing counsel can explore which means were used & judge can order that those means be produced (usually a non-issue)

2. **While on the Stand: 2 Types**

i) Past Recollection Recorded	ii) Present Recollection Revived [the "Aha!"]

i) Past Recollection Recorded *("I formerly knew this but I no longer recall"; ie. don't know answer so becomes evidence going in)*

- **D:** A witness may, with leave of the court, refresh her memory in court from a document or an electronic record that was recorded reliably.
    - ex. police officer: "I don't remember the time, but I know I wrote it down, may I check my notes?"*
        - *make them indicate when they're reading notes [because it's an audio recording]

REQUIREMENTS:*
1. Original or authenticated copy
2. Past recollection must have been recorded in some reliable way
3. Created/reviewed when their memory was sufficiently fresh
4. Affirmation that the witness "knew it to be true at the time"
    - [ie. accurate reflection?]

**becomes the evidence going in, so more stringent requirements*

- **NOTE:**
    - generally once judge says "you can use notes", then at any point in trial, officer can do so (unless other party objects)
    - might go to weight → ie. no independent memory at all vs. mix of checking notes
    - notebook itself generally doesn't go in, unless it's quite a long section → witness just reads it in

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ii) Present Recollection Revived *(the "Aha!" or trigger word to jog memory; doesn't go in as evidence because they testify on their own)*

- **D:** A witness may, with leave of the court, consult any document in court while testifying to spark an actual recollection of the event recorded.
    - [ie. look at document, look away, aha! + testify from own memory]
- EXCEPTION: not allowed if too suggestive, unreliable, erroneous, too much time passed between event and recording, etc.
    - ie. can't look at lawyer's notes from interview

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3. **Transcripts During Trial** → *slightly different procedure from those above, but very common in EIC and cross-ex.*

- **D:** A court may allow witnesses who cannot recall matters they have previously testified about under oath to be shown transcripts of their earlier testimony or their depositions.
    - ex. "Honestly, I don't remember, that was 4 years ago, but I do know that I knew and answered that in the disposition 6 months after the event" → show them the transcript, they read it silently, turn it over/put it down, then answer questions]
- DON'T need contemporaneous requirement nor for witness to verify that transcript accurately recorded their testimony [assumption is that it does]

PROPER PROCEDURE : *if attempting to refresh witnesses' memory (not needed if cross examining someone on their **prior testimony**)*

- Ask the question first
    - [ex. "what were the 4 safety steps at the manufacturing plant?" → establishes that the witness's memory needs to be refreshed]
- Confirm surrounding circumstances of transcript
    - [ex. "This was made at the police station?" "Were you under oath?" etc]
- Give witness transcript
- Confirm truth at the time
    - [ex. "Is this an accurate reflection of what you knew this to be true at the time?"]

CROSS-EXAMINATION → right is fundamental, but not limitless [pg 37 in CAN]

D: Cross-examiner can ask questions, **including leading questions** *[because witness is partisan to the other side]*, on any relevant topic, even if it was not brought up during EIC

- Trying to discredit or impeach the credibility of the witness' herself/her testimony to "explain away" an assertion of fact made by the that doesn't help your side
    - ie. somehow biased, corrupt, contradictory, acting out of self-interest, unreliable, inconsistent, etc.

LIMITS:

QUESTIONS MUST BE…

- relevant + more probative than prejudicial

QUESTIONS CANNOT….

- Harass
    - [ie. insult or abuse for the sake of it]
- Misrepresent
    - [must be asked in good faith; can't put something to witness you know to be false]
- Repeat

CONTRARY FACTS…

- CANNOT be suggested UNLESS there is a "good faith" basis for the question
    - IOW uncertainty is OK, but no fishing expedition

NOTE:

- No need to adduce evidence to support the suggestions made → either witness agrees with you or they don't
    - ex. hold up blank piece (but witness doesn't know that) and say you're holding text messages between witness and AC → witness can agree or disagree that that is what it is ***as long as defence has good faith reason to ask questions related to those text messages*

CROSS EXAMINATION: THE RULE IN *BROWNE v DUNN*

D: where counsel intends to impeach the witness by presenting contradictory evidence, the evidence should be put to the witness to give them an opportunity to respond.

- RATIONALE: matter of fairness
- Most often comes up for defence or D → their evidence is called last
    - [so know client's full version of events beforehand]
- Especially important in he said/she said cases
    - [credibility is key]
        - So at end of cross, can say "I'm going to suggest to you this, and this, and this" and the witness will go "no!" but judge and you and Crown know you're doing the *Browne v Dunn* rule

Examples:

1. Complainant's after-the-fact conduct
    - Complainant: "I was really mad at him after and told him I never wanted to see him again"
    - AC: "Well she called me 10 times in the days after"
    - Prof: you need to give complainant an opportunity to respond, so you need to know ahead of time what client will say on the stand before you cross-examine the complainant
2. No shoulder check
    - P's lawyer says "D clearly changed lanes without shoulder checking, so although he claimed to be driving safely, he wasn't"
    - D wasn't given an opportunity to respond = violation
3. Collusion
    - 3 Crown witnesses testify they were sexually assaulted by the AC … if in closing, defence says they colluded = violation
4. Burned boat
    - If the cross-examiner violates rule and still wishes to rely on the point they are making, the Court should first see if the witness can be recalled. If that is not possible, the weight of the contradictory submission may be lessened or completely rejected.

CROSS EXAMINATION: **COLLATERAL FACTS RULE** → *ie. witness says A, but some evidence suggests what he said is untrue*

D: forbids the calling of evidence to contradict the answers given by an opponent's witness [usually in cross, but sometimes in EIC] about "collateral" matters/facts.

- RATIONALE: witnesses lie all the time → can't spend all day cross-examining them on that, so their answer on a collateral matter is final

ASK: is the evidence offered of sufficient importance to the issues before the court that we ought to hear it having regard to the necessary court time required, potential confusion of issues, and any unfairness and prejudice to the witness? Is it about a collateral matter or does it go to an important fact in issue?

- if only purpose is to contract opponent's witness = inadmissible
- if it assists trier of fact in some other way [ie. going to a fact in issue] = admissible

The allowing of evidence to contradict a witness' testimony is left to the discretion of trial judge, who must weigh the benefits of receiving the evidence against any potential prejudice:

- Benefit = it goes to witness' credibility
- Prejudice = time/confusing things for jury

NOTE: defence evidence on behalf of AC? → general rule is that it should be received UNLESS counterbalancing concerns SIGNIFICANTLY outweighs value of receiving it

EXAMPLE: AC is charged with robbery of a bank. An eyewitness identifies the AC as the robber. The Defence has evidence that this eyewitness was drinking all day at a local bar and then went to the bank. The waitress who served the eyewitness specifically remembers him because he returned to the bar and told everyone about the robbery. In cross-examination, the Defence questions the eyewitness about his drinking.

Prof: clearly relevant, but how relevant? 1-2 drinks or wasted? Are there other witnesses that ID'd the robber, or is eye-witness the only one?

- *If he admits to drinking heavily, impeachment is complete and there is no need to call potential contradictory evidence (the waitress).*
- ***If he denies that he had too much to drink, the Defence will want to call the waitress to contradict him.***

CROSS EXAMINATION: **PRIOR INCONSISTENT STATEMENTS**

D: Witnesses may be impeached using prior inconsistent statements [he says "A" on the stand and you have evidence he said "B" before], **BUT** inconsistency goes only to credibility/reliability and **NOT** to POTOC of the statement **unless adopted by the witness.**

PROPER PROCEDURE:

1) Counsel has the witness **confirm** the present testimony.
   - purpose: to make the testimony clear in order to highlight the inconsistency
2) The witness is then confronted with the making of a prior statement.
   - don't necessarily have to physically show it to them (if they agree they said it, that's enough)
3) The prior inconsistent statement is then put to the witness showing the contradiction. [rule in *Browne v Dunn*]
   - usually cross-examiner reads the prior inconsistent statement out loud for the record, the court and the witness
4) Finally, the witness may be asked to **adopt** the prior inconsistent statement for the POTOC. If the witness refuses to do so, then the statement goes only to credibility/reliability **[unless it's an AC]**

PRIOR INCONSISTENT STATEMENTS OF…

AC/Parties to an Action → statements may be used as evidence going to the substantive issue of guilt NOT just credibility /reliability [AC **doesn't have to adopt it** for it to be used for POTOC]

RATIONALE: they are "admissions"

BUT: usually Crown is using prior inconsistent statements to impeach AC, not for POTOC [can't "split it's case" in big CAN]

Other Witnesses → statements must be adopted to be used for POTOC

EXAMPLE: Witness on stand "I saw AC swerve outside lane twice with tires outside lane before car crash" but defence has police statement that says "I saw AC swerve outside lane once". When you put that to her, she can say:

- i) "that's not true, I was mistaken when I said that previously"
  - Can be used for credibility/reliability, but CAN'T be used to prove that AC swerved once vs twice
- ii) "oh, I was mistaken today, that's true" [ie. adopts what was previously said]
  - Can use it for both credibility/reliability + to prove that AC swerved onced vs twice

Prof: remember what your purpose in raising a prior inconsistent statement and impeaching someone is:

- Credibility? → how can AC explain 1 hammer hit vs 8? [ie. he's lying]
- Reliability? → AC says it was 6 instead of 8 [ie. he can't remember, so can you reliably convict on that evidence]

CROSS EXAMINATION INCOMPLETE? → testimony admissible, but weight given in discretion of trial judge

- ex. when witness refuses to continue speaking, or trial gets adjourned mid-cross and witness gets sick/dies/doesn't want to come back

3 Considerations: *contextual approach*

- The reasons for the incomplete cross-examination
  - ["fault analysis": why did witness not complete cross-examination? Were the questions fair or bordering on abusive? Are they ill?]
- The impact of the lack of cross-examination +
  - [was defence almost done? Or can they point to 10 or 20 important questions they would have asked?]
- Possible ameliorative action
  - [can we do something to fix it? Previous transcript where they did complete cross examination? Is it possible to postpone trial until witness recovers? How important is this witness?]

["Tips" in big CAN for practical tips]

REAL EVIDENCE → *"first hand", direct evidence → trier of fact relies on his **own** senses to draw inferences*

D: tangible items shown to the trier of fact, such as a physical piece of evidence (the murder weapon) or "demonstrative evidence" (aids used to help witnesses better explain their evidence).

- Admissible IF properly authenticated:

  Trial judge must be satisfied that there is a sufficient basis to support the:
  - 1) identification of the exhibit
  - 2) its continuity +
    - [ie. it went into locker and was brought straight to court]
  - 3) its integrity
    - [ie. hasn't been tampered with]

  NOTE: witnesses DON'T need to be called if other side concedes authenticity and continuity

- Excluded where:
  - Not relevant
  - Potential for undue prejudice outweighs its probative value
    - ie. visual evidence can have powerful impact, so need to be careful not to include anything that would be inflammatory
      - ex. if not in dispute that victim was brutally beaten, might be unnecessary to put in a bunch of photos of brutally beaten victim VS. if cause of death is an issue, then victim with stab wounds picture might have to go in
    - **NOTE:** less concerned with prejudicial side of things today given the amount of gore we see [shock value isn't as high]

PHOTOGRAPHS & VIDEOTAPES

Only admissible if:

1. They are an accurate representation of the facts;
   - ie. not distorted [like slow motion (*R v Maloney*), in hands of professional editing company (*R v Penney*), etc.]
2. There is no intention to mislead; +
3. They are verified/authenticated under oath.
   - can be videographer or eyewitness at scene who confirms it's an accurate depiction of what they saw

Once authenticated, can stand on its own as a "silent witness" [see *R v Nikolovski*]

DOCUMENTS

Use of docs guarded by the "best evidence" rule, which requires that the **original** of a document be tendered when a party seeks POTOC of that document.

COPIES?

Original available? → copies generally inadmissible

- Party needs to show original lost, destroyed, or otherwise unattainable

Can authenticate document by:

- calling writer or a witness familiar with person's handwriting, comparing writing with writing court's already found genuine, admissions from other side, circumstantial evidence suggesting it's genuine, an expert, by virtue of statute

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JUDICIAL NOTICE → *facts that are clearly uncontroversial OR something looked up in a dictionary, map, etc.*

D: acceptance by a court, without the requirement of proof, of any fact or matter that is **i)** so generally known and accepted in the community that it cannot be reasonably questioned, or **ii)** any fact or matter that can be readily determined or verified by resort to sources whose accuracy cannot be reasonably questioned.

EXAMPLES: Edmonton is in AB // Alcohol can impair a person's faculties // Children can drown in lakes // Wood comes from trees // Residential schools existed

NOTE: must consider the general knowledge within the community where the trial is being held & can refer to previous precedent

- Under the various Evidence Acts in Canada, judicial notice is to be taken of the laws in Canada and in the provinces.
  - ie. the law itself does not need to be proven BUT lesser legislation like bylaws have to be proven

PROCEDURE

- Counsel formally asks the Court to take Judicial Notice of certain facts
  - Counsel has the opportunity to present argument, and if need be, to call evidence on the point
- Judges may take judicial notice on their own initiative without input from counsel
  - BUT not okay if judge comes to it by doing own independent research
    - [ex. if the judge themselves goes to scene of crime]

TEST: the more important to the case = the more indisputable proof needed

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WITNESS' CREDIBILITY → *all witnesses are assumed to be of good character*

YOUR OWN WITNESS' CREDIBILITY

EIC: CANNOT ask your witness questions solely to bolster their credibility	**CROSS EX:** opposing party CAN challenge your witness' character* **you can then call rebuttal evidence to "rehabilitate" their character*

EXCEPTION: an AC in a criminal case CAN call evidence bolstering his good character

- BUT if AC puts his "character in issue", Crown is entitled to cross examine AC on his character and call otherwise impermissible bad character evidence

EXPERT EVIDENCE REGARDING OTHER WITNESS' CREDIBILITY

A party can call an expert to testify about facts relevant to the credibility of one of that party's other witnesses **IF**:

- The facts to support the credibility finding are likely to be beyond the experience of the trier of fact

You can NEVER ask a witness [expert or otherwise] if they think another witness is telling the truth

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PRIOR CONSISTENT STATEMENTS → *"oath-helping"*

D: it is never permissible to infer that a witness' claim is more likely to be true because that witness has told the same story on prior occasions

- Doesn't make it necessarily more true → "consistency is just as agreeable to lies as to truth"

Evidence that a witness made a prior statement consistent with that witness' in-court evidence = generally inadmissible

EXCEPTIONS:

- The prior consistent statement is relevant to a different issue
  - ex. 9-1-1 calls as evidence of a witness' emotional state [Was she crying? Was she upset?] rather than of offence itself
- If the opposing party brings an allegation of "recent fabrication"
  - ex. N says complainant made this up after she found out AC was dating someone else; J has text messages weeks prior where complainant told a friend about what happened → J is allowed to put in "oath-helping" text messages to rebut what N defence has put in

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EVIDENCE ANALYSIS:

1) The Golden Rule says that information can be admitted as evidence only where it is relevant to a material issue in the case [unless another exclusionary rule applies].
   - ASK: Is evidence logically relevant? **very low threshold*
     - *The proposed evidence is relevant where – based on logic and human experience – it makes it more likely that the proposition for which it is advanced is true (R v Arp).*
   - ASK: To a material issue in the case? **facts-specific*
     - Primary or secondary materiality? [actual fact-in-issue vs credibility/reliability]

2) What's its probative weight?
   - Depends on its believability (ie. credibility + reliability) + the strength of the inferences that can be drawn
     - Is it credible?
       - *ie. Is the witness being honest?*
     - Is it reliable?
       - *ie. How accurate is the otherwise honest witness? (Was he drinking? Was it late? It's so long ago, does he really remember?)*

3) What is the purpose the evidence is being called for?
   - As proof of the truth of its contents? → *hearsay*
   - To establish guilty of AC but it directly or indirectly reveals bad character of AC? → *SFR*
   - To show AC is "sort of person" likely to commit offence charged? → **propensity/prohibited reasoning*
   - To support an inference relating to sexual assault CO's consent or credibility? → *inadmissible*

4) Is it hearsay? [ie. something said to an ordinary person] → pg 5 **CHART**
   - **D:** an out-of-court statement that is offered as proof of the truth of its contents?
     - Presumptively inadmissible because of the difficulty testing reliability & determining if there should be concerns about the declarant's perception, memory, narration, or sincerity, all of which could be mitigated by contemporaneous cross-examination (*R v Khelawon*).
   - ASK: 1) Out-of-court statement?
   - ASK: 2) What purpose is it being led for?
     - IF YES: does a traditional hearsay exception apply? (Which conforms with principled approach)
       - Prior judicial proceedings [pg 6]
       - Prior convictions [pg 6]
       - Admissions by a party [pg 7]
         - ASK: Did the opposing party actually make the statement? (ie. Is the witness reliable + credible?) Trier-of-fact must be convinced of such on BOP.
       - Declarations against interest by non-parties [pg 7]
       - Dying declaration [pg 7]
         - <u>Offence MUST be homicide of the declarant</u>
       - Declarations in the course of duty ("Business Records") [pg 8]
         - *ex. nurse's notes*
       - *Res gestae* [pg 8]
   - DOES PRINCIPLED APPROACH APPLY? (*Khan*) [pg 9]
     - Necessity +
       - "Reasonable necessity" to hear evidence in hearsay form?
         - ie. declarant dead, a child that "clammed up", can't be located by police? NOT just because declarant doesn't want to testify, except for rare cases (*Nicholas*)
     - [Threshold] Reliability
       - Established where hearsay is sufficiently reliable to overcome the hearsay dangers (ie. declarant's perception, memory, narration, or sincerity + lack of cross examination) **high standard (Bradshaw)*
         - i) Procedural → are there adequate substitutes for testing truth and accuracy?
           - Statement video recorded? Under oath? Given in court on a related proceeding?
         - ii) Substantive → are there sufficient circumstantial or evidentiary guarantees to find statement inherently trustworthy? **case-specific* *[NEXT PAGE]*

        - Is there corroborative evidence? (*Bradshaw* **factors** pg 10)
        - Timing of statement? Motive to fabricate? CO's age? (*Khan*)
        - "No real concern" about whether statement is true?
    - *KGB* statement? [pg 10]
        - Prior inconsistent statement of a non-party witness may be admitted for its truth on a case-by-case basis using the principled approach
            - ie. witness recants earlier hearsay statement in court

5) Is it self-incriminatory? [pg 11]
- ASK: Is this a compellable witness?
    - AC is NOT a compellable witness (*Charter* s 11(c))
        - *s 11(c) doesn't apply to corps + it has to be penal proceedings
- Multiple proceedings: [pg 12 **CHART**]
    - Statutory use immunity (s 5 *Canada Evidence Act*):
        - AC who is compelled to give evidence at civil P1 has use immunity from any self-incriminating admissions being used against them at criminal P2.
    - Constitutional use immunity (s 13 *Charter*):
        - Witness who testifies in any [criminal or prosecution] proceedings has the right not to have any incriminating evidence given used to incriminate that witness in any other proceedings.
            - EXCEPTION: perjury or giving of contradictory answers
                - *Informal statements also don't qualify (ex. answers in police questioning)
            - "Other proceedings" = civil trials, criminal trials, *voir dire*, bail hearings, etc.
    - Derivative use immunity (s 7 *Charter*)
        - AC a compellable witness in P1 + their testimony leads to discovery of evidence = testimony cannot be used against AC in P2 if the evidence would not have otherwise been found.
            - Initial burden on AC to show plausible connection between testimony + discovery of evidence, then Crown must prove on BOP that the evidence would have been found regardless
- NOTE: no adverse inferences can be drawn against an AC who chooses not to testify (or who chooses only to provide some, nor, or all of the information he has (*Turcotte*))
    - EXCEPTION: for credibility of an alibi + pg 13 exceptions
    - ALSO might be tactically compelled to testify (not a legal compulsion: s 7 & s 11(c) don't apply)

6) Is it a confession? [ie. something said to a person of authority] [pg 13]
- COMMON LAW Confessions Rule (*Oickle*): if AC speaks to a person of authority (or someone he reasonably believes to be a person in authority), regardless of whether or not he is detained, and regardless of whether the statement is inculpatory or exculpatory, his confession must be voluntary to be admissible.
    - ASK: was AC given a "meaningful choice to speak?"
        - Crown must establish BRD that in all the circumstances, the will of the AC to remain silent was NOT overborne by one or a combination of:
            - 1) inducements [**contextual* pg 14] , 2) oppressive circumstances [**contextual* pg 15], 3) the lack of an operating mind [**high standard* pg 15], or (4) police trickery so appalling that it would shock the community [**high standard* pg 15]
                - *Did fact AC had a few drinks lower his inhibitions with respect to other factors?*
    - "Person in authority" = Does this person have the ability to influence or control the prosecution and is allied with the police/prosecution? [pg 14 **for analysis**]
- S 7 Confessions Rule: [pg 15]
    - Only applies if:
        - a) AC detained + statement was actively elicited by an undercover state agent (*Hebert* rule) OR
            - Doesn't apply to Mr. Big Operation or voluntary confession as part of natural conversation
        - b) statement was statutorily compelled
            - ie. use immunity under s 7
            - Doesn't apply to border agent confessions (*White*)

- S 9 & 10(b) Protections: [pg 16]
    - Statement might be excluded under s 24(2) if AC establishes on BOP that it was obtained in violation of s 9 or s 10(b)
- Derived Confessions Rule [pg 14]
    - Subsequent confessions are excluded if they are a) derived as a result of an early involuntary confession and b) where the circumstances that made the initial statement involuntary continue to exist.

7) Is it opinion evidence? [pg 19]
- Opinion = an inference from observed fact
- General rule: opinion evidence is presumptively inadmissible, whereas observations of fact are generally admissible. Two exceptions (*_look at substance of evidence_, *not status of witness*):
    - 1) Lay witness opinion evidence
        - pg 19
    - 2) Expert witness opinion evidence (**can be dangerous, as jury/judge may defer*)
        - Expert = someone with "special knowledge or experience beyond the understanding of the average juror"
        - Presumptively inadmissible. Party calling evidence must satisfy a two-stage test on BOP in a *Mohan voir dire*. pg 20
            - REMEMBER: impartiality of experts is presumed (**high standard to exclude evidence on this*), but must be assessed throughout, including at admissibility and weight stages.
        - ATTACKING EXPERT: "Rule in Abbey" [pg 21]
- ASK:
    - Does opinion come close to the "ultimate issue" of the case? *Greater scrutiny required.*
    - Does opinion deal with question of domestic law? *Inadmissible.*
    - Does opinion deal with whether another witness is telling the truth? *Inadmissible UNLESS properly qualified expert witness is offering opinion evidence that is relevant to assessing credibility and reliability of a witness generally.*
    - Is it novel or challenged science? pg 20

8) Is it character evidence? [goes to primary materiality: *actus reus* or *mens rea*] [pg 21]
- ASK: Does the evidence colour your impression about the AC? Is it relevant to a material fact-in-issue?
- CRIMINAL CASES:
    - Is it "bad character" evidence about the AC (**would ordinary person disapprove of conduct or character revealed*?)?
        - Similar Fact Evidence = type of bad character evidence Crown is trying to get in
            - Evidence that directly or indirectly reveals bad character of the AC is presumptively inadmissible, so onus is on Crown to show on a BOP that it is more probative than prejudicial to a material fact-in-issue (**high standard*).
        - SFR analysis: [pg 22]
            - i) identify the fact-in-issue
            - ii) consider the 3 Steps when weighing probative value:
                - 1) What is the strength of the evidence that the similar acts occurred? [pg 22-23]
                    - Evidence of conviction = very probative
                    - Evidence of acquittal = can't be used
                        - Exceptions: fact of prior charge relevant OR if multi-count indictment
                    - Evidence of stay = rarely used
                    - Evidence of collusion? (**more than simply an opportunity for collusion*) pg 23
                - 2) Connection between the SFE and the Fact-in-Issue?
                    - a) connection of previous act to AC? *If yes to 1), then yes here*
                    - b) nexus between SFE and a properly defined fact-in-issue?
                        - i) what are the inferences the Crown is seeking?
                        - ii) how persuasive are those inferences?
                            - 7 non-exhaustive factors (*Handy*) pg 23

                - ASK: Is it an ID case? *Yes → need higher degree of similarity and connectedness (Arp) to prevent wrongful convictions.*
            - 3) Materiality of the Evidence?
                - Is SFE material to a fact-in-issue? And how important is that fact-in-issue?
        - iii) consider the 2 types of prejudice when weighing prejudicial value
            - Moral prejudice? *Emotional reaction from trier-of-fact?*
            - Reasoning prejudice? *Resource question* [factors on pg 24]
        - iv) balance: Is the SFE sufficiently probative to justify running the risks of prejudice?
            - Error of law to skip this step
    - NOTE: <u>if SFE admissible, requires mandatory jury direction</u> to reduce risk of prejudice → go to step 13
- Is it AC leading "bad character" evidence about others? [pg 26-27]
    - Against co-AC:
        - Almost always admissible, unless clearly more prejudicial BUT AC1 puts his character into issue by doing it
        - Can only be used in AC1's defence (Crown can't use it to prove guilt of co-AC)
    - Against third parties: *ie. self-defence cases*
        - *Prima facie* admissible unless <u>substantially outweighed</u> by prejudice or irrelevant
        - Opens door to Crown rebuttal against AC + good character of TP
    - Against unknown suspects via SFE
    - Against CO in sexual assualt case
        - To combat the twin myths, s 276(1) *Criminal Code* prevents AC from raising evidence about CO's sexual activity to support either the inference that CO is more likely to have consented to the sexual activity forming subject-matter of the charge OR that CO is less worthy of belief UNLESS a judge allows it vis-a-vis s 276(2) → pg 27
            - If Crown wants to introduce this evidence ⇒ use *Seaboyer/Gayme* common law scheme
- Is it AC leading "good character" evidence about himself? [pg 25-26]
    - Generally considered relevant and admissible, so to exclude it, prejudice must <u>substantially</u> outweigh probative value.
        - BUT where AC puts his character into issue (**in court*), Crown is entitled to call rebuttal evidence to the contrary, which goes to AC's credibility as a witness.

- CIVIL CASES: [pg 28]
    - Good character evidence <u>CANNOT</u> be called unless character of party is directly in issue (*defamation*) or civil case raises allegations of a criminal nature
    - Bad character evidence is <u>ONLY</u> admissible vis-a-vis SFR, but there is no presumption of inadmissibility

9) Was it obtained vis-a-vis a Mr. Big Operation? [pg 16]
- Suspected crime = murder?
    - **D:** undercover police operation that is intended to induce a confession revealing what the target's involvement, if any, is in the offence (presumption of innocence).
- Evidence is led in a *voir dire* and is presumptively inadmissible. To be admissible, Crown must prove the statement should be admitted on BOP because its probative value outweighs its prejudicial effect (*Hart*). Corroborative/ confirmatory evidence is also key. If the Crown is successful, the onus shifts to the AC to establish on BOP that to admit the evidence would amount to an abuse of process.
    - Probative (**context specific*):
        - Coercion? Operating mind? Length of operation? Number of interactions? Nature of relationship? "Truth verification method" vs "Prove your worth"
    - Prejudicial (**potential for prejudice is a fairly constant variable in this context"*):
        - Moral prejudice from bad character evidence
        - Reasoning prejudice (how distracting is this for the jury?)
        - "Tactical inevitability" that AC will have to testify
    - Abuse of process: *[NEXT PAGE]*

        - Does what police did offend a reasonable member of the public? Was it reasonable, given the charges before the court?

10) Was it obtained vis-a-vis a *Charter* breach by a state agent? [s 24(2) *Grant* factors] [pg 17]
    - Polygraph = inadmissible
    - AC must establish on BOP that the evidence was 1) obtained in a manner than infringed or denied his *Charter* rights; and 2) admission of the evidence would bring the administration of justice into disrepute.
        - Pg 18 **for analysis**
        - ASK: after weighing three *Grant* factors, would reasonable person, informed of the circumstances and values underlying the *Charter,* conclude that the administration of justice would be brought into disrepute if evidence is admitted?

11) Is it privileged?
    - i) Class privilege asserted? *Communications prima facie privileged & inadmissible*
        - Every privilege needs to meet the 4 *Wigmore* criteria [pg 28], but all class privileges have been recognized as having met these requirements +
            - Solicitor-Client privilege?
                - test [pg 29]
                - 3 exceptions: crime, innocence at stake (**only for criminal proceedings*), protecting public safety [pg 30]
            - Litigation privilege?
                - test [pg 31]
                - What was the "dominant purpose"?
                - NOTE: litigation privilege arising from criminal case is not protected in civil case arising from same incident and *vice versa*
            - Spousal privilege?
                - test [pg 31]
                - S 4(3) *Canada Evidence Act* → applies to AIPs in AB too
            - Settlement negotiation privilege?
                - test [pg 32]
                - 3 exceptions: settlement agreement or its terms are at issue; negotiation discussions give rise to a cause of action; compelling public interest to override it [pg 32]
    - ii) Case-by-case privilege asserted? *Communications prima facie <u>not</u> privileged & admissible*
        - Apply 4 *Wigmore* criteria [pg 28]
    - ASK:
        - Is privilege expressly & voluntarily waived by holder? Is privilege impliedly waived by holder? [pg 29]
        - Is privilege unintentionally disclosed? [pg 29]
            - Criminal → privilege likely pierced, UNLESS solicitor-client privilege
            - Civil → privilege upheld UNLESS communications important to outcome of case + no reasonable alternative form of evidence
        - Criminal case?
            - First party records? [pg 33]
                - Crown duty to disclose + Crown duty to inquire
                - Matters of opinion vs matters of fact
            - Third party records? [pg 33]
                - ASK: sexual assault case? *No = O'Connor test* [pg 33] // *Yes = Mills test* [pg 33]
        - Informant? [pg 32]
            - = <u>not</u> police agent
                - ID protected from disclosure in criminal <u>AND</u> civil proceedings
            - EXCEPTION: McClure's innocence at stake test [pg 32]

12) Does the exclusionary discretion apply?
    - Is its probative value outweighed by its prejudice? **ad hoc cost-benefit analysis*
        - Probative: believability + strength of the inferences it leads to

[NEXT PAGE]

- Prejudicial: practicalities of presenting the evidence (resource question) + fairness to parties involved (especially AC) + potential for evidence to distort outcome of the case (ie. emotion or bias driving conclusions?)

13) It's admissible – now what use can we make of it?

- Does it require a discretionary warning? ("Vetrovec")
  - *ie. evidence from accomplices, jailhouse informants, "unsavoury characters"?*
- Is it related to a dock ID?
  - *Little weight & judge needs to warn jury*
- Is it DEFENCE evidence that, if believed, would result in acquittal? → must give *W(D) instruction*
  - *ex. Often when AC testifies*
  - *Not in civil cases*
- Does it require a mandatory jury direction?
  - *ie. SFE that's admitted*
- *If SME against AC: what purpose was it admitted for? *Alters allowed uses* → pg 25

OTHER CONSIDERATIONS:

- *Prima facie* case standard [pg 4]
- "Air of reality" [pg 4]
- Examination in Chief
  - Generally no leading questions (**exceptions* pg 32)
    - Answers are evidence, not the questions
  - Refreshing memory: [pg 34]
    - Prior to trial
      - Means used might affect weight of evidence
    - While on the stand
      - i) past recollection recorded [pg 35 + proper procedure] → **becomes evidence going in*
      - ii) present recollection revived [the "Aha!"] [pg 35 + proper procedure] → **not allowed if too suggestive, unreliable, erroneous, or too much time passed between event & recording*
    - Transcripts during trial
      - ie. previous testimony under oath → ***don't need to do proper procedure (assumed)*
- Cross examination [pg 36]
  - Questions (including leading) on any relevant topic
    - Trying to discredit or impeach the credibility of the witness herself or her testimony
  - Limits: must be relevant + more probative than prejudicial & cannot harass, misrepresent, or be repetitive
    - ALSO contrary facts can't be suggested unless there's a "good faith" basis for the question
  - Rule in *Brown v Dunn*:
    - If presenting contradictory evidence, evidence must be put to the witness to give them an opportunity to respond
      - Important in he said/she said cases
  - Collateral facts rule:
    - Forbids the calling of evidence to contradict the answers given by an opponent's witness about "collateral" matters or facts.
      - ASK: is evidence offered about a collateral matter or does it go to an important fact-in-issue?
  - Prior inconsistent statements:
    - NOT AC?
      - Witnesses may be impeached using prior inconsistent statements but the inconsistency goes only to the witness's credibility/reliability and not to prove the truth of the statement's contents, unless adopted by the witness.
    - AC?
      - Prior inconsistent statements made by an AC may be used as evidence going to the substantive issue of guilt. The inconsistency may be used to prove the truth of the statement's contents, regardless of whether the AC "adopts it," because it is an admission.
        - BUT the Crown can't "split its case," and the prior inconsistent statement is usually being put forward by the Crown to impeach the AC.

    - Incomplete cross-examination?
        - Testimony might be admissible, but weight given in discretion of trier-of-fact
            - 3 considerations → contextual approach [pg 38]
- Real evidence
    - Not subject to solicitor-client privilege
    - Admissible if properly authenticated [pg 38]
        - Photographs & videotapes → [pg 38]
        - Documents & copies → [pg 38]
- Judicial notice [pg 39]
    - Acceptance by a court, without the requirement of proof, of any fact or matter that is i) so generally known and accepted in the community that it cannot be reasonably questioned, or ii) any fact or matter that can be readily determined or verified by resort to sources whose accuracy cannot be reasonably questioned.
        - NOTE: consider general knowledge within community trial is being held
- Witnesses' credibility [pg 39]
    - All witnesses are assumed to be of good character
- Prior consistent statements ("oath-helping") [pg 39]
    - Evidence that a witness made a prior statement consistent with her in-court evidence is generally inadmissible because "consistency is just as agreeable to lies as to truth."
        - EXCEPTIONS: statement is relevant to a different issue or opposing party brings an allegation of "recent fabrication"

RATIONALE FOR EXCLUDING EVIDENCE: the information is more likely to mislead than instruct.