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Secondary Materiality & Your Own Witness

Exceptions
Accused’s good character
Secondarily Material Expert Evidence
Prior Consistent Statements
Rehabilitating the Credibility of your Own Witness
Challenging Credibility of your Own Witness

Corroborations

Burdens of Proof & Presumptions
Standards of Proof
Legal burdens
Evidentiary Burdens

Burdens of Proof

Presumptions
CH 1: Introduction

1. The Role Of The Law Of Evidence
- Most criminal and civil cases are not decided on questions of law, they are decided on questions of fact that are established by the "evidence" presented at trial
- Evidence is the gateway to the application of the law

Three Types of Rules in Evidence (Process, Admissibility, Reasoning)

1) Rules of Process
   - Outlines how evidence is presented to triers of fact
   - Includes the promise to tell the truth, the oath and the affirmation
     - Ensures witnesses tell the truth

2) Rules of Admissibility
   - what evidence the trier of fact can consider.
     - General principle: Trier of fact have access to as much evidence as is possible. But this is balanced against other principles.
     - Some rules are of restricted admissibility: they allow information to be admitted for one purpose but not others.
     - General types of rules restricting admission:
       - Practical exclusionary rules: reject evidence to encourage trial efficiency
       - Subordinated evidence rules: reject evidence to promote competing principles (e.g. privilege)
     - Non-evidence rules: reject evidence that won’t help trier of fact come to correct conclusion.
   - R v Jarvis (SCC): Principles of access to evidence elevated to constitutional status in criminal cases.
     - All relevant info must be available to trier of fact (principle of fundamental justice)
       - Impediments remain: ex – solicitor-client priv
     - Protects principles of access to justice and proper legal advice

3) Restricted Admissibility
   - Evidence can only be used in specific way
   - Judge gives limiting instructions if only used for specific purpose.

- Three categories of restricted admissibility
  - Practical Exclusion Rules: reject evidence to encourage trial efficiency (ex: limiting number of expert witnesses)
  - Subordinated Evidence Rules: Exclude on basis of competing policies or principles (ex: solicitor-client priv or evidence obtained unconstitutionally)
  - Non-Evidence Rules: irrelevant info that wont assist trier of fact, can include info that may be helpful on its face but distorts truth (ex: hearsay)

3) Rules of Reasoning
   - how the trier of fact should come to a conclusion given the information we have.
     - I.e. standards of proof, burden of proof

   - Two stages where evidence evaluated
     - Admissibility stage where evidence is evaluated for compliance with rules of admissibility
     - Deliberation stage where trier of fact weight evidence and applies its finding to relevant substantive law

   - Some rules of reasoning but this is the smallest category
Goals Of Evidence Law

- Procedural evidence is major goal to ensure accused is given full and fair trial
  - Ex: before Stinchcombe Crown was not obliged to disclose anything to the defense
  - Since then, Crown and police are obliged to disclose everything which MAY be relevant to the case
  - Defense not obliged to disclose anything to the Crown, subject to the Taylor decision
- Trial efficiency: evidence law helps more proceedings forward, will exclude certain types of evidence on basis that it’s superfluous or irrelevant.
- Establish public confidence in the administration of justice, and that guilty verdicts are reached fairly and accurately

2. Sources Of Evidence Law

- **Common law** – bulk of evidence law. No statutory overlay in Canada (unlike other jurisdictions)
- **Charter** – section 24 allows exclusion of evidence acquired through Charter breach
  - More an issue for criminal procedure and constitutional law – how we balance Charter rights against functioning of criminal justice system
  - Remember – doesn’t apply to private legal proceedings anyway
- **Evidence Acts** – both federal and provincial
  - Federal proceeding (including criminal) use federal Act
    - Canada Evidence Act applies to federal courts, criminal matters, non-criminal federal prosecutions (i.e. regulatory offences under federal statutes), federal administrative proceedings, bankruptcy matters and other civil proceedings under federal jurisdiction
  - Civil proceedings use provincial Act
- **Rules of civil procedure** – modify the common law – mostly regarding privilege and witnesses
- **Individual legislation** – i.e. family law, administrative tribunals
- **Rules of professional conduct**

3. Trends In The Law Of Evidence

Four Recent Trends:

1. **The Purposive Approach**
   - Previously law preferred certainty
     - Problems: over inclusive or under inclusive
       - Creating rules that perfectly fit goals is impossible
         - Flexibility and purposive approach works best
   - Two societal factors that furthered purposive approach
     - 1) **Sexual offense Awakening**
       - *R v Khan*: example of changes to hearsay. Reliable statement outside court was accepted.
       - Whether in the context of the given case, exclusion will advance the goals the hearsay rule is intended to achieve
     - 2) **Charter**
prior rules applied rigidly and denied access to info that may raise reasonable doubt and other rules could admit evidence that could operate unfairly against accused.
  o Both show underperformance of the law of evidence to be unacceptable. Another push came from access to justice to make more purposive approach available (primarily in historical litigation dealing with abo cases)

2. The General Exclusionary Discretion
- Some evidence, although otherwise admissible, could take too much time, be confusing or be inflammatory and distort the truth
- Recently, greater discretion to exclude evidence for these reasons
- Must weigh probative value of evidence against prejudice

3. Increased Admissibility
- 1, 2 resulted in increased admissibility
- Some other inadmissible evidence can be used in other contexts (bail hearings, prelim inquiries, extradition hearings, etc.)

4. Technology
- Provisions in urles of practice and even Crim Code for testimony to be received by video conference
- Technology changed around admissibility
  o In past most technology driver info rejected
  o Courts have taken functional approach to accommodate the admissibility of such things as internet maps.

- Rules that apply during criminal trial do not apply to bail hearings, preliminary inquiries or extradition hearings
- Therefore practices unacceptable at a criminal hearing may be permissible during sentencing → in sentencing character of the accused is important (proof of prior convictions), uncharged criminal conduct forming part of circumstances of event can be aggravating factors
- Admissibility also differs between jury and judge alone trials – because judge can be more impartial

5. Rules Of Evidence In Courts vs Tribunals
- While rules of evidence similar in crim and civ matter, important differences
  o Ie. Evidence excluded for Charter violations in Charter violation in crim matters may be admissible in civil matters
  o Ie. Self-incrimination protections in crim but not civil (compellable vs non-compellable)
- Different kinds of evidence admissible at different stages of crim trials
  o Ie. Evidence of the accused’s past crim record admissible during sentencing but not during determination of guilt
- More relaxed evidentiary rules applied for admin tribunals than for courts
  o Tribunals more informal and accessible (like residential tenancy board)
Rules may still be consulted but not slavishly followed

**Voir Dires**
- Need to resolve dispute about whether particular evidence admissible
  - Held before judge alone so they can determine if evidence is admissible without jury hearing it (and potentially changing their perspective if evidence is found to be inadmissible)
- Technically separate hearings, but take place seamlessly within larger proceedings
- If found admissible parties can agree to submit contents of voir dire as part of trial record and avoid having to go through it all again (if judge alone trial). If not then Crown has to prove it again.

**Basic Criminal Trial Process**
- Proceedings begin with “laying of information”
  - Generally done by police. Private citizens can also swear informations alleging that a crime was committed.
    - Is there a reasonable likelihood of obtaining a conviction? Is it in the public interest to bring forward a prosecution?
- Crown has unfettered discretion to proceed summarily or by indictment
  - Multiple accused being indicted for the same crime, Crown decides the order in which the accused’s appear on indictment
    - Order important because person listed first is asked to bring forward evidence first and goes down the list from there
    - Crown will often list the “weak link” last – this way the first few may elect not to testify or bring forward evidence, and then the last accused testifies and implicates the others (the others cannot later decide to introduce evidence or testify on their own behalf)
- Bail is often first step in proceeding
- After bail hearing, Crown must provide Stinchcombe package to the D (full disclosure)
- For indictment proceeding in QB – prelim inquiry may be held (governed by s.548 of CC)
  - Judge must determine if Crown has sufficient evidence that might be excluded in the final trial
  - **Is there sufficient evidence upon which a jury, properly instructed and acting reasonably, could convict the accused?**
    - Low bar, 95% of prelims go to trial
  - D doesn’t need to provide disclosure or introduce evidence in prelim inquiry
    - Except for limited circs
      - Ex: for alibi D must provide that evidence to the Crown (ie if the D has evidence the the accused was not at the scene of a crime.
      - If D witness is in bad health then may call this evidence strategically
  - **Direct Indictment** – Crown can elect to proceed by direct indictment and skip the prelim inquiry

**The Trial**
- Begins with pleading of guilty or not guilty
  - Don’t need to specify what type of defense you’re using
    - Must put position of the defense to Crown witnesses (*Brown v Dunn*)
      - When crossing the D must inform witness about possible D that will be introduced late, if any, that directly pertain to that Crown witness (ie if the defense is prepared to allege that the Crown witness is being untruthful or is unscrupulous)
- Judge may conduct prelim voir dires before jury is selected to determine admissibility of evidence (if req)
- Crown presents evidence first, may make opening statement in jury trial and complex trials before judge alone
  o Provides a “roadmap” of the Crown’s theory for how the evidence should be interpreted
- Physical items may be introduced as exhibits, but most evidence is given orally by witnesses
  o For each witness, D counsel is permitted to cross the witness after exam in chief
- D counsel can move to have judge enter an acquittal if the Crown’s evidence does not reveal primate facie case
  o If judge enters acquittal, jury is dismissed and trial ends
- The defence can choose whether to call evidence or not – they do not need to, but must in some specific circcs
  o If D calls evidence must make its closing submissions first, otherwise they go last
    ▪ Set out in s.651(3) of CCC
  o If they raise particular D they have burden to show there is an air of reality to defense, and must raise evidence to substantiate that D
    ▪ Best to settle on one D, raising many Ds can be difficult to substantiate
  o For NCR D must prove on BoP
- After closing arguments judge instructs jury on burden and standards of proof, and pertinent points on operation of substantive and procedural law
  o Judge also summarizes main evidence to jury
  o If judge makes mistake, counsel must object
  o Jury must follow judges instructions but he can not order them to convict (Krieger case)
    ▪ Indeed, jury can decide to not convict despite the fact that conviction would be req on strict application as the law, otherwise known as jury nullification (Morgentaler)
- Jury then deliberates – must be unanimous to enter guilty or not guilty finding (any split means a mistrial)
  o Jury does NOT need to provide reasons for decision
  o Otherwise, judge will render a decision, must give at least some reasons (R v Shepard)

Enforcing The Laws Of Evidence
- If counsel is presenting evidence that the other side believes in inadmissible, then the other side must register an objection with the judge
- Judges do have discretion to enforce laws of evidence even if counsel does not object
- That being said, they may not intervene - it can be a tactical decision for counsel to not enforce laws of evidence in specific circumstances
- When objections are raised, the jury may be asked to leave the courtroom before the judge hears arguments pertaining to admissibility

Enforcement at the Hearing
- Enforcement of the rules begins with party who wishes to present the evidence
  o Unethical for lawyers to blurt out inadmissible information before juries, or where there is no air of reality
- Where admissibility is contentious, counsel should alert opposing counsel and the judge so that admissibility can be properly determined.
- If information is being improperly presented it is important for other party to object.
Objections can be taken to the improper form of questions, to the admission of inadmissible evidence, to improper submission of opposing counsel, or in a jury trial, to errors in the judge’s charge to the jury.

- In jury trial jury leaves for objection unless it’s simply objecting form of question

  - Objections are imperfect, generally improper comment has been made.
    - Judge must give clear instruction for jury to ignore this information.
    - Trial judges may stop things such as leading questions, direct witnesses not to offer hearsay evidence, or enforce other rules of proof, even in absence of objection on own initiative

### Enforcement on Appeal

- If a party objects to introduction of evidence and the judge makes an incorrect decision in applying the evidentiary rule, a legal error occurs
- These can be appealed to appellate courts unless the courts deem the error to be harmless
  - Allowed by s 686 of Criminal Code in criminal context
- A substantial wrong or miscarriage of justice must have occurred for an error to lead to a new trial
- Failing to object to introduction of evidence may not be fatal on appeal
- Same standard is applied to determine if the error should lead to a mistrial
- However, in some cases, failure to object in a timely fashion may kill an appeal
  - I.e. if the appeal court determines that the failure to object was a tactical consideration, then that might prevent them from appealing on that point
- General advice: party identifying the evidentiary error should object to ensure the proper application of rules of evidence, and to secure an effective right to appeal just in case

### CH 2: Basics of Admissibility & Evaluation

#### Order of Evaluating Evidence

1. **Material/Relevance**: Is the proposed evidence material in that it relates to issues of consequence in the case?
2. **Probative**: Would the evidence advance this proposition? Is it probative?
3. **Measure Probative Value versus Prejudicial Effect**

#### 1. The Basic Rule

- Information can only be admitted as evidence where it is relevant to a material issue in the case
  - Not all evidence speaking to the material issue may be admitted, but no evidence can be admitted that does not speak to the issue before the courts
  - “relevance” and “materiality” are two separated but related concepts
    - **Relevance**: does the evidence help prove the fact that it is directed towards?
    - **Materiality (necessity)**: is the evidence directed towards a material issue in the proceedings?
    - **R v Truscott**: evidence will be irrelevant either if it does not make the fact to which it is directed more or less likely (relevance), or if the fact to which the evidence is directed is not material to the proceedings (materiality)
  - If evidence is declared inadmissible in voir dire, can never be mentioned again
Five Factors Governing Admissibility
- 1) Is the evidence relevant and material?
  o Does the evidence tend to prove or disprove a particular matter which is in issue between the parties?
  o No particular test – determining relevance is made with reference to logic and human experience
- 2) Is the evidence excluded because of some exclusionary rule?
  o Assuming evidence has some logical relevance, does it run afoul of a traditional exclusionary rule such as character, opinion or hearsay?
  o Does it offend privilege against self-incrimination? Does it offend solicitor-client priv?
- 3) Is the evidence to be excluded on the basis that it was obtained in violation of a specific Charter protected right or freedom?
  o If the admission of evidence violates Charter right or could bring administration of justice into disrepute, it must be excluded.
- 4) Is the evidence legally relevant?
  o Leading decision is R v Mohan (SCC 1994) – Court determined that legal relevance of evidence is a question of law to be decided by the judge
  o Does the probative value of the evidence outweigh its negative costs?
  o Needs to be applied particularly to expert evidence that is really “junk science”
- 5) Differing standards of admissibility for Crown and Defence in criminal cases
  o Standard of admissibility is higher for the Crown than D.
    ▪ Should give the D the “benefit of the doubt” generally for evidence that they introduce.
  o Difference for “rape-shield” arguments in sexual assault cases – Defense will be barred from introducing evidence regarding the victim’s sexual history.

2. Materiality
- Courts will not waste time examining things that are irrelevant to the proceedings
  o Ex: Court is deciding robbery case, evidence that child porn was found at accused’s residence when police conducted search is not material and can’t be admitted
- Primary issues that court must decide are defined by the pleadings
- Trier of fact must also assess whether the evidence is accurate (secondary materiality)
  o Other evidence can be introduced to buttress the credibility of primary material evidence
    ▪ However, there are strict limits on this kind of evidence, imposed to ensure that time is not wasted and that the proceedings do not become overly cumbersome
    ▪ Evidence law relies heavily on cross-examination to produce secondary material evidence on the witness’ credibility
- There are 2 kinds of materiality:
  o 1. Primary – this related to the fact that you need to establish to win your case
    ▪ Defined by the matters in dispute, as defined in the indictment or information (criminal) or the pleadings (civil)
    ▪ Defined by the law governing the area of dispute (elements of criminal offences, law regarding formation of contract, etc.)
    ▪ Materiality evolves as new facts emerge – facts only become relevant in relation to other facts (other facts in issue, other evidence, how the other side argues)
  o 2. Secondary – facts help us determine the value of primary evidence
    ▪ This bears mostly on the value of witnesses and is governed by different laws than primary materiality
3. Relevancy

- **Does the evidence assist in proving or disproving a matter that is material to the parties?**
- Primarily about relationship between evidence and the fact it is introduced to prove
- **Direct Evidence**: if introduced, resolves matter at issue. No inferences need to be drawn, proving the evidence directly proves the fact. Ex: eyewitness evidence is form of direct evidence
  - Eyewitness evidence can be problematic:
    - How reliable is the eyewitness?
    - Are they honest?
    - How capable were they of perceiving the event at the material time?
    - How good is their memory?
- **Circumstantial Evidence**: evidence that tends to prove a factual matter by proving other events or circumstances from which the fact can be reasonably inferred.
  - Trier of fact must determine whether the circumstantial evidence is strong enough to establish a fact (determining its **probative value**).
  - Relevance, as a concept, only affects circumstantial evidence, not direct evidence
- The evidence must increase or diminish the probability of the existence of a fact in issue
- You only need to show that the evidence has some, minimal, probative value
- Some authority suggests that evidence introduced by the D should be subject to a more relaxed relevance standard than evidence tendered by the Crown (**R v Finter**)

### The standard of logical relevance

- Relevant where evidence has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence.
  - It's admitted because it makes it MORE likely than if the evidence didn't exist
- Relevance **does not** need to establish material fact on its own. Just needs to contribute towards an evidentiary inference
- Relevance may only be established once other evidence is introduced (ie establishing a “chain of evidence” to prove a fact”)
  - On contrary, apparently relevant evidence may be irrelevant when taken into context
    - Ex: If evidence too speculative, may not be sufficiently relevant. If someone found running away from the scene of crime, that alone is not sufficient to infer that specific person committed that crime.
    - Also, introducing evidence regarding the “motive to obtain an acquittal” is deemed to be irrelevant. This is common motive for both guilty and innocent accused’s.
- **Logic and human experience** are problematic - everyone experiences the world in different ways
  - Some claim that our ability to objectively assess truth is tainted by biases and perspectives
  - Seen in sexual assault cases- in **R v Seaboyer**, the SCC rejected the presumption that past consensual sexual experiences of a complainant are relevant to proceedings, and that this shows the complainant readily consents to sex because she is "the type" to frequently consent to sex.
4. Evaluating the Probative Value of Evidence

- Don’t confuse **relevance** with **weight**
  - Relevance – tendency to support logical inference
  - Weight – relates to how probative or influential the evidence is

- **Basic rule of admissibility:** relevance and materiality NOT weight
  - Trier of fact determines weight. Weight also refers to how **believable** the evidence is (especially for witness testimony).

- Whether evidence is “**believable**” there is distinction between credibility and reliability
  - **Credibility:** the extent to which the witness should be believed (shaped by factors external to the evidence itself)
    - **Issue of Weight:** We don’t exclude evidence because the witness isn’t credible.
      - Credibility is an issue of weight – it does not go to probative value when considering admissibility.
      - Issue of fact which falls to the jury, not the judge.
    - Holistic assessment of witness believability
      - the witnesses’ evidence may be good, but can we believe them?

- **Reliability:** the extent to which the evidence should be believed (shaped by internal factors)
  - Used to measure the strength of inferences (how strong is the link from A to B)
    - is the tendered fact more likely to lead to one inference than another (NOT EQUAL)
  - Nothing against the witness, but can we trust what the evidence is saying?
    - i.e. the blood evidence is only a 75% match
  - Reliability can go to both admissibility and as weight if it can undermine PV altogether
    - Admissibility: if there are severe technical defects in the evidence
      - e.g. witness is blind; machine wasn’t calibrated
    - Weight: defects can make it less likely that evidence is accurate

- **Probative Value:** just decision of admissibility; whether to exclude evidence
  - Evidence may, on its own, appear not to have much probative value, however taken in conjunction with other evidence, has more probative value - THAT IS OK.
  - Probative value of eyewitness testimony is especially questionable – memory fades with time, witnesses may not be perceptive (i.e. poor eyesight), some witnesses may not use properly descriptive language to accurately describe things.

**Relevance vs Weight**

- Weight – how probative is the evidence, or how much does it contribute to demonstrating a proposition – believability + informativeness. Considered at the end of trial
- Relevance – whether the evidence pertains to a material issue. Considered when evidence is presented
- **Weight is a matter for the trier of fact alone**, though some argue weight should be a matter for admissibility
  - Once evidence is admitted, it is up to the trier of fact to determine what to do with it
  - 2 key issues
    - 1. How believable is the evidence? Is the witness credible/honest? Is the evidence reliable or might it be inaccurate – i.e. bad memory, scientific uncertainty
2. How informative is the evidence? How important is the issue, which the evidence speaks to – is it peripheral, or is it the ultimate fact in issue? How effectively does it prove the point?

- Informativeness is determined by the strength of the inference you can draw from the evidence.

- In directed verdicts, where the judge dismissed the case before the jury can come to a decision, judges can’t consider weight, only whether evidence could support a guilty verdict at all.

**Conditional Admissibility**

- It is often impossible to demonstrate the particular relevancy of a single piece of evidence that is being tendered early in a trial.
  - Counsel will often undertake to demonstrate the relevancy of the evidence upon calling further proof later in the trial.
  - If Counsel fails to introduce this additional evidence, then the trier of fact will be told to ignore the previously-admitted evidence.

- Also, evidence that has been ruled admissible may not actually be tendered - Crown counsel will often obtain early opinions and rulings on the admissibility of evidence that they ultimately do not introduce at trial.
  - A common example - Crown and police will interview accused when arrested. May introduce this evidence only if the accused makes statements in the trial that are inconsistent with previous statements. This can be used to call the accused’s credibility and integrity into question.

- Another type is evidence that is admitted for a specific purpose only.
  - Good example is a Corbett motion - If the accused fails in a Corbett motion to exclude evidence on their prior criminal history from the trial, then their criminal record can be introduced, BUT the jury will be instructed that the evidence can only be used on the limited issue of determining the accused's credibility as a witness, NOT to infer that the accused is the "type of person to have committed this crime" (that is, it cannot speak to the accused’s propensity to commit the type of crime they are accused of).

**Remedies if Inadmissible Evidence is Heard**

- In some cases, evidence will be introduced that is inadmissible without a voir dire. Some of it may be heard by the trier of fact before the opposing counsel or judge objects to the evidence.
  - If the trier of fact is the judge - the judge will simply "disabuse their mind of the inadmissible evidence" when coming to a final determination.
  - If the trier of fact is a jury - two possible remedies:
    - Limiting Instructions: Judge gives close and detailed limited instructions to the jury before they deliberate directing them to disabuse their minds of the evidence. This would be given during the trial, and also at the end.
    - Mistrial: If the introduced evidence is so prejudicial to the accused that it is impossible for the jury to disabuse themselves of the evidence, then a mis-trial will be declared.
      - For example, s 4(6) of the Evidence Act prohibits the Crown and the judge from commenting on the fact that the accused was not called to testify. If this is violated, then that will generally result in a mis-trial.
5. Judicial Exclusionary Discretion

- **Basic Rule:** Judges can exclude evidence if PE > PV.
- CL Allows judges to exclude otherwise admissible evidence
  - May do so if **probative value outweighed by prejudicial effect**
    - Higher standard applied to excluding evidence led by the defense
- Traditionally, judges not granted much direction, but this has changed considerably
  - Frist recognized in *R v Wray* (1970 SCC)
  - CL no recognized discretion to exclude technically admissible defence evidence – in *R v Seaboyer SCC* change law by recognizing that such discretion exists but applied in extreme cases.

- **Two types** of exclusionary discretion
  1. Discretion to exclude evidence obtained in circs such that it would result in unfairness to the accused if it were admitted (in criminal proceedings only)
  2. Exclude otherwise admissible evidence where benefits of admission can’t justify negative effect the admission will cause
    - More closely linked to relevance. Produce outweighs probative value.

- **Note:** no “inclusionary” discretion: If evidence inadmissible, judge does not have discretion to allow it regardless.
- When judges exercise discretion, **must come to some understanding of evidence’s probative value**, even though they are not trier of fact.
  - This has been controversial issue for SCC
  - Judge is NOT allowed to assess how believable Crown witnesses are, must proceed on assumption that Crown witness evidence is true
  - Some authority that judges are allowed to assess credibility and reliability of evidence when exercising exclusionary discretion.
  - **Judges should be allowed some discretion to assess probative value when exercising exclusionary discretion.**

- **There is really 2 thresholds for admissibility**
  1. Evidence tendered by an accused in a criminal case will be admitted unless the prejudicial effect substantially outweighs the probative value (*Seaboyer*)
    - We don’t want to have a wrongful conviction because prejudicial evidence was excluded – bad acquittal better than wrongful conviction
  2. Evidence tendered by the Crown in a criminal case, and any party in a civil case, uses the ordinary balance between PV and PE

### The Concept of Prejudice

- Refers to any adverse costs associated with the presentation of evidence
  - Ex: evidence has tendency to be given more weight by trier of fact than it should in determining the outcome
  - Can also refer to when it would be unfair to introduce evidence
- Isn’t prejudicial just because it works against interest of a party or increased risk of conviction in crim case
- PE is likelihood that evidence will be used improperly, to:
  - **Reliability** concerns: undue weigh, unfair surprise, distraction
  - Party or Witness concerns: privacy, dignity
  - **Efficiency** Concerns: time-wasting
  - NOT strength
- Only so where it operates improperly or where is produces problematic collateral costs
- Prejudice can both distort impact that evidence can have on the finding of fact and broader considerations of fairness in allowing the evidence to undermine accurate results.
- Until recently crim cases prejudice was concept confided to accused, now applies to Crown or witnesses
  - \textit{R v Osolin}: SCC held lines of questioning undertaken in cross of sexual assault complainants can be denied, even if relevant, if questioning unduly prejudicial.
- \textbf{PE exists where the evidence:}
  - Arouses the sympathy of the jury for the party or witness
    - Will the evidence make the jury feel bad or arouse some other emotion?
    - Might it lead to a decision not based on reason and common sense?
  - Could raise contempt or horror for a party or witness
    - Will the jury transfer its hatred or contempt of a party to the decision to be made in a way that is misleading?
    - Does not matter if it is directed against the accused or the victim of ANY party
  - Could cause the jury to act on a hunch rather than logic
    - Some kinds of evidence lead to faulty inference based on myths or stereotypes or other wrongheaded ‘common sense’ i.e. sexual history of victims in sexual assault cases
    - Main issue – does the hunch lead to the overvaluing of some evidence in an illogical manner? Is the evidence of the sort that is characteristically overvalued by juries?
  - Will \textit{distract} the jury from a proper focus on the facts of the case – i.e. time-consuming, inefficient
    - Things that take a long time can distract by giving the impression that the issue is really important, or that other issues are less relevant
  - Will be overly expensive to the importance of the issue in the case
    - i.e. is it more expense to prove the point than it is ultimately worth?
    - Another way to fram prejudice – 50 witnesses all saying the same thing becomes prejudicial because it wastes time and you get diminishing returns
    - Expert evidence can cost too much to be worth it for a particular case (\textit{Johnston v Brighton})

\textbf{Controlling prejudice}
- PE can be reduced by a charge to the jury – or self instruct to the judge
  - This entails strong instructions form the trier of law not to use the evidence in a prejudicial way – only for certain purposes, don’t let it anger you etc.
  - An adequate charge, as a matter of law, can reduce PE enough to make evidence admissible
- If a charge to the jury cannot reduce PE enough, the evidence will be excluded
  - Mostly an issue where evidence has low PV – balance still applies
  - We do not want to exclude evidence this way – the more evidence we exclude the harder it is to make a decision
- Main issue here – how much do we trust the jury to use the evidence properly?
  - This is a philosophical dispute between judge. Dickson – we can trust a jury to apply prejudicial evidence if they are property charged. Arbour – jury should not see excessively prejudicial evidence
  - Whether judge thinks juries can be trusted shapes what evidence can be admitted – do they think the jury will mess it up? Can we persuade them otherwise?
The balancing
- Fundamental rule of evidence – where PV>PE, the evidence is admissible unless excluded by another rule (and vice versa)
- Once determined, probative value (believability and informativeness) of evidence to be weighed against the costs or prejudice of admitting proof.
  o Should not speculate but consider actual or likely costs presented by such evidence
    ▪ Including thing such as the practicalities of its presentation, the fairness to the parties and to the witnesses, and the potentially distorting effect the evidence can have on the outcome of the case. In jury trial judge should even consider whether judicial direction can remove prejudice.
    ▪ This exclusionary power has potential to render all other evidence rules pointless so extreme discretion is used.

CH. 3: Character
1. Introduction
- Character Evidence: Any proof that is presented in order to establish the personality, psychological state, attitude or general capacity of an individual to engage in particular behaviour
- Rule prohibiting introduction of character evidence on of the oldest exclusionary rules of evidence
- A 'species' of evidence that asks the trier of fact to use PAST conduct to infer PRESENT fact – Did it before, will do it again
- Presented as:
  o Opinion: Individual, witness, or limited circs expert can testify
  o Reputation: not personal opinion on personal knowledge but awareness and knowledge of their reputation in their community.
  o Previous Acts
- Introduce character evidence to show a disposition of a person – that they’re the kind of person to do something – not to attack or bolster their credibility
  o Proof of habit is different from proof of character. Habits are repeated actions which may not reflect character – ordinary rule of PV > PE applies for their proof
    ▪ Habit: smokes cigarette brand
    ▪ Character: always carries a gun
  o Character goes to who the person is, not simply what they do
- Character evidence carries high risk of Prejudicial Effect
  o Diverts the trial
  o Tends to be overvalued – since it involved reasoning from dispositions over time, not the particular facts of the case
  o Leads to confusion over what the actual issues are
- Neutral (neither good nor bad) character evidence is admissible where it has probative value for some material fact. Its just another type of evidence, albeit a common one
  o Walks by river, smoke cigarettes
- Some trickier forms – character evidence relating to credibility, character evidence in sexual assault cases – i.e. trying to show propensity to consent prohibited under s.276 of Criminal Code
- Crown can present character evidence regarding third parties where relevant, including to rebut character submissions made by defence
- What’s wrong with character evidence?
  o Overweighing: may react emotionally
Distraction/Reasoning Prejudice: having to deal with side issue of character will distract trier of fact and be inefficient

- Varies with Context
  - If Character directly in issue – matter that needs to be decided
    - Character rules won’t apply – purpose of evidence is to discern the character or disposition of the party
    - Ex: Dangerous offender hearing where attempting to predict the future behaviour
      - Or mental state of person at time offence committed (NCR defence) may want to look at character evidence
  - If admitted as proof of what happened, person who’s character has been proved testifies trier of fact can consider that to assess credibility
    - Character evidence admitted about credibility can’t be used to draw inferences about what happened

- *R v Handy*: leading case on character evidence
  - Bad character is not an offense in law. Discreditable disposition or character evidence at large creates nothing but moral prejudice and Crown not entitled to ease burden by stigmatizing accused as a bad person.
  - Similar fact exception: Crown bears high burden to demonstrate evidence probative value outweighs effect. **This is rarely done.**
    - Only allowed when linkage between similar fact and case at bar is plainly obvious and no other logical inferences.

### Bad Character Evidence (Against the Accused in a Criminal Trial)

- Bad character evidence (BCE) is character evidence that reflects badly on/discredits the person it is dealing with
  - High PE – draws attention to the person, not the facts of the case
- BCE can occur **before or after** the event for which the accused is on trial
- **Presumption evidence is not admitted**
  - Onus on Crown to to justify admission
  - The **prohibited inference** – that the accused is the type of person who does bad things, and thus committed the offence in question
- The exclusion of Bad Character of Accused
  - Scope of the rule:
    - 1) Only applies to discreditable acts: anything that the ordinary person could disapprove of if that character or conduct were revealed.
      - Doesn’t apply to neutral or favourable behaviour (habit is neutral and good character doesn’t trigger rule)
    - 2) Only applies evidence adduced by crown to help prove guilt of the accused (prove a primarily material issue)
      - if adducing discreditable evidence for some other purpose (like discrediting an accused testimony or rebutting accused’s good character) then the character evidence may be admissible HOWEVER must instruct limited purpose of the evidence
- **Exceptions:** (1) similar fact evidence; (2) Situations in which the BCE is relevant to the case; (3) BCE becomes admissible when the accused “opens the door”
  - **Relevant:** e.g. context, motive
    - when you’re using the evidence for some independently valuable purpose other than disposition
      - i.e. it is ‘specific’ propensity reasoning rather than ‘general’ propensity reasoning that goes to show the accused is a bad person
        - General propensity – bad guy = more guilty
• i.e. context (implicates in a robbery) or motive (provides a reason why) \(\rightarrow\) makes more likely that the crowns theory is correct
  o Doesn’t mean you can admit anything related, probably limited to aspects of the evidence that are absolutely critical to show what they need to show
• So long as \(PV > PE\), BCE can be admitted even where it demonstrates the bad character of the accused
  o **Opens the Door**: if the accused introduces bad character evidence against the victim (in self-defense), or a 3rd party (to cast blame), then, based on judicial discretion, they may become fair game for rebuttal using their own character
    ▪ when the accused, through their conduct in trial, makes the BCE probative (makes more material/important), the Crown can introduce rebuttal BCE
      • AKA reactionary / responsive evidence
      • i.e. where the accused blames a third party by suggesting they have a propensity to commit the crime, where they raise their good character
      • Can’t be used to provide evidence of guilt
  o **Similar Fact Rule**: Evidence of prior bad acts by the accused will be admissible if the prosecution satisfies the judge on a balance of probabilities that, in the context of the particular case, the probative value of the evidence in relation to a specific issue outweighs its potential prejudice and thereby justifies its reception.

**BCE Against a Witness**
• For *witnesses (in any case) and parties in a civil case*, we’re less worried about BCE – it can be admitted if \(PV > PE\) for material issues (or excluded at judge’s discretion)
  o No presumption of innocence or risk to liberty interest for them
  o i.e. showing history of violence for the victim in a self-defence case
• **Dangers of BCE of the witness**
  o The jury may decide the witness is a bad person and sympathize with the accused
  o The jury may become confused about who’s really on trial and overvalue the evidence

**Similar Fact Evidence Rule**
- 3 Step Test
  o 1) **Probative value**
    ▪ A) Strength of evidence that the discreditable or criminal act occurred
    ▪ B) Connectedness
      • 1) connection between accused and the similar act event
      • 2) extent to which the discreditable or criminal act support the inferences sought to be made (connectedness of the evidence to the question in issue)
  o 2) **Prejudice**
    ▪ moral prejudice
    ▪ reasoning prejudice
  o 3) **Balancing**
- Three Step Test
  o **Step 1)** **Probative value**
    ▪ **A) Strength of evidence** that the discreditable or criminal act occurred
      • **Generally**: conviction – almost conclusively prove that accused did in fact commit the act
      • **Acquittals and Stays**
Acquittal: presumptive proof accused did not commit similar act and not admissible subject to limited exceptions

Stay: middle ground
- **Unable to meet case stay** (not enough evidence, esp with prosecutor): treated same as Acquittal
- **Procedural reasons stay**: not treated as equal to acquittal and similar fact evidence can still be admissible (ex: Charter remedy for police conduct).

Exceptions to Acquittals and Stays that are functional equivalent to acquittal: where otherwise would bar use of discreditable evidence
- **Ollis exception**: acquitted of false pretenses for cashing cheque where no money in account. Claimed subsequently for passing another dishonored cheque and thought money in account, unlikely he honestly believed it.
  - Crown can lead evidence underlying previous acquittal to established accused’s state of mind in relation to subsequent charge.
  - If fact of prior charge relevant – whether to the state of mind of any other live issue in the face – Crown can lead evidence about that even where there was previous acquittal on that charge
- **Arp anomaly**: multi-count indictments – where accused is tried at same time for more than one act of misconduct.
  - If rule satisfied, then Crown can rely on evidence about one charge as similar fact evidence helping to prove another charge
    - Can use allegation as similar fact evidence even where accused is ultimately acquitted of that allegation at the end of the case.
      - Instruction must be given not to use counts that they have already decided to acquit on.

B) Connectedness
- **Connection to the Accused**
  - Trial judge doesn’t have to decide whether accused is probably the perpetrator of the similar act since ultimate decision whether to use similar fact evidence up to trier of fact, at admission stage judge merely needs to be satisfied that there is some evidence **upon which a reloadable trier of fact can make a proper finding that the accused committed that similar act**
- **Connectedness to Properly Defined Issue**
  - Evidence must be shown to be relevant to some material issue, other than propensity/tendency
  - **1) Frequency**: the more an act occurs, the more strongly it will demonstrate the defendant’s propensity
  - **2) Connection**: the more closely connected in time between the propensity and act for which defendant on trial, the more probative
    - the fact that they did it 3 years ago doesn’t automatically disqualify it
  - **3) Similarity**: The more similar between propensity and acts for which defendant on trial, the more probative the propensity is
4) Unusual Nature: The more unusual the propensity, the more unlikely it is to be a common propensity.
   o Bad character evidence of an unusual nature, that matches what the accused is alleged to have done at trial, tends to be admissible, primarily because the weirder the conduct, the smaller the group of people who would have performed it.
   o Improbability of coincidence
     - Shearing case: even though difference between the different allegations could discern that the way or method of doing something of grooming adolescent girls in the bizarre cultish environment. Was allowed to be used to prove AR for sisters and non-consent in other victims. There was sufficient modus operandi Shearing used to create each sexual opportunity to support the double inferences sought by the Crown. Particularly he used distinctive combination of “spiritualist imagery”, “horror stories” and prophylactic power of sexual touching to ward off these horrific threats. This coupled with age is sufficiently situation-specific to support the relevant inferences.
     - Handy: too many difference, even though there was similarities they’re generic and found in many different types of cases
5) Independent Voices: The more people who claim the defendant has a particular propensity, the more true the allegations are likely to be.
6) Collusion: Unless there is evidence that the independent voices are colluding to frame the defendant, or suggestive.
   o Proof of mere potential for collusion, and not actual, will void this concern.
   o Intentional and Inadvertent “Collusion”
     - number of separate and independent allegations against accused and Crown wants to bring forward allegation to help prove case that’s at issue at trial
       - these alleged similar acts will be generally the credibility of the complainant
         o Inference is that allegations are so similar to each other that the same person committed each of those acts – possibility of coincidence not tenable given the degree of similarity between them
     - Concerned about 2 possibilities
       o 1) Collusion: whether reasonable possibility that 2 or more complainants actually consciously and deliberately colluded with one another to fabricate allegations or tailor stories to more closely match on another than actually case
       o 2) Contamination: exposure to media reports about allegations and complainants coming forward and being to tailor or shape their own stories to deliberately or not conform with the stories of complainants who’s stories have been in the media.
       o Defence must bring air of reality to either collusion or contamination then corn must disprove
• Must be more than proof of opportunity because the issue is concoction or collaboration, not contact.

• C) Illustrations of Connectedness (or relevance and materiality)
  o Bad character conduct that is directly relevant
    ▪ Even if not similar it is relevant
      • Ex: drug addict prove motive for robbery, possession of drugs where allegation that accused killed informant to prevent discovery, membership of a gang to provide context of the offense (routinely admitted)
  o Bad character conduct establishing **Mens Rea**
    ▪ Prior conduct can have significant probative for est mental element
      • Ex: previously sold drugs (when D claims ignorance of illegal nature of substance) is prejudicial but highly probative, previously shot someone in front of witness (claiming they wouldn’t do this), previous sexual relations with patients (when claim of accidental touching)
  o Violence towards victims: even not necessarily similar, allegations at trial relates to violence against victim and that same victim is subject of previous allegations – attempting to prove accused has motive of previous history of violence directed to that same person – evidence most often admitted.
  o Bad character conduct establishing **Actus Reus**
    ▪ **Shearing** demonstrates, similar fact evidence can be used to prove crime occurred
    ▪ **Makin**: evidence that a number of babies found buried in three properties linked to Makins was admitted to establish that the alleged murder victim had been killed
  o Bad character evidence and credibility of complainants
    ▪ Similarities in the particular features of independent allegations by two or more persons can reach point where it would defy common sense to think that similarities are merely coincidental
      • Possible to use independent allegations to support credibility of complainant
  o Bad character evidence relating to alleged victim
    ▪ Allow Crown to prove the violent or abusive nature of the prior relationship between accused and victim
  o Confirmation by Other Evidence
    ▪ Probative value not enhanced because other evidence supports the same inference the similar fact evidence is offered to promote
      • Its about probative value of the inference yielded by the similar fact evidence, not probative value of Crown’s case.

  o **Step 2) Prejudice**
    ▪ **Moral prejudice** (horrify the jury)
      • Consider in **absolute** terms – is act particularly repugnant in nature? – bestiality, child porn
      • Consider in relative terms – is it worse than accused is already on trial for?
Danger that trier of fact is going to look at the previous act and say that because they’re culpable act then more likely to commit this offence

- IF very culpable or more than current charge the presume high degree of prejudice
- Shearing: took high probative value to overcome prej evidence of a pattern of misuse of religious authority to sexually exploit adolescents
- Modest where similar fact evidence involves prior acts of aggression against victim of the crime charged
  - So closely connected to specific charge that it is unlikely a jury would resort to prohibited inference
- Ex: on trial for assault can’t bring in evidence of prior murder, hugely prejudicial
- Can mitigate by editing and limiting instructions

**Reasoning prejudice** (distract the jury)

- How clear is the case against the accused? How complex is the case? The more complex the facts the more prejudice
- Concern that similar acts and complexities of proof and allegations by D that they didn’t occur can lead to inefficiency or confusion and distraction from main issues
- Two types of distraction
  - 1) how trier of fact can be deflected from rational assessment of the case by sentiments of revulsion and condemnation
  - 2) risk that court will be caught up in a conflict about the accuracy of the similar fact evidence
- Usual suspects problem: similar acts allegedly committed by accused + strong connection between previous acts then usually highly probative
  - Who lives there and has criminal record for that offence? – selecting from people that fit offence, without further evidence then potentially could be very prejudicial
- Factors reducing prejudice
  - Similar fact evidence more likely to be admitted in judge only trial
  - Where one can edit info
  - Problematic info will be admitted in any event through another mode of proof (such as s.12 of Canada Evidence Act)
- Factors enhancing prejudice
  - Where similar fact evidene is required to bear the whole burden of connecting crim charged… very high degree of similarity req
- Previous convictions different because can’t deny them
- **Complexity:** more complex the facts, the more prejudice
  - Will the trier of fact become confused about what pertains to the charge and what relates to the bad character
  - The more the prior facts become their own mini trial the more prejudicial they are
- **Intermingling:** the more the facts intermingle with the facts of the offense the more confusion and prejudice
- **Disputed Accuracy:** how likely is it that the act occurred?
  - court treats unproven allegations differently than prior convictions, as they may distract more
Can the accused not properly respond to the bad character evidence due to the passage of time, surprise, or collateral nature of inquiry?

R v Jesse: Accused cannot challenge that conviction occurred in voir dire.

**Step 3) Balancing**
- No magic formula
  - No necessary inverse relationship between prejudice and probative value (can be strong for both)

**Mandatory Direction**
- Must give certain directions about:
  - Not inferring that accused did bad thing before they committed the offence (prohibitive reasoning)
  - Don’t punish for past acts
  - Don’t use this evidence unless jury satisfied that act occurred
  - If satisfied it occurred then only use for particular purpose that are permitted
  - Keep in mind frailties in evidence
  - Even though evidence admitted still must be careful of collusion

**Special case of proving identity through Similar Fact Evidence**
- No different test than general similar fact evidence rule BUT subspecies of same kind of balancing that provides specific guidance where ID is at issue
- Proving identity requires a high degree of similarity given how big of a logical leap the chain of reasoning makes otherwise
  - Consideration – is there a “unique trademark” or distinctive *modus operandi*? Are there enough significant similarities to support the conclusion based on coincidence?
- ONLY applies when we know crime was committed by someone and the only Q is whether is was accused
- Special rule set out in Arc does not apply when:
  - D says allegation was fabricated and there was no crime
  - Missing element of the *Actus Reus* (eg consent in sexual assault cases)
  - D argues that missing *Mens Rea* evidence (eg knowledge of prohibited drugs)

**Test (reverse of ordinary analysis of probative value and prejudice for other forms of similar fact evidence)**
- **Step 1**) Were acts likely committed by the same person
  - Either unique trademark that is common to the similar act
  - OR series of very distinct significant (not generic) similarities
    - Like shoving win cork up vagina when killed
  - In assessing similarity not concerned about linking the accused, any evidence attaching accused to the act is irrelevant, simply looking at the two incidents in the abstract and asking whether likely that the same person committed both offences
  - Require high degree of similarity in order to assert probative value

- **Step 2**) Is there some evidence linking the accused to similar act
  - Some evidence that the accused committed the similar act
  - More than a mere possibility
  - Less onerous than step 1

**Multi-count indictments or informations**
- If person is accused of mass shooting, there is no SFE – single event
  - But, sometimes Crown brings charges against person saying they committed acts during separate events – each event can be used to prove that the accused committed the others
• i.e. The crown says that the accused committed A (1987), B (1989), C (1991). The crown can use A and B to prove C, or A and C to prove D etc.

- from separate incidents, different period of time, not a single transaction
- How do we deal with admissibility of evidence on one count as it pertains to the other?
  o Defence will want to attempt to obtain a severance order, argue that inevitable trier of fact will be exposed to evidence on one count that may not be admissible on the other and thus prejudicial
- When accused is charged, the crown will make an application to use each of the counts as similar fact evidence for the other – the judge uses the ordinary SFE inquiry to determine whether the events are similar enough – i.e. is there enough frequency, connection etc. (factors sighted above)
- If severance not applied for or not possible, 2 possibilities
  o 1) Admissible on one count but not the other
    ▪ Clearly give instruction that you can’t use that evidence to help prove on the 2nd offence
  o 2) Admissible: crown applies for a similar fact ruling and applies to evidence on one count admitted on the other count and application successful then complex jury direction given to minimize prejudice
- When the primary issue in the case is: “Was the accused the perpetrator of the offence?”, the courts are very sensitive to the admission of similar fact evidence to prove identity

Character Evidence Called by the Accused About Others (3rd parties)
- Restriction applied to Crown when presenting bad character evidence relating to accused does not apply when accused wishes to lead bad character evidence about another

Co-Accused
• Common for people to be tried together, and often play the blame game
• “cut-throat defense strategy”
• One accused can bring in character evidence to attack the other accused
• Its much easier for the accused to do this, than it is for the crown
• Accused has the right to a fair trial and to induce all evidence that is relevant to their defence
• If evidence that is relevant to their defence is evidence that shows the other guy is the more likely candidate, the accused cannot be precluded from admitting it.
  - Can only be excluded if the prejudicial effect substantially outweighs the probative value
- Where this evidence is relevant and where it makes the accused’s defence more likely, its going to be admitted
  - However this puts accused’s own character into question
  - This includes evidence the crown could not have called
  - Even permissible for an accused person to rely upon the otherwise prohibited inference that the co-accused is, by reason of his character, the type of person to commit the offence.
  - Limitation: accused can’t try to establish the propensity of the co-accused by relying on acts for which the co-accused has been acquitted
  - This evidence can be used by accused in defending himself, but not by crown in proving the guilt of the co-accused
    o Can’t be used by Crown on the issue of the co-accused’s credibility as a witness.
    o It can’t be used by the trier of fact to find guilt of the co-accused
• Where it is the accused has had this evidence admitted, that means the crown has failed to have it admitted – the other guy also has fair trial rights, therefore the only way to admit this evidence is
by instructing the jury that they **cannot use this evidence to convict the other guy, you can only use it to acquit the first guy.**
- If the crown admits this evidence, no problem, it can be used to convict

**Unknown Suspects**
- To raise bad character of third party we don’t need to know who that is
- If “air of reality” that someone else committed the offense and probative value of the evidence is not substantially outweighed by the prejudice we can present this as a form of character evidence
  - Defense will say crime is strikingly similar or has unique trademark and accused could not have committed that previous act to implication is person must have committed both offences. Since it couldn’t have been the accused must be someone else

**Third Parties in Non-Sexual Prosecutions**
- Where character of person other than accused or co-accused is relevant to a primarily material issue, it can be proved provided probative value is no **substantiality outweighed** by the prejudice it could cause.
  - Still opens door to rebuttal by Crown of accused’s own bad character
- **General Rule**
  - Primarily developed in Self-Defence cases
    - Evidence about reputation of victim for violence is admissible
    - Proof that victim has violent disposition as demonstrated through specific acts of violence unknown to the accused is also relevant according to the theory that violent people are more likely to react violently – provided the evidence establishing the propensity for violence of the victim is strong enough law has evolved to permit this kind of evidence in self-defence cases.
  - Evidence about discreditable propensities of non-victims can be led in any type of case whether accused defends himself on the basis that the act was committed by another person who had the opportunity to do so or when such evidence is otherwise relevant.
    - Ex: *R v Khan* past practice of racial profiling by police officers can be admissible
  - If lead evidence about the character of a third party the accused puts their own character into issue because would be unfair for the trier of fact to learn only about the character of the third party

**Third Parties in Sexual Prosecutions**
- Accused can’t lead evidence about sexual experience of complainants to show that complainant is the type of person to consent or show that they are of discreditable character.
  - Where evidence revealing sexual experiences of complainants on other occasions invites other specifically relevant inferences, it will be admissible if probative value substantially outweighs the prejudice, including dignity and privacy interest of the complainant
- **Twin Myths:** Consent and Credibility
  - **Consent:** the more experience with sex than compared to someone with no experience they’re more willing or likely to have consented (forbidden inference)
  - **Credibility:** myth that there’s more sexual experience the more likely you are to lie (even more patriarchal)
- **S.277 CCC**: makes sexual reputation evidence inadmissible on issue of credibility. In order to adduce any evidence to a complainant’s sexual history the evidence must be specific sexual acts and thus reputation is never admissible. S276(2)(a) makes sexual reputations evidence inadmissible on the issue of consent as well

- **S.276 CCC (Rape Shield)**: puts strict limits on the admissibility of proof about specific instances of a complainant’s sexual activity other than the sexual activity that forms the subject matter of the charge.
  - 276(1): evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
    - a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
    - b) is less worthy of belief
  - Doesn’t prevent all sexual activity evidence from being used in issues of consent or credibility, rather only certain kinds of inferences about consent and credibility from being drawn.
    - Primarily the “twin myth” relating to consent or credit which draw on “the sexual nature of the activity” for their relevance is prohibited.
    - prohibits absolutely use of sexual experience evidence for certain enumerated purposes
  - 276(2): provides that even if proof of the sexual activity of the complainant is not being used for a prohibited purpose, it will **still be inadmissible unless the judge determined that the evidence has “significant probative value”**.
    - Will be excluded if it doesn’t have “significant” probative value – “not be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt”
    - Even if “significant” may still be excluded if its “significant probative value” is “substantially outweighed by the danger of prejudice to the proper administration of justice”
  - 276(3) provides non-exhaustive list of competing considerations that a court must take into account in making this assessment: right of the **accused to make full answer** and **defence** and the need to **protect the complainant’s personal dignity** and right of privacy

### Third Party Evidence Called by Crown in Criminal Cases
- Crown is free to lead evidence about character or personality of third parties, provided the probative value of that evidence not outweighed by prejudice
- Crown can initiate proof of the character or personality of third parties, including the complainant.

### “Good” Character Evidence – Called by Accused
- Any character trait that may help exculpate accused – any trait that shows it may be less likely the accused committed the offence
  - Someone says he’s an honest guy then can help but can also be prejudicial (overvalued)
- Less concerned about good character from accused than BCE by Crown since we have tilted scale to minimize risk of wrongful convictions
- The court recognizes that this type of evidence has enough **relevance** to be admitted and enough **probative value** to be admitted in **certain circumstances**
- Not very probative so limit presentation and allow Crown to rebut with evidence of bad character
- Admitting doesn’t mean much weigh will be given. Particularly in sexual assault where we know these things happen in private
- Parties in civil cases cannot use good character evidence to prove a fact – only applies in criminal cases
- Because of time, the accused can testify to good acts, but cannot call evidence to support

Presentation
- Reputation witnesses, admissible expert testimony, accused’s own testimony, similar fact evidence, lay witnesses familiar with accused
  - Reputation Evidence: most common
    - D witness will testify to certain trait in community – share a relevant circle of acquaintances with them
  - Lay Opinion: Generally don’t allow witnesses to give lay opinion (their direct personal opinion) about accused relevant character
    - Limited to testify to their reputation in the community but not that they think he’s an honest guy.
  - Expert Opinion: in certain cirсs expert opinion (as a result of certain assessment with expert’s areas of expertise) – must show sufficient distinctiveness about the character trait in question in order to draw inference that it has any probative value.
    - Must be satisfied that perpetrator or accused has distinctive behavioral characteristic that it will assists in determining innocence.
      - Generally not successful because behavioral science tends not to provide reliable science tends not to be reliable
      - Mohan: Tried to bring expert evidence that crime could only be committed by someone classified as pedophile and experts opinion was that he was not a pedophile – SCC said exclusion upheld since scientific validity of inference was not established sufficiently.
  - Accused’s Testimony: put character in issue when they initiate evidence intended to suggest that they are not the type of person to commit offence
    - Not put in issue just by denying allegations, explaining a defence, or repudiating parts of the Crown’s case
    - Can’t be brought into question based on answers furnished by other defense witnesses during cross
    - Opinion: about the relevant character trait is admissible
      - Allow accused to testify about their own good character
    - Specific Acts: can testify to specific acts that may speak to certain character trait
      - Just needs to be sufficiently situation specific
        - Ex: trying to show caring an selfless personality, can testify he saved kitten.
  - Other evidence of specific act: usually don’t allow witnesses to testify to specific acts they saw that support character trait.
    - Ex: can’t allow someone else to testify to seeing accused save kitten
    - Exception: version of similar fact evidence rule
      - If specific act associated with good character allows us to make specific inference that’s inconsistent with guilt, then may allow
        - Ex: voyeurism type of offense – climbed tree, crown trying to point to that he was watching neighbours. Witness sees him save kitten and plausible there was kitten in tree.
        - Not character trait that’s emphasis but similarity of the acts and the plausibility of an innocent explanation
Rebuttal by Crown

- Evidence may be used to refute the assertion of good character and on issue of accused’s credibility (as a witness) but may not be used as a basis for determining guilt.
- Once accused has "opened the door" Crown can rebut with bad character evidence.
- Presentation:
  - Cross-examination: common way to contest statement.
    - Crown can cross accused or witness who has provided good character evidence in a fashion that suggests that the accused does not possess the particular good character claimed.
    - If accused says “I’m not violent” Crown can raise issue of violence with them.
  - Rebuttal Reputation Evidence
    - When evidence put forward by D reputation witnesses of good character then Crown can put forward witnesses who will contrast that reputation.
  - S.666 of CCC
    - Where the accused adduces evidence of his good character, the prosecutor may…adduce evidence of the previous conviction of the accused for any offences, including any previous conviction.
    - Crown generally permitted under S.12 of Canada Evidence Act to refer to criminal record in order to impugn credibility (only when testifying)
    - Where good character put in issue (not just testifying) Crown can rely on s.666.
      - Allows Crown not just to prove criminal record but also specific details of crimes in question (can’t do this with s.12)
      - S.666 rebut evidence of good character, s.12 only to impugn credibility
      - S.666 can go into details of previous acts
  - Expert Evidence
    - D can bring expert under limited circs about good character and so can crown, once in issue
    - Just needs to meet standards for admission of expert opinion evidence then can be used to present notion that D lacks character trait or possesses negative character trait.
  - Prior Inconsistent Statement
    - Crown can rebut by putting forward PIS: can cross and ask about PIS
  - Similar Fact Evidence
    - Just like accused can for good character so can Crown.
      - If on direct say he’s honest then even if not prior conviction could potentially present evidence from witness that they had in fact engaged in dishonest dealings in past.
    - Generally admitted but prohibited inference prevents trier of fact from using it to draw conclusions about the general character of the accused.
  - Testimony relating to specific acts not satisfying similar fact evidence rule
    - Where accused testified to specific acts of good character and the Crown demonstrates that permissible methods of rebuttal will not suffice to prevent a distorted picture from being created by that testimony, trial judge has discretion to permit witnesses to be called by Crown to contradict accused on those specific assertions
Civil Cases
- **Good character**: Unless directly in issue, or unless civil case raises allegations of criminal nature, good character evidence can’t be called
- **Bad character**: if presented as circumstantial proof of what happened it must satisfy similar fact evidence rule although generally more relaxed and subject to different consideration than criminal case
  o Nature of prejudice is different between civil and criminal cases
  o Crim cases the similar fact evidence rule applies solely to Crown, deosnt pevent accused from calling relevant, general disposition evidence.
    ▪ In civil cases right of access to evidence not skewed in this way
    ▪ Should be no presumption of inadmissibility, should turn on relevance, subject to the ordinary exclusionary discretion.

- Doesn’t tend to play large role in civil litigation
- If directly in issue such as defamation case, character evidence admissible although methods by which it can be adduced are controlled
- Not directly in issue evidence rules more restrictive than those that apply in criminal cases
- **Character of Third-Parties**: if sufficiently relevant and won’t take undue time to develop, evidence of the disposition of third parties can be proved in civil cases by establishing specific conduct that shows how that person may have acted on the occasion in question.

CH 4: Hearsay

**Framework**
1) *Is the evidence hearsay?*
   - Who is the “real witness”?
   - What is the relevance of the evidence?
   - Do we care more about WHAT was said or WHY it was said?

2) *Does it fit into a categorical common law exception?*
   - If it does fall under a categorical exception, that exception can be challenged if it does not comply with the principled approach.
   - Does it fall within:
     o Admission?
     o Spontaneous utterance?
     o Reflective state of mind or physical condition?
     o Declaration against interest?

3) *Does the evidence fit into a statutory exception?* – business record?

4) *Does the evidence fit into the principled exception?*
   - If the hearsay does not fall under a traditional exception then it may be admitted if it complies with the principled approach.
     o this still may not be admitted if PE > PV
   - the reliability of the statement matters for admissibility, the credibility of the person relaying the hearsay can be addressed on weight
   - a) Do the surrounding circumstances help assure its reliability?
     o Did the speaker have a motive to lie?
     o Was it made under circumstances that help guarantee truth – i.e. spontaneous, under oath, to a loved one
     o Is there evidence that corroborates the statement?
     o Are there adequate substitutes for cross-examination?
b) Is the witness unavailable to testify
   o Do they have a complete or partial lack of memory?

Recognizing Hearsay
- **Hearsay is presumptively inadmissible**
  o **Rationale**: can’t critically examine like testimony where oath given and we can assess demeanor of the witness and cross-examine their testimony. Can’t get behind the truth-value
    - 4 ways crossing helps assess value of witness testimony
      - 1) **Perception**: can question ability to observe events in question
      - 2) **Memory**: ability to probe and find potential frailties
      - 3) **Narration**: ability to tell story accurately. May be skewed or misleading
      - 4) **Sincerity**: does witness have motivation to lie or misrepresent the truth

**An out of court statement (or implied assertion) offered for the truth of its contents**
- **TRUTH**: know hearsay rule triggered when we admit hearsay for the truth of its contents
  o If reasons other than truth value then it’s not hearsay and presumptively admissible subject to discretion
    - **Not hearsay is we don’t care if real or genuine**
  o **R v Collins**: police observing potential drug trafficking, nothing suspicious but receives word from another police officer that there’s info about her carrying drugs, puts her in chokehold
    - Statement to other officer about grounds to conduct search goes to state of mind and goes to whether charge is reasonable.
    - Doesn’t matter whether its true that she’s carrying drugs, just whether reasonable to act the way he did.
    - If we induce statement to prove it was made then its not hearsay (I heard him SLANDER him)
- **OUT OF COURT**: Applies even if person who made statement is in court and can testify
  o If testimony is about statement, even though person who made it is repeating it, still hearsay
    - Maybe a reason to admit though and rebut presumption
  o Adopts statement: can refresh memory by showing previous statement – if refreshes and can testify that he has independent recollection of events then statement isn’t admitted but testifying about current memory.
  o Double” (or triple etc.) hearsay – when A testifies that B told her that C said… Even more problematic than ordinary hearsay because its less reliable – the longer the chain of communication, the higher the risk of the message being corrupt
- **STATEMENT**: 
  o Concerned with out of court statement – any statement made other than by the witness while testifying in court.
  o Even though in court to testify, an out of court statement made by witnesses are hearsay when tendered for the truth of their contents
    - **Rationale**: crossing witness now doesn’t make it any more reliable.
    - If witness **adopts** earlier statement when testifying (refreshing memory during trial, there’s no hearsay problem)
    - But if person **gives two different versions** they must be lying about one, therefore out of court statement is almost always admissible for it’s non-hearsay use when its being used to prove someone is a liar.
o **Implied assertions**: conduct or behaviour can constitute a statement in its actual effect and meaning
  - Pointing, nodding, waving arms gestures can trigger hearsay. Hearsay by conduct
  o Statements written or oral that can be used as circumstantial evidence
  o **Baldree** – there is no distinction between express and implied statements. The difference between them is mere semantics as they’re both used to communicate facts, and doesn’t escape the concern about cross-examination. Greatly expanded scope of hearsay.

**CH 5: Hearsay Exceptions**

1. Principles Underlying the Exceptions

**Necessity and reliability underlie all exceptions (principled and categorical)**

**Categorical and principled**

- If it fits categorical exception presumptively admissible
  - Exists in CL and statute, criticized for not being flexible enough
- Principled approach (reliability + necessity) applies to all hearsay exceptions (**Starr**)
  - Opposing party may still challenge categorical admission on basis that it fails to comply with **twin req (necessity and reliability)**
    - Now case in Canada that categorical exceptions to conform in basic structure to principled approach (reliability and necessity) even though they remain distinct grounds for admissibility
  - **Three situations:**
    1) Complies with twin reqs and in category = admissible
    2) Problems with categorical exception but if CL categorical exception then can be **modified by court so that it complies with necessity and reliability** = admitted
    3) Or Categorical exception doesn’t comply with necessity and reliability can’t be modified = excluded (rare circumstance)
  - If no categorical exception then can try to sue principled approach to get evidence in

**Hearsay Exception vs Exclusionary Discretion**

- Rarely exclude under discretion when admitted under hearsay because already balanced costs and benefits of hearing the evidence
  - Limited circs may exclude where prejudice arises from evidence that’s not incorporated in hearsay exception
    - Ex: party opposing admission didn’t have opportunity to cross then more prejudicial. However, inability to cross taking into consideration determining the principled exception and underlies many categorical exceptions so wouldn’t justify excluding it under discretion

- Consider whether hearsay exists in silo but must still consider other rules (ex: bad character may be included under hearsay but still must look at different rules in their own silos)
- Don’t apply hearsay as strict in defence case but still apply test
Principled Exception
- Assessment of the need (necessity) and reliability (if one greater one less required of other)
- 1) Reasonable Necessity
  o Is the evidence necessary to supplement testimony?
  o Does the evidence provide information that a witness won’t?
    ▪ Witness won’t provide evidence, withholding their evidence in court
  o Would it be unduly expensive/inconvenient/time-consuming to prove the evidence otherwise?
    ▪ Convenience alone isn’t sufficient
  o How important is the evidence?
  o Unavailability of evidence in form of courtroom testimony (not unavailability of witness)
    ▪ Evidence of the declarant not available
    ▪ Wigmore: we can’t expect evidence of the same value from the same or other sources
  o Party seeking exception must show reasonable efforts made to get direct evidence from declarant
    ▪ Khelawon: died between time of making statement and trial court found Crown could have made some effort to preserve evidence because they knew he would die
    ▪ Mostly where death exists necessity easily satisfied
    ▪ Baldree: critical of police for failing to try and track down called who made call to accused drug dealer
  o Examples of necessity:
    ▪ death,
    ▪ level of competence (incompetent to testify as a witness, like 3yo in Khan),
    ▪ lacks sufficient memory,
    ▪ trauma (will usually need expert evidence),
    ▪ recant prior statement (different story at trial, look at PIS exception – admission of prior inconsistent statement of the truth)
    ▪ Khan: SCC recognized modern principled exception to hearsay – sexual abuse against young child – 3yo couldn’t testify and and met necessity req. was not competent. Old enough by trial but memory wasn’t sufficient
- 2) Threshold Reliability
  o Threshold vs Ultimate Reliability: ultimately trier of fact that determines latter
    ▪ Hawkins: whether particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement.
    ▪ Khelawon: two ways to established threshold reliability:
      ▪ inherent reliability (some reason to think statement is accurate and probably true)
      ▪ Testing (probably not true but believe trier of fact will be able to asses the evidence adequately. Can test accuracy at trial.
    ▪ Relationship between inherent reliability and testing is similar to relationship between necessity and reliability
  o A) Inherent Reliability
    ▪ Features of the statement itself that tend to give the statement some aura of reliability
      ▪ 1) spontaneous
      ▪ 2) Natural (not suspicious circs, time for fabrication)
      ▪ 3) Without suggestion
4) Close in time to the event in question (closer the better), contemporaneously.
5) Motive to fabricate
6) Against interest (more likely to be true)
7) By young person who would not likely have knowledge of the acts alleged
8) By young person who would not likely have knowledge of the acts alleged
9) No other knowledge of facts alleged
10) Whether there is corroborating evidence
   - Less reliable if double or triple hearsay
   - Corroborate or confirm
     - In addition to looking at features we can look outside statement to extrinsic evidence
       - Khan: young child’s statement was confirmed by semen on clothing.
     - Striking similarity between two statements
       - FJU: daughter alleging sexual abuse by father, police statement had detailed description, when initially confronted father confirmed truth and gave detailed account and matched daughters account – both recanted statements, court looks at Crown argument to admit pre-trial statement and said looks very unlikely statements were so similar unless based on true events.
   - Whether any safeguards in place surrounding the making of the statement that would go to expose any inaccuracies or fabrications
     - Was person under duty to record statements
     - Was statement made to public officials
     - Was statement recorded
     - Did person know statement would be publicized
   - B) Testing
     - Generally test in court through testimony (oath, presence, cross, accurate record), don’t have for hearsay. We can find some substitutes
       - Warning: when police take statement they can give warning of possible repercussion of statement
       - Record the statement
       - Cross-examine: more commonly can test witnesses testimony at trial
         - Compare hearsay with in court testimony and cross witness on inconsistencies.
   - No magic formula for determining necessity and reliability – only thing we do is make best arguments we can to gauge how necessary and reliable it is

2. Prior Inconsistent Statements (KGB)(specific example of Principled Exception)

Also look for impeaching credibility under cross-examination

Prior inconsistent statements (PIS) of non-party witnesses may be admitted for their truth on a case-by-case basis using the principled approach.
- **Necessity** is accepted whenever a witness recants his or her earlier out-of-court statement.
- **Reliability** is found either when the process in taking the prior inconsistent statement is sufficient to allow the trier of fact to assess its value against the witness’s in-court testimony or the statement is inherently trustworthy.

Example: Shaggy states to friend Scooby that there’s ghost chasing. Counsel asks Shaggy if true that he testified earlier that he was chased by a donkey, says that’s right. Counsel points out that Scooby will testify it was a ghost not a donkey.

- Scenario 1: Possible you were chased by ghost? Answers Yes
  - No PIS, negated by witness adopting the statement.
- Scenario 2: possible chased by ghost? Answers NO
  - PIS

Outlined:
- Form of principled exception
- Historically only for admitted for credibility, couldn’t be used for truth of the statement as hearsay.
  - If admitted for credibility judge will warn trier of fact can only use it for that purpose.
- SCC developed principled approach
  - KGB Case: If PIS admitted under KGB and general principled exception then can be used for truth of its contents AND credibility.
  - KGB Statement: getting the previous statement

Test:
- 1) **Necessity**
  - reality for PIS is that they arise in recantation (one way or another witness recants previous statement)
  - any time can show witness recanting previous statement we have necessity
  - Three types of recantation – all meet necessity threshold – reliability is where 3 categories differ
    - 1) Admitting previous statement made but denying truth
    - 2) Deny making PIS
      - Denies other party can prove statement was made
      - Can get another witness to confirm it
    - 3) Witness claims they can’t remember making statement (doesn’t appear to be recantation but it is).

- 2) **Reliability**
  - Inherent reliability
    - Can use all same factors from general principled exception (ABOVE)
      - Both inherent reliability and testing (any factors may be relevant)
    - Particularly relevant
      - Whether oath to tell truth
      - Warning from person taking statement that there are consequences to making the statement (potentially criminal)
        - Can consider this and oth to be testing
      - Whether police used any pressure, coercion, undue influence in order to make the statement appear to be something police wanted it to say
        - Threats of harm or promises of benefits
        - Scrutinize way statement was made
        - To admit for truth we have to show its made in voluntary way (not applying full confessions rule because not accused here)
          - Applied a little more leniently
o **Testing**
  - Ability to scrutinize or test PIS
  - Presence of witnesses, accurate recording or statement and contemporaneous cross
  - *KGB:* can also look for **substitutes like recorded audio and video**
    - Allows us to assess undue influence, credibility, demeanor
    - Some courts have demanded police do this unless good reason not to do so.
  - **Ability to cross at trial** (probably most important factor)
    - Will be in court anyway
    - Must look at nature and extent to which cross-examination is possible
    - Effectiveness will depend on nature/type of recantation
      - 1) Made statement but deny truth
        - Can generally cross examine effectively
        - Comparative reliability of statements
        - Can look at current testimony and compare
        - Will generally give us sound basis for admission even without other KGB factors
      - 2) Denying statement made in form alleged
        - Cross exam limited
        - Can’t use comparative reliability analysis
        - Other reliability factors must be much stronger
      - 3) Claiming not to have remembered making any statement
        - Cross exam limited
        - Can’t use comparative reliability analysis
        - Other reliability factors must be much stronger
  - 3) **Otherwise admissible**
    - If Scooby makes KGB statement that Shaggy said ghost, Scooby on stand and recants and said Scooby says that Shaggy said Donkey, maybe because of undue influence from Shaggy
    - Even if prior inconsistent statement is sufficiently reliable to admit under principled approach we still must determine if it would have been admissible if given in court
      - Look at prior inconsistent statement we want to admit
        - Look at video recording of statement and imagine as if it’s given in court
          - Look at testimony and can see that it itself is hearsay statement
          - **Double hearsay really:** prior statement that contains in it a hearsay statement
            - Generally inadmissible unless category.
      - In order to admit has to pass principled exception must also find some exception to justify the admission of this statement assuming it had been made in court
Categorical Exceptions

3. Prior Identifications

- Out-of-court ID made by witness may be admitted for truth and credibility where witness makes in court ID
- Also permitted where no in-court ID but can testify that they previously gave an accurate description or made accurate ID
- Where ID witness makes no in-court ID and doesn’t testify as accuracy of prior ID then same as if they did not testify, out of court ID is hearsay and not admissible under hearsay exception for prior ID
- Generally not allowed to testify to previous consistent statement but prior ID are exception.
- Preference for prior ID than at trial
- Must have been reliable circs, police lineups are considered reliable
- Three most common scenarios
  o 1) Prior ID confirms and corroborates in court ID
     ▪ Questioning by Police by witness and person ID’s
     ▪ Done in court again, IDs same person
     ▪ PI is presumptively admissible because confirms in court
  o 2) Prior ID contradicts in court ID
     ▪ Gave description of perpetrator in court witness described them much differently
     ▪ Can’t use prior ID exception to admit hearsay
     ▪ Might be admissible as PIS using Khelawon
  o 3) No court ID, only prior ID
     ▪ Witness IDs prior to trial, asked at trial claims they can’t remember.
     ▪ Prior ID not admissible under categorical exception, will have to rely on principled approach (but no ability to test), would need LOTS of inherent reliability
     ▪ However if they testify that they made accurate ID previously can be admitted for truth

4. Prior Testimony

- Still out of court statement for this proceeding
- Multiple exceptions
  - CL:
    o declarant must be unavailable
    o parties must be substantially the same
    o issues must be substantially same
    o party against whom statement is being offered must have had opportunity to cross previously
    o Authors say this is too restrictive
  - Provincial Rules of Court
    o Mostly civil proceedings
    o R8.17(3) Evidence taken in other action may be admitted so long as sufficient notice is given
  - S.715(1) CCC
    o Must have same charge (like re-trial, prelim inquiry, or investigation where we have testimony)
    o Taken in accused’s presence
Full opportunity to cross

Witness unavailable for one of the following reasons
- Refusal to take stand
- Death
- Insanity
- Absent from Canada

Discretion to exclude prior testimony even though conditions met in circumstances where a purely mechanical application of the section would operate unfairly to the accused SCC (Potvin)

May exclude where:
- 1) If admission brought unfairness in manner in which evidence was obtained
- 2) Where admission would not be fair to the accused
- Examples:
  - Witness away from Canada temporarily, Crown could have obtained witness’s attendance at trial with a minimal degree of effort
  - Crown aware at time evidence initially taken that witness would not be available to testify at trial but did not inform the accused of this fact so that he could make best use of the opportunity to cross witness at earlier proceeding.

5. Prior Convictions
- Generally admissible, prima facie proof of subject matter that the conviction supports
- Someone convicted to assault criminally then prima facie proof in civil case
- Alberta Evidence Act S.26: allows for admission of previous convictions
  - (4) When proof of the conviction or finding of guilt of a person is tendered in evidence pursuant to subsection (2) in an action for defamation, the conviction of that person or the finding of guilt against that person is conclusive proof that the person committed the offence.
- Offensive and defensive use
  - Offensive: can use it to prove civil claim example
  - Defensively: to resist claim, insurance company D against P that he didn’t get paid, but insurance co says you killed wife who had insurance.
- Impeachment of judicial finding (fresh evidence or unfairness): (May have opportunity to explain why the conviction should not be taken as proof of underlying facts.)
  - Reluctant to do this
  - Unless fresh evidence that previous conviction had frail basis
  - Previous conviction is minor regulatory infraction where no full defense and not much on the line but current civil action has a lot
    - Potentially in this case can argue prior conviction may not be proof of current conviction
- Unlike criminal law, acquittal is not admissible in subsequent civil suit.

6. Party Admissions and Co-Conspirator Exception
- EXAM – when solving a fact pattern, you must know who the accused party is
  - If its an admission that fits into this rule, you don’t need to discuss the hearsay aspect of it. Just write, “its an admission…” and move on. Sometimes there is an issue.
  - Also assume its being admitted for its truth
- Anything other side ever said or did when called by party who is adverse in interest.
Statement or conduct by opposing party in lawsuit is an admission and **presumptively admissible**

- **Basis:** we can cross parties because in court – party objecting is person who made statement – exception based on fairness not reliability
- This exception **cannot be used by a party to admit evidence of their own statements** or acts
  - But if crown calls part of a statement, the accused is allowed to call the rest
  - Doesn’t require personal knowledge – if a party adopts another person’s statement, its admissible
- **Double hearsay** – ANY time you have an admission that is two steps removed it cannot come in under the admissions rule
  - If her statement of mind is relevant, then you can admit that statement and the statement just provides context to who/why she was scared

- **Formal Admission**
  - Party prepared to concede issue at trial.
  - Rarely permitted to be withdrawn
  - Can be made in pleadings (agreed statement of facts, s.655 CCC: *Where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof*: can admit to isolated particular facts that don’t constitute entire element of the offense)
  - Not required to be incriminating on its face
  - In civil matter both sides can give formal admissions
  - **Justification:**
    - 1) won’t necessarily be crossed at trial but will be available and can get up on the stand to explain admission.
    - 2) generally don’t say things against interest that are not true.

- **Informal Admission**
  - So broad we kind of ignore anything about multiple hearsay because people generally wont say things against interest
  - Can be by conduct

- **Admission by silence**
  - 1) Must be in presence of declarant in
  - 2) Situation where declarant expected to respond but failed to do so
  - 3) and thus strongly infers or connotes an adoption of the truth of the statement
  - 4) Probative value must outweigh prejudice
    - Can have very innocent silence
  - **Never for statements of silence in criminal cases** to police or other people in authority because that overrides right to silence (can’t infer guilt from silence in criminal case)

- **Vicarious Admission**
  - When party authorizes person to speak on their behalf.
  - Authority rarely given
  - **Conventional:** can’t take statement of an agent and attribute that to principle unless agent given specific authority
    - **Ex:** slips on floor of movie theatre, usher says “you should have cleaned that up half an hour ago”. Can’t bind corp.
    - Alternative view: agents should be binding so long as speaking within scope of authority
      - If employee makes statement in authority then binding on corp. Not widely accepted and uncertain

- **Voluntary Confessions Rule**
- Statements of accused to people in authority must be shown to be voluntary
- Look later in CAN
- Still admission and exception to hearsay and ordinarily admissible but also captured by additional confessions rule.
- Not exception to rule that admission is presumptively admissible.
  - However, confessions rule can exclude it thereafter

**Admissions by Parties in Furtherance of a Common Design**

- Normally admission made by another party can only be used against that party
  - However, under exception can admit statement to prove guilt of other party
  - Often applied in criminal conspiracy context
- About statements made during the formation of common design, during execution, and in limited cirсs after as long can still characterize statement as being made to advance or further conspiracy or common design

**Requirements:**

- Only applies to statements in furtherance of common design or conspiracy (ex. I'm going to go steal the picnic baskets).
- 1) **Common design existed**: Trier of fact must be satisfied BRD that alleged conspiracy in fact existed
- 2) **Member of common design**: If existed, BoP that accused member of conspiracy
- 3) **Consider statements**: If yes, entitled to apply hearsay exception and consider co-conspirator statements in deciding accused guilt BRD
- 4) **Warning**: Even if permitted to consider co-conspirator statements in deciding guilt, may not be determinative of that guilt. Still must prove all the elements of offense BRD

- Can't be used to admit statement made by party that's not in furtherance of conspiracy (ex. confession to policy by other party after, not in furtherance of conspiracy so exception doesn't apply).

### 7. Declarations Against Interest by Non-Parties

- Admissions by a person who is unavailable to testify may be admitted for their truth where the admission is against that person’s pecuniary or penal interests, and the person had personal knowledge of the facts admitted
- Never use against party to litigation because covered by admissions exception

**Statements against interest: Pecuniary or Financial Nature**

- 1e. Acknowledgement of a debt owed or paid
- No threshold, any interest of any magnitude will suffice
- Don’t say things against financial interests unless true (inherently reliable)

**Requirements**

- 1) Declarant must be unavailable
- 2) Must go against interest in part
- 3) must be personal knowledge of declarant (no multiple hearsay)

- Can admit even if pecuniary interest is collateral issue.

**Statements against interest: Penal Nature**

- Statement that exposes declarant to potential criminal liability
- More strictly controlled than pecuniary
- No double hearsay

**Requirements:**

- 1) Declarant should have known that it should have apprehended a vulnerability to penal consequences
- 2) Real vulnerability to non-remote penal consequences
- 3) Against interest of declarant on balance
  - The statement, as a whole, must be weighed against the defendant
    - So unlike pecuniary interest, where the whole statement is admissible, if the statement against penal interest is more supportive of the declarant than harmful on the whole it will be excluded
- 4) Corroboration (that would support voracity of statement)
  - doubtful case court may consider whether or not there are other circs connecting the declarant with the crime and whether or not there is any connection between the declarant and the accused
- 5) Unavailability: died, insane, grave illness, absence from jurisdiction and not compellable
  - Even more narrow: Can’t use to incriminate accused (used against non-accused). Can only be used to exculpate the accused.

8. Dying Declarations
   - Only in **homicide** cases
   - **Requirements** (strict)
     - Settled, hopeless expectation of immediate death
     - Statement about circumstances of death
     - Statement must be admissible if deceased testified
     - Only used if offence is homicide of deceased

9. Declarations in the Course of Duty
   - Different than admission. Declarations fall under exception may be admitted by party responsible for the record in order to support the face, unlike admissions that are tendered by opposing party against the party who made the statement.
   - **Common Law**
     - Include oral and written statements
     - **Requirements: admitted for its truth where:**
       - 1) Made reasonably contemporaneously with offence in question
       - 2) Made in ordinary course of duty/job of declarant
       - 3) Personal knowledge
       - 4) Must have had duty to make record and no motive to misrepresent
       - Flexible about interpretation: insisted we ID specific individual who recorded the message (just by someone in the course of ordinary duty)
   - **Business Records Exception**
     - Exist in *Canada and Alberta Evidence Acts*
     - Don’t need to know details
     - Basic Framework
       - All these legislative provisions limit applicability to actual documents or records (not oral)
       - Apply to any record made in ordinary or usual course of business
       - Does not apply to police officers in course of business (source may not be reliable)
   - **Electronic Records:** admissibility depends on creation. If generated automatically without any human intervention can be admitted as real evidence.
     - **If humans created, hearsay concerns arise.**
       - Business records, electronically stored, have to fall within the business record exception and meet statutory or CL reqs.
10. Statements as Part of the Res Gestae (facts accompanying transaction)

- **“facts surrounding or accompanying a transaction”**
  - spontaneous statements
- Wigmore: “phrase not only entirely useless, but even positively harmful"
- Similar to declarations against interest and declaration in course of duty is a catch all category that contains within it specific exceptions and must engage one of these
  - Necessity because evidence is unavailable in current form
  - Reliable because made spontaneously and leaves no room for lying
- **Present Physical Condition**
  - Where person claims to be experiencing a particular physical condition, the statement containing that claim is admissible but only to prove that the person was experiencing the condition at the time and to establish its duration
  - “my face hurts” – statement of pain = admissible
  - Past pain or past physical condition not admissible
  - Whether declarant made statement at time of physical condition
- **Present Mental State Condition**
  - Must be hearsay (often not hearsay when it shows the mind of the declarant, if relevant for some purpose other than truth of statement then not hearsay at all)
  - Must ask: whether the intended use of the evidence requires that the trier accept as true the declaration of mental state
  - Two examples: “no one likes me; no one is going to miss me” – not tendered for truth, admissible as original evidence. “I intend to kill myself” – hearsay and admitted for truth under hearsay exception.
  - **Requirements:**
    - 1) statement must be made spontaneously and not in manner that raises suspicions about motive to lie
    - 2) Can only admit it to show declarants intention
    - must be statement of intention not belief
    - Not admissible to establish past events, past intention, past state of mind.
  - SCC Star decision: can show declarants intention but not a third parties
- **Excited Utterances**
  - Statements made when a person is startled or excited are admissible for their truth if made while the person is experiencing the excitement caused by the event
  - Statement made before or after event has taken place
  - Must provoke or induce spontaneous response from a fairly stimulating event before there is time to concoct a story
  - Mind must still be dominated by the event, soon after point where mind still consumed or dominated by impressionistic event.
- **Present sense impressions**
  - Statements made by someone about something they’re perceiving at the time they’re perceiving it may be admissible for their truth
  - P+S say that this hasn’t been formally recognized in Canada
CH 6: Opinion & Expert Evidence

1. Opinion and Fact
   - General rule – witnesses may only give evidence of facts that they personally perceived, and may not give their opinion as to the meaning of those facts
     - Allowing witnesses to give opinions usurps the role of the trier of fact – to draw inferences from the facts and come to a conclusions
     - Witnesses aren’t in possession of all the evidence and aren’t well-placed to draw conclusions about what happened
     - Would be prejudicial to allow witnesses to give their opinion – wastes time and causes confusion as to what’s really at issue
   - 2 main exceptions
     - Non-expert opinions (lay witnesses)
     - Expert opinions
   - Opinion vs Fact
     - Sometimes something that seems like a fact may be opinion
     - Things like ID, age, height, weight, speed, emotion call for some form of judgment based on observation and not pure facts

2. Lay Witnesses
   - Requirements
     - 1) Better position than trier-of-fact to make inferences or draw conclusion (like speed care travelling at)
     - 2) Persons of ordinary experience must be able to make conclusion
     - 3) Experiential capacity to make conclusion (similar to previous)
       - must ask whether particular person can make this conclusion (ex. child)
     - 4) Compendious (containing or presenting the essential facts of something in a comprehensive but concise way) mode:
       - opinions being expressed are merely compendious mode of presenting fact that are too complex or subtle to be narrated effectively without resorting to inference or conclusion (just efficient way to convey technical fact).
         - Driving erratically is not compendious mode
   - Admitting non-expert opinion evidence is a matter of judicial discretion
     - Descriptions of events are usually admitted
     - If their evidence can be presented to the court in a way that doesn’t require an opinion be drawn, an opinion is likely to be excluded

4. Expert Testimony
   - Must be opinion, not just fact
   - Expert vs Lay: don’t apply expert when using lay opinion
   - Expert opinion presumptively inadmissible
     - Trier of fact often overweighs this evidence
       - Gives undue deference to credentials
     - Concerned about using scarce judicial resources (battle of the experts)
   - Justice Goudge Inquiry
     - Forensic scientists saw role as assisting police and the Crown
       - Most employed by police, work with them, clear conflict
     - Particularly bad forms (pretty much junk)
       - Pathology (examining medical evidence)
- Hair and fiber analysis
- Shoe impressions
- Fingerprint analysis

- **Mohan Test: requirements (on BoP)**
  - 1) Necessity
    - Some information that lies outside normal lay experience (specialized knowledge or expertise to understand)
    - Truly necessary to ensure accurate adjudication (not merely helpful)
  - Substitutes
    - This also includes consideration of adequate substitutes – can jury instructions render the expertise unnecessary, are there other ways to provide the information, etc.
  - 2) Must be relevant to particular material issue in case
  - 3) Exclusionary Rules
    - General rules (ex character evidence, BCE, relay hearsay etc)
    - Specific Rules in context of expert evidence
      - **Oath helping**
        - There must be some independent value for the testimony other than bolstering the credibility of a witness. As discussed above, evidence about creditability may be admitted, but evidence relevant to a particular determination of credibility may not
        - any evidence that speaks directly to credibility of another witness at trial
          - Can’t use witness A to comment on credibility of another witness at trial – would usurp function of trier of fact
        - Ex: Expert who purports to show using testing, examination that a witness is or is not a member of a distinctive group that exhibits a particular trait or behaviour. Only admissible in very limited circs where we can show with very high degree of certainty that the group really is distinctive and witness really is member of group and rarely successful.
        - May be able to testify about issues that are relevant generally to credibility, line drawn between direct comments on credibility and evidence that may be helpful to trier of fact in assessing credibility (like children generally recant statements of sexual abuse)
      - **Pure questions of domestic law**
        - Contact not enforceable because it contains unconscionable terms – can’t have expert witnesses testifying to Canadian domestic law. Only applies to domestic because cdn court not presumed to know law in other jurisdicitions.
  - 4) Qualifications
    - Expertise means possessing knowledge and experience going beyond the trier of fact in the matter being testified to
    - Modest standard – must show some sort of systematic learning
      - once met, deficiencies go to trier of fact
    - Expertise must be relevant to particular issue, can’t testify to matters outside their field - a GP’s testimony may be insufficient when a cardiologists opinion is required.
- If an expert goes beyond the scope of their expertise (generally as defined in voir dire, or where their expertise is otherwise clear), their opinion is inadmissible

  5) Gatekeeper Function: Trial judge weighs benefits vs costs

  ▪ Benefits (probative value)
    - Testimony founded on proven facts?
    - Does conclusion support objective that party calling expert is attempting to achieve
      - Does it support inference party that is proffering to help prove its case?
    - Importance of issue: want it in if vitally important issue
    - About reliability underlying principles and methods associated with expert testimony and how reliably have they been applied.
      - Determining reliability
        ▪ Don’t have to have scientific method (ex. accountants)
        ▪ Testing
        ▪ Peer review
        ▪ Rate of error for particular methodology
        ▪ General acceptance – not determinative, if accepted method in expert community then more reliable

  ▪ Costs (prejudicial effect)
    - Uncritical acceptance by trier of fact (likelihood that the trier of fact will defer to the expert’s opinion)
    - Confusion or complexity (wastes time, diverts trial)
    - Inflaming of emotions
    - General inefficiencies (could lead to a contest of experts; also consider if cross-examination, instructions etc. can mitigate PE)

  - Some jurisprudence holds that experts must be independent and impartial for their opinions to be admissible – otherwise they’re just hired guns. But generally independence and impartiality go to weight, not admissibility
    - Partiality based on being paid for their testimony is not problematic
    - Experts may be disqualified where their independence is completely undermined, usually due to a personal connection to a party or the case.

  - Experts should attempt to explain their opinion in language understandable by the trier of fact, to avoid mistranslation of technical advice (and lose of accuracy/precision) by the judge

3. The "Ultimate Issue" Rule

- Witnesses (including experts) cannot usurp the role of the trier of fact in coming to conclusions about the ultimate issue in the case
  - Historically, this was a legal rule. Now, it’s just a guiding principle
  - This does not mean that experts cannot testify about evidence related to the ultimate issue – just that we have to exercise more care in admitting expert evidence where it bears on a central issue in the case
- Experts are not entitled to draw conclusions on behalf of the trier of fact – they can say that a victim showed all the signs of abuse, for example, but cannot conclude that they were abused

5. Novel and Challenged Science

Threshold reliability and novel science
To be admissible, expert opinions must be based on a sufficiently reliable foundation to merit their inclusion. This means that the court must evaluate reliability before admission.
- As part of their gatekeeping functions, courts must exclude “junk science”

To pass the threshold for reliability, there must be sufficient evidence to show that the evidence being tendered has some probative value.
- This is conditional, not absolute. We don’t need absolute proof or scientific certainty to admit evidence, it just has to be helpful
- This is determined through a pragmatic balancing exercise:
  - For scientific evidence
    - Has the theory been accepted by the expert’s peers/academic community?
    - Has the theory been tested?
    - Is the success rate of the theory sufficiently high?
    - How accurate is the data used?
  - Are there grounds (through experience or research) for thinking that the witness’ specialized knowledge is reliable
  - Is the expert’s field a recognized discipline or area of specialization (either inside or outside academia)
  - Is the evidence unduly difficult to explain? Can the expert’s reasoning process be explained?
  - Would it take up too much time, or distract the trial, to admit the evidence?

Generally, reliability is only an issue for novel or non-established techniques/theories

Novel science exists where there’s no established practice in courts for admitting evidence of that sort, or where an existing technique is being used for a new purpose. Additional requirements for admitting novel science:
- Reliability of evidence subject to “special scrutiny”
- The novel science must be strictly necessary/essential to come to a proper conclusion
- The closer the evidence prepared by novel science comes to the ultimate issue, the more carefully it must be scrutinized – higher threshold than other evidence

CH 7: Privilege

1. General Principles
- Privilege is a policy choice, not a product of balancing PV and PE. Privileged material is usually probative – privilege inhibits truth-finding in the name of protecting societal interests.
- At CL only thought to be rule of evidence and only applied to exclude certain kinds of evidence at trial or legal proceedings
  - Now has effect outside legal proceedings (limit other peoples use or ability to obtain even outside of legal proceedings)
- Substantive rule of procedure that protects confidentiality outside of court
- **Privilege belongs to the person who benefits from it**
- There are 2 kinds of privilege – class and case-by-case
  - Beyond the categories here, there are not other class privileges (and no more will be created – R v National Post)
- **Rationale**
  - Protects social interest
    - Maintenance and preservation of certain types of relationships (ex. lawyer-client)
- Balance social interest with truth seeking function of court and other societal interests
  - **General framework:** Wigmore Conditions for determining all privilege whether claimed or established

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1. Originated in circs where parties expected confidence
2. Want confidentiality to be essential to relationship
3. Socially important relationship
4. Cost-benefit – even if 1-3 we must consider them

- **Class Privilege and Case-by-case Privilege**
  - Class (or categorical): presumption info protected and inadmissible
    - Party urging admission must show why communications should not be privileged
      - 1) **CL** – Solicitor Client Privilege
      - 2) **Statute** – spousal communications
      - 3) **Settlement** discussions between contemplated/actual litigants (less defined)
  - Case-by-case: no presumption of admissibility, must look at facts of each case

- **Waiver**
  - Holder of privilege entitled to waive and provide information to court
  - **Express**: voluntary and informed waiver by holder of it then evidence can be admitted
  - **Implied**: can occur even if holder of privilege would rather not disclose information
    - Courts will imply where fairness dictates
      - To avoid partial or biased view of what happened
    - Can also imply where party claims to have acted in good faith on basis of legal advice.
      - Court will want to know what legal advice consisted of.
      - Imply waiver in order to assess whether genuine

- **Inadvertent Disclosure**
  - Traditionally disclosure of information protected by privilege would extinguish privilege for all purposes even if accidental or inadvertent
  - Where fairness dictates that information be protected despite disclosure court will do so.

- **Party Witness vs Ordinary (non-party) Witness**
  - Parties have no right to assert privilege – whether or not privilege is asserted or waived is up to witness and any harm done to witness by erroneous admission of that info that would have been privileged and wasn’t properly waived will not be ground for appeal since parties not harmed.
  - Can appeal if claim of privilege by ordinary witness was improperly upheld

**CLASS PRIVILEGE**

2. Solicitor/Client Privilege

- **Communication** between **solicitor and client**, of **confidential nature** related to the seeking, forming, or giving of **legal advice**, is privilege information
  - No privilege for communications that are made with a view to obtaining legal advice to facilitate the commission of crim or fraud
  - Privilege may also be overridden where it would result in withholding of evidence that might enable an accused to establish his innocence, or where public safety is at risk.

- Robust privilege courts extremely reluctant to depart from
  - Rationale: in order to perform duties and obligations as lawyer you need full information from client, need to have client be assured that damaging information is not going to be disclosed and available to other side or anyone else
    - Incentive is full disclosure
  - Only client can waive this
  - Doesn’t apply to document or communication that pre-existed legal relationship
- Non-communicative evidence (like physical evidence) does not attract privilege under any circumstances
- Survives death of client: limited exception for Wills, Estates, and Trusts cases and possibly where very clearly demonstrate that it would be in clients interest that communication is disclosed

- Legal Advice:
  o Actually seeking legal advice?
  o Interpreted broadly (don’t need retained or payment)
  o Any time lawyers consulted for purposes of seeking legal advice
  o Issues where line isn’t clear about legal/non-legal matter (ie inside counsel, must be very careful about this)

- Confidential:
  o Information that privilege is claimed over must actually be confidential
  o Applies to other lawyers in firm or people working with lawyer directly or indirectly
  o Can be shared by more than one party if they are represented by same lawyer
    ▪ Multiple clients on same file means privilege applies to any communicant so long as we can say that client have shared or have common interest
      • If interest diverges at any point then privilege is extinguished and lawyer has ethical obligation to share any information with all of the clients

- Communication:
  o Draw distinction between communication and pure fact (arriving at lawyers office isn’t communication)
  o If fact integral to communication (forms part of the communication between lawyer and client) then it will be protected
    ▪ Ex. difference between fee schedule and trust account
      • Fee: info about nature of service and fees charged (almost always protected by lawyer-client priv because it gives you picture about type of advice provided
      • Trust: simply tells you that clients money went into trust account and left trust account
    ▪ Clients identity generally will not attract privilege
      • Generally won’t expect confidentiality in ID
      • However, limited circs client will go to lawyer for purpose of preserving their ID. If purpose of legal advice is to maintain anonymity then protected.

- Exceptions
  o Applies to all of the legal privileges (but exceptions most common in solicitor-client)
  o 1) Crime/Fraud
    ▪ Intention
      • Must look at intention of client
      • If you go to lawyer and attempt to get advice on how to commit a crime/fraud or other form of wrongdoing then law will not protect that communication
      • However if done in good faith and explains plan which is actually criminal then it wont be captured under exception.
    ▪ Past vs Future: exception only applies to future or when crime is committed in the act of consulting the lawyer (like criminal conspiracy)
      • If lawyer consulted about past crime then protected
    ▪ Misnomer: crime/fraud is anything that is unlawful or constitutes abuse of process (even though not technically a crime or a fraud) will not attract privilege
2) Innocence at Stake
   - Only for criminal cases
   - When one person becomes aware that another person has said something to a lawyer that can exonerate them from a crime, privilege can be waived
   - A times public interest will demand that information disclosed to show accused may be innocent
   - Almost never been invoked

   McClure Test
   1) Threshold
      - 1) Whether there is any other source of information that is sought from lawyer-client privilege
      - 2) Without the information that is protected by privilege there would be no way to raise a reasonable doubt
   2) Innocence at stake
      - Production: whether or not protected material should be produced to court for examination
        1) Evidentiary burden to show that the information COULD raise a reasonable doubt (not would).
        - If me the produced to the court but not disclosed to the defence yet. So judge can examine
        2) Judge will determine whether information is LIKELY to raise a reasonable doubt about the accused’s guilt

3) Public Safety
   - also rare
   - Where the privileged communication indicates that there is a clear and imminent risk of serious bodily harm or death to an identifiable person or group of persons, privilege can be waived to protect public safety

   Smith v Jones Test
   1) is there clear risk to identifiable person or group (can’t just be generic threat)
   2) Serious bodily harm or death
   3) imminence required

3. Litigation Privilege
   - Scope: any information obtained by solicitor from third persons if its made for the dominant purposes of commenced or anticipated litigation (Blank).
     - The possibility of litigation is not sufficient
   - Purpose: dominant purpose test
     - If purpose of making information or communication or acquiring it in some fashion is to help prepare for existing or anticipated litigation privilege applies
       - If merely one of several purposes (but no main) then doesn’t apply
         - Interpreted strictly
   - There must also be some exercise of skill or industry in preparing the document – something must have been added to the information to bring it under the privilege.
     - Photocopying existing material for the litigation does not qualify, but research does
   - Rationale
     - Providing incentive for parties to prepare fully for trial
     - Facilitate the adversary process by giving people some assurance they can go out and collect information and prepare for trial, retain experts and will not come back to haunt them.
- Ends when litigation ends unless we can demonstrate some subsequent lawsuit so closely related that we can categorize it as part of a series of related lawsuits
- **Blank:** litigation privilege will not apply to material collected for purposes of criminal litigation that is later sought to be used for civil claims (difference between civil and criminal trial so great can’t say it’s continuation of the same related dispute)
- Litigation privilege is weaker, but broader in scope, than legal advice privilege. It creates a ‘zone of privacy’ for preparing for litigation
  o Litigation privilege does not protect the lawyer-client relationship, it protects the adversarial system. If preliminary work could be held against you in litigation, people would not fully investigate their cases
  o Current trends in discovery favour disclosure over secrecy, and the scope of litigation privilege can be limited by statute and the rules of civil procedure – i.e. ability to withhold expert reports is curtailed now
- **Status of Copies**
  o Assume original documents not covered by privilege, normally copy also would not be but there may be exceptions
  o Courts have found that if copy obtained through application of professional skill or knowledge (if there was selection of material as in the case of legal research) then litigation privilege will attach to that selection process to the cases collected.
    ▪ Cases are publicly available but lawyer applying knowledge, judgment, skill to that process in hopes it will provide an advantage in preparing for legal proceedings.
- **Implied Undertakings Rule**
  o More of a civil procedure rule
  o Documents disclosed on discovery are not free to be used by the receiving party for purposes other than present litigation
    ▪ For use only in present litigation
  o Does not apply to crim cases because it applies to documents disclosed in discovery process
  o Tied up with litigation privilege: if we find document or communication is protected by litigation or solicitor-client privilege and its disclosed to other side in civil proceedings that doesn’t mean other side can use that information for any and all purposes
    ▪ Will be implied undertaking made to court to use information only for legitimate purposes in legal proceedings
      • Other side can seek leave to court to use it for other purposes where the public interest in that use outweighs the prejudice or harm to any other party
      • If breached then remedy is contempt sanction because it is undertaking made to court

**Litigation vs Lawyer-Client**
- Lawyer-client much more robust
- Must be careful when communications with 3rd party.
  o Not necessarily litigation privilege but may claim lawyer-client privilege if we can show that 3rd party just agent of lawyer or client and purpose of communication was to maintain lawyer-client relationship
    ▪ (like a courier with privileged documents, translator, or where lawyer obtains expert to assist in consultation with client)
    ▪ **Smith v Jones:** crim D counsel retaining psychiatrist to interview accused for purposes of preparing for trial. In this context clearly psychiatrist is agent for lawyer and communication protected by lawyer-client privilege
• Retaining private investigator or other expert to collect publicly available information, if purpose is simply to gather information from witnesses or databases then normally not essential to lawyer-client relationship (at best litigation privilege)

4. Spousal Privilege
- No spouse is compellable to disclose any communication made to him by his wife during their marriage
- Differentiate between spousal privilege and competence
  - At CL in civil cases spouse not competent but has been abolished
  - Can still testify but may refuse to answer certain questions under the claim of privilege.
- Originates in Statute
  - Canada Evidence Act S.4(3): No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.
  - Alberta Evidence Act S.8 – A spouse or an adult interdependent partner is not compellable to disclose any communication made to him or her by the other spouse or adult interdependent partner during the marriage or adult interdependent relationship.
- In any jury trial, trial judge must give instruction to jury along following lines
  - All legally married spouses have statutory right to assert privilege
  - Privilege belongs to the witness, not the accused.
  - Decision whether to assert privilege belongs to witness not the accused.
  - Designed to protect the accused from many adverse inference about spouses decisions whether or not to convey privilege communication.
- Rationale:
  - Helps insulate spousal relationship and allows spouses to share in confidence
  - Preserve/maintain marital harmony
  - Unseemly to have one spouse testify against the other (indelicacy)
- Many courts have sought to restrict spousal privilege as far as they can given statutory protection
- Limitations:
  - Only made during existence of marriage (not before/after)
    - Not clear whether dissolution by death or divorce extinguishes privilege (conflicting authorities)
  - Must be Communication
    - Doesn’t need to be confidential, can be ordinary run of the mill dinner conversation, still protected
    - Needs to be communication, can include words and actions.
      - Gosselin v R: communication narrow and doesn’t include privilege a spouse’s observations.
        - Holding bloody knife is not communication just an observation.

5. Settlement Negotiation Privilege
- Requirements
  - 1) Litigious dispute ongoing or contemplated
  - 2) Communication that is intended to be kept confidential
  - 3) Purpose to effect settlement
- Rationale
Encourage parties to settle cases prior to trial and to provide incentive for them to be confident that any admission made will not damage them
- Applies to third parties and not just revelations made in court
  - Ex: if Co-D's and settle with on then other will not have access to this information
- Exceptions:
  - More flexible than solicitor-client privilege
- Disclosure when (divergent case law on exceptions)
  - 1) Disclosure needed to actually determine whether there was an agreement or what the scope of that agreement was intended to be
  - 2) Where interests of justice demand disclosure
    - More important to know what was said in the context of settlement negotiation than it is to protect privilege in those circumstances

6. Case-by-Case Privilege
- If you cannot bring yourself into one of the recognized heads, then you have the onus of showing that a communication ought to be privileged
- Many cases where you have a professional or other actor who deals with individual on the basis they expect privilege
  - Ex: physician, journalist dealing with source, cleric or religious advisor, psychologist, social worker
- Must meet Wigmore factors
  - 1) Show communication originated where confidence expected by parties
  - 2) Confidentiality is essential to the functioning of the relationship
  - 3) Relationship must be one which is socially important (for the community)
  - 4) Even with 1-3 must show benefits of protecting relationship outweigh costs of potentially disclosing relevant and probative evidence to trier of fact
- M(A) v Ryan: SCC said mere possibility that communications might have to be divulged does not change fact that they are made inconfidence.

Self-incrimination
- Stemmed from excesses in pre-modern and early modern era of criminal law and procedure
  - Created rule against self-incrimination
  - Not a privilege anymore
- CL developed 2 basic rules against self-incrimination
  - 1) privilege against self-incrimination (seen in 5th amendment)
    - applies to any witness who may say something that is incriminating and could be used against them later proceedings
  - 2) Arose indirectly, at CL accused wasn’t able to testify at trial (19th century accused was made competent to testify)
    - Legislature stepped in and said accused could not be compelled to testify for prosecution
- Statutory Use Immunity: answers cannot be used against them in subsequent proceedings whether as admission or to contradict evidence. Quid pro-quo for losing their CL privilege to refuse to answer.
  - S.5 Canada Evidence Act did away with CL privilege against self-incrimination (1 above)
    - 5(1): No witness shall be excused from answering any question on the grounds that the answer to the question may tend to criminate him, or may tend to
establish his liability to a civil proceeding at the instance of the Crown or of any person.

- Don’t have privilege in its CL form in Canadian law instead

5(2): Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him… and if but for this Act… the witness would therefore have been excused from answering the question… the answer so given shall not be used or admissible in evidence against him in any… criminal proceeding against him except a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence. (similar provisions in provincial evidence acts)

- Witness compelled to answer but the evidence is protected from use in any future proceeding
  - Limitations generally witness must specifically invoke the protection (like pleading 5th) in order to obtain the benefit or immunity from the protection that would then be triggered and applied to any future proceeding
    - Because of this and that these provisions are only statutory they have almost been entirely superseded by S.13 of the Charter
  - Doesn’t require witness to invoke the protection

2. Self-incrimination protection of Witnesses (S.13 Charter)

Constitutional Use Immunity
- Scope
  - S.13: A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings except in a prosecution for perjury or the giving of contradictory evidence
    - "Incriminating": Only provides protection in criminal or quasi criminal regulatory prosecutions
      - Can’t use in administrative or civil proceeding (ex. disciplinary hearing)
      - Only protects against admission of previous testimony in criminal or quasi-criminal regulatory prosecutions
      - Decide whether it is incriminating at the time other side seeks to introduce statement
    - Any informal statement fall under other rules. S.13 only captures testimony taken in proceedings
    - "Other Proceedings": interpreted liberally – any previous formal legal proceeding, whether civil or criminal and includes earlier proceedings in the same matter like accused previous trial, pre-lim hearing, bail hearing, etc.
      - any testimony that forms the act reus of the offense. Means actual words that you speak form part of the elements of the offense
    - Exception for perjury or contradictory evidence
      - Rationale: don’t want to insulate offenders who have committed offence involving subversion of the truth seeking function of the legal process to benefit from the protection.
    - Derivative Physical Evidence: excluded under s.7 not s.13
      - Derivative physical evidence: but for the testimony would the evidence have been discovered.
- Burden initially on accused to show that evidence would not have been discovered without testimony. Effectively shifted to Crown after showing a plausible connection between testimony and discovery of evidence.
  - Crown prove on BoP that evidence would have been discovered even without testimony
  - S.13 only refers to testimony, doesn’t apply to derivative physical evidence.

  - **Operation:**
    1) **Does not testify at his criminal trial (later prosecution)**
      - If accused chooses not to testify then any previous testimony in any kind of legal proceeding is going to be admissible for any purpose
      - *Dubois v R:* having decided not to testify at current trial and introducing previous testimony would indirectly compel accused to testify at 2nd trial to explain differences.
      - Ex: “yes I killed my boss, but it was self-defence” – could have even been own prosecution, ends in mistrial or appeal and CA find for new trial – no admissible
    2) **Testifies and in earlier proceeding was not compellable witness**
      - Testimony not protected under s.13
      - Rationale: accused not compellable witness at either trial, voluntarily, would subvert truth seeking function of the trial for the trier of fact not to be made aware of contradictory testimony
      - any witness that’s not accused is essentially compellable
      - *R v Henry/R v Nedelcu:* not only may the trier of fact use the previous testimony (credibility and reliability of evidence) but can use previous testimony as direct evidence of guilt (hearsay but it’s admission and therefore admissible)
    3) **Testified, and in earlier proceeding was compellable witness**
      - Protected by s.13
      - Rationale: because compellable at first trial there is quid pro quo (state/court gives benefit of the use immunity)
      - **EXCEPTION:** testify at prior trial not that they did it, but that they don’t remember
        - If at own trial person distinctly recalls events then not protected by s.13
        - S.13 only protects incriminating testimony in earlier legal proceedings
        - *R v Nedelcu:* earlier testimony not incriminating per se (doesn’t prove any elements of offence)
          - Allows trier of fact to consider earlier testimony for assessing credibility of accused
          - **Difference** between **incriminating** and **merely impeaching** evidence: “Evidence given by the witness at the prior proceeding that the Crown could use at the subsequent proceeding, if it were permitted to do so, to prove guilt, i.e. to prove.. one of the essential elements of the offence”
            - Prior testimony is not inherently incriminating

4. Non-compellability of Accused Persons at their own trials
   - CL accused wasn’t competent to stand on their own behalf
   - **S.4(1) Canada Evidence Act:** makes accused competent but only for Defence, therefore at CL accused still **not compellable by Crown**
     - If voluntarily chooses to testify, then must answer all proper questions
   - **S.4(1) Provincial Evidence Act:** parties to action competent and persons on whose behalf the action is brought, instituted, opposed or defended are, except as otherwise provided in this
Act, **competent and compellable** to give evidence on behalf of themselves or of **any of the parties**.

- **Exception**: 4(3): provincial prosecution of regulatory offences: accused or D not compellable
- Civil proceedings compellable including D
  - If quasi-criminal or regulatory prosecution, then D is not compellable

**Section 11(C) of the Charter**
- **S.11(c) Charter**: any person charged with an offence has the right...
  - **Not to be compelled to be a witness** at proceedings against that person in respect of the offence
  - Interpreted **NOT to apply to corporations**. They are compellable
  - Charged with an offence: only applies to penal proceedings (including criminal, quasi-criminal, regulatory proceedings)
    - anything that has significant penal consequences.
    - May include professional discipline but only in rare cases, only if harsh punishment including imprisonment
  - **Requirements**:
    - Compelled to be a witness
    - In proceedings against that person
    - In respect of an offence (link between offence and proceeding in question)
      - Applies even to co-accused or co-d: one co-accused can’t compel another to testify at trial if jointly tried
  - May extend to related proceedings
    - Must have direct and substantive link between criminal proceeding and civil proceeding
    - Civil forfeiture hearing is one example
      - **Extremely limited**, many other proceedings that may generally be linked in some way to criminal proceedings courts have not applied it
        - Examples where not applied: separate trials of co-accused, civil cases (may be similar but not compellable), criminal inquiry into wrongdoing in a given field, court mostly unwilling to protect witnesses from testifying even if person may be accused in related criminal trial.

**Section 7 and Constitutional Exemptions from Testifying**
- Limited circumstances S.7 goes beyond S.11(c) for non-accused witness not to be compellable
  - **Generally provide use protection**
  - **Test**: If predominant purpose of compelling the witness is to obtain incriminating evidence
    - I.e. Backdoor attempt by state to evidence for future criminal proceedings and not some other legit purpose
  - **Test difficult to establish**
    - State can usually show legitimate purpose to compelling witnesses testimony that goes beyond seeking self-incriminating evidence
      - Ex: prosecution of Co-D, may desire witnesses testimony to help prove guilt. Extend use and derivative use immunity to witnesses testimony but not Crown from calling Co-accused.
- Vast majority of instances won't grant constitutional exemption from witnesses testifying in civil suite even if witness may become accused in separate criminal proceeding
  - In commission of inquiry general public purpose to determine issue of social policy or get behind systematic problem in society and state justified in compelling witness testimony to serve public purpose
    o Must be able to show bad faith to make person make incriminating statements that we can grant constitutional exemption
- *R v Bagri*: SCC dubbed the relevant protection a “constitutional exemption” from testimony. Right to this arises where “the predominant purpose” of calling a person at a hearing is “to obtain information or evidence for the prosecution of the witness.”

**Adverse Inferences from Failing to Testify**

- Failure to testify can't be sued as evidence of guilt
- *R v Noble*: caught trying to break into car, provides ID, police forget. But recalls that he looked like the person on ID. Judge looks at license and confirms.
  o Trial judge makes error holding that it provided him with reason to convict and innocent explanation could have been made by accused if he testified.
  o SCC: adverse interest violates 11(c) because indirectly forces someone to testify
- Can't use failure to testify to help Crown prove case BARD
- Silence used in limited ways:
  o Satisfied BARD, failure can persuade us of any concern that there may have been innocent explanation.
    - Don't need to speculate about innocent explanation because case already proven. Not used as weight, confirming BARD has been reached
  o Limited use of adverse inference
    - 1) Joint trial of more than 1 accused
      o 1 accused can cite failure to testify by other to raise reasonable doubt
        o Crown/Court can't use this to prove guilt
    - 2) Accused advances defense of alibi
      - Fails to disclose alibi within reasonable period before trial or fails to testify in support of alibi
        o Court can draw adverse inference here. Can infer that alibi likely false (not mandatory inference)
    - 3) Possible exception: Failure to testify on appeal
      - Prior to *Noble*: CA in deciding whether there was a legal error that was so insignificant that it had no substantial wrong of miscarriage of justice court could consider failure to testify.
        o Didn't make difference and evidence of this is failure to testify
      - Similar inference often made where D argued on appeal verdict was unreasonable, especially in jury cases, CA would point to fact that accused failed to testify and offer explanation of what happened and use this to determine if verdict reasonable.
  - Current status unknown

**Commenting on Failure to Testify**

- S.4(6) Canada Evidence Act
  o *Failure of the person charged… to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.*
  o 1) Applies only to jury trials (interpreted this way)
o 2) Does not apply to defense counsel
  ▪ D counsel free to point to jury that accused not obligated to testify and warn court against drawing adverse interest
o 3) Interpreted only to apply to adverse/negative comments about failure to testify
o 4) Does not preclude favourable comments
  ▪ R v Prokofiev: Court may warn jury not to draw adverse inference from failure to testify.
    • Novel development, traditionally interpreted to include favourable comments

Tactical Compulsion
- May feel no choice to testify because of strength of case against them.
- Not protected by 11(c) or 7 because it’s a choice
- Darach: claimed CC s.276.1 unconstitutional because it forces accused to present evidence if they want to raise complainants prior sexual experience in sexual offence case
  o Only compelled by tactical choice, could just not use 276.1 and he would be fine
- Dubois: tactical compulsion can have a bearing on rules
  o Compelled to testify earlier, basically HAD to answer that testimony, so s.13 engaged
- Hart: SCC developed probative prejudice rule related to admissions of particularly dangerous from of confession. Those scurried by manipulating suspects into joining fictitious criminal organizations staged by police.
  o In assessing prejudice under the “fictitious criminal organization” rule is that admitting the confession will invariably require the accused to forfeit his right not to testify to explain what he said and did.
    ▪ Essentially had to testify to meet burden

Pre-Trial Rights to Silence
- Accused entitled to choose whether to speak to persons in authority.
  o Adverse interest can’t be drawn against accused because of pre-trial right to silence
- Where accused speaks series of rules
  o Protect the choice by distinguishing true voluntariness
- Common Law
  o Voluntariness rule
    ▪ Crown must establish BARD that will of the accused to remain silent was not overborne by inducements, oppressive circs, lack of operating mind, or combination
    ▪ Confession not admissible if made under circumstances that raise a reasonable doubt as to voluntariness
    ▪ Can provide quid pro quo promises/threats
      • Rather things like depriving food, water, sleep, medical attention, denying access to counsel, or intimidating/prolonged questioning
      • May also not admit confession if trickery that shocks community
- Fictitious Criminal Organizations (Mr. Big)
  o Presumptively inadmissible
  o Crown must establish on BoP that threshold reliability of statement in circumstances outweighs prejudicial effects of admitting
    ▪ (reliability) Manner circs obtained, vs Proof of bad character, tactical inevitability to answer
- Section 7
  o Supplements CL
Undercover/Detained Statements: Exclusion for statements surreptitiously and actively elicited from detained suspect by state agents
- Deprives ability to make active choice

Statutorily Compelled Statement: Excluded in proceedings that incriminate the accused of some statements that they were forced to make by statute
- Not all though: look for:
  - 1) Existence of real coercion in making statement
  - 2) Existence of an adversarial relationship at the time the statement was made
  - 3) Any risk that statement will be unreliable
  - 4) Risk that the statutory authority to compel statements may lead to abuse of power
- Evaluate together to decide whether admission of statement would compromise purpose against self-incrimination

Derivative Evidence: Exclusion of evidence found from involuntary confession (maybe, not clearly decided yet)

Remedial Exclusion for statements for the breach of other Charter rights
- Like right to counsel, arbitrary detention
- S.24(2) may exclude even if voluntary

Improperly Obtained Evidence

1. The Evolution of Inadmissibility of Some Improperly Obtained Evidence
   - CL: Fact that evidence obtained on some type of impropriety or illegality on part of police not relevant to question of admissibility
     - Apart from CL confessions rule courts not concerned about the way evidence was obtained
       - Wrongdoing addressed outside of the trial in civil suit, professional discipline, or in rare cases criminal prosecutions against the police
     - Gradually some CL courts liberalized (Not Canada)
       - Some discretion realized to permit evidence to be excluded on how it was obtained
       - US led to 14th amendment where most evidence obtained through violation of one rights was interpreted that limited inclusion.
       - Canada resisted this until Charter
         - *R v Wray:* abusive involuntary confession that revealed location to physical evidence (rifle) violated confession rule but physical evidence wasn’t excluded because no power of court to exclude illegally obtained evidence.

2. The Current Law Introduced (Section 24)

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.
   - General remedy in charter

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 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.
3. The Application for Exclusion

- Must prove on BoP that rights infringed by a state agent

Standing
- Does person requesting exclusion have legal standing to make that claim?
  - 1. Application of Charter to State Agent
    - s.32 issue as well as state agency issue, wont look at this in depth
      - must show state agent to whom Charter applies actually violated the charter
    - 2. Claimants own right
      - Accused in crime case generally, they must show on BoP that their Charter right violated, not of third party

"Court of Competent Jurisdiction"
- Is one that has jurisdiction over the person and the subject matter and has, under the criminal or penal law, jurisdiction to grant the remedy
  - For unconstitutionally obtained evidence, this will be the trial court
    - If not available at trial court then can apply to superior court for remedy
  - Trial Courts: provincial or superior courts
    - Not preliminary inquiry, not other pre-trial hearings (bail, other pre-trial motions)
    - Regulatory: will apply and will be in what is court of competent jurisdiction
    - Extradition Court included
    - Administrative tribunal dependent on the circumstances

5. Requirement 1: “Obtained in a Manner”
- Sufficiently strong connection between violation and states acquisition or obtaining of evidence
- Generous, flexible approach taken in this step.
  - Court have been reluctant to reject applications on this requirement
- Relevant Connections:
  - Causal Connection
    - But for violation would evidence been obtained or would evidentiary significance been realize?
    - Don’t always require connection and just because one found doesn’t end the matter.
      - Court have not insisted on showing causal connection
        - Ex: Have considerable grounds to obtain warrant to search residence but want more, start searching exterior, go to judge say reasonable grounds to obtain warrant.
          - If police would have reasonable grounds without unlawful search then wouldn’t be able to establish causal connection.
      - Police may feel free to search illegally
    - Mere fact of connection not always sufficient
      - Look at strength of connection and ask whether between breach and acquisition of evidence is too remote (violation may be only background factor)
      - If causal connection weak, tenuous or remote then may find it’s not sufficient to established
        - Ex: finding witness during illegal search,
        - Enough: gun discovered as a result of confession after right to counsel violated
Temporal Connection
- Sufficient closeness between breach and evidence obtained
- Generally means violation precedes finding of evidence
  - Court hasn’t said can’t have it other way around
    - May be a sufficient connection if we can say violation of Charter and acquisition occurred in context of the same transaction or series of related transactions
      - Contextual relation of violation and obtaining of evidence. Happens in many cases
- All in all assessment of causal connection, temporal connection, contextual connection. Qualitative assessment to determine if there is sufficient connection

6. Requirement 2: The Effect of Admission on the Repute of the Administration of Justice
- Heart of the analysis: generally ignore obtained in a manner presuming it is satisfied
- Process has been simplified: Stillman test and 2 box approach overruled

R v Grant
- 3 factors to look at in overall assessment
  - 1) Seriousness of the violation
    - Assess degree of culpability we assign to state actors
      - Inadvertent or trivial vs deliberate continuum
      - Good faith
        - Special definition: not absence of malice or intent to commit wrong but inadvertent mistake and reasonable mistake. Careless or negligent is NOT good faith. At best can say negligence or carelessness is absence of bad faith
        - Factors in assessing culpability or good faith
          - Reasonable reliance on legal or policy standard that gave them permission
            - Ex: law not developed in that area
          - Isolated or part of pattern of misconduct
            - If multiple Charter violations and systematic then case for exclusion stronger
          - Exigent circumstances: if don’t act now evidence destroyed or public safety periled
  - 2) Impact on the Accused
    - What Charter interests violated?
      - Ex: s.9 arbitrary detention protects liberty interests: degree to which liberty restrict
      - Ex: S.8 privacy: extent to which privacy invaded, have areas where we have strong protection and thus more impact
      - Ex: S.10: right against self-incrimination: some conduct by police will have greater effect than other type
    - Discoverability
      - Same as causal connection in “causal connection”
      - Even if it has a negative effect it will be mitigated if evidence discovered without violation
        - Not determinative but definitely an aspect that weighs in favour of admission
  - 3) Adjudication on the Merits
- **Reliability**
  - Not the case if evidence not reliable (no public interest in gathering unreliable information) – applies to statements obtained through some sort of constitutional violation
    - As with voluntary confession rule, if we have violation of s.10 of Charter and self-incriminating statement of confession from accused then in many circumstances may question reliability of statement
    - Physical evidence almost always reliable (not integrity or way of questioning reliability at trial) just asking whether violation compromised integrity of evidence.
- **Importance** of the Evidence
  - More important to Crown’s case the more we want to admit
- **Seriousness** of the Offence
  - Prior to *Stillman* more serious offense accused charged with greater societies interests in having adjudication on the merits
  - **Grant:** seriousness of the offence can cut both ways
    - Just as more interests of society to admit reliable evidence we also have societies interest to protect the right of accused.
      - Now generally a neutral factor
  - Keep in mind, even in cases where reliable, serious offence, and evidence perhaps critical to case courts still often exclude where serious violation or profound effect on Charter protected rights of accused or both. No trumping rule. Consider this factor with all others.
- **Bodily Samples:** depends on extent to which privacy, bodily integrity, and human dignity are compromised given nature of the samples and the manner they were collected
- **Non-Bodily Physical Evidence:** turns on manner of discovery and degree to which manner of discovery undermines the *Charter* protected privacy interests of the accused
- **Derivative Evidence:** Degree is usually significant unless:
  - Breach had no real impact on Charter protected interest of the accused to make an informed choice about whether to speak to authorities
  - Can be said that the statement would have been made notwithstanding the Charter breach
  - Can be concluded that there is a likelihood that the derivative evidence would have been discovered even if there was no *Charter* violation.
    - Significance of intrusion varies with the degree of likelihood that discovery would have occurred in any event.

**Exclusion Apart from 24(2)**
- Law in this area not clear, not clear when exclusion outside 24(2): power to exclude in civil cases especially ambiguous

**7. Excluding Evidence under S.24(1)**
- “obtained in a manner” difficult to achieve at time or can have a non-state actor in public law case
  - 1) Can use 24(1) when evidence not obtained under breach but which relate to that evidence (abuse of process by crown, crown breaches *Charter* by failure to disclose) – standard is high
  - 2) Exclusion may occur under 24(1) where receipt of evidence by court would breach Charter (admission of statutorily compelled statements would compromise self-incrimination principles).
- Because state is a party the *Charter* can still be used
  o Not clear which source, cases not consistent
    ▪ Some cases said if we can find that admission of evidence at trial would violate Charter right then can use 24(1)
      ▪ Aka find source of violation and not obtaining of evidence (rather the admission at trial
      ▪ Other cases say just define exclusion under substantive provisions (like 7 or 11d)
      ▪ Either way, results same, different methods of achieving it.

**When can court use power to exclude evidence that was not “obtained in a manner”**
- Difficult to generalize, no test. Best was is through examples:
  o **Failure to Disclose**
    ▪ *Bjelland*: In appropriate cases court can remedy exclusion where violation of Crowns disclosure obligations under S.7
    ▪ Not breached from acquiring but from failing to disclose
    ▪ Possible but difficult to obtain remedy under S24(1)
  o **Derivative Use Immunity under S.7**
    ▪ S.7 right against self-incrimination
    ▪ S.13 protects use of prior testimony, physical evidence obtained from testimony not under s.13
      ▪ S.7 used as a bar of admission of testimony that would violate s.7
  o Courts can use discretion to exclude evidence in violation of Charter even though not obtained in a manner that violated any Charter right
  o In addition to Charter Doctrines Courts have held s.7 or 11d in combination with S24(1) to exclude evidence that **would result in unfair trial**
    ▪ Goes beyond CL discretion to exclude where PE > PV
      ▪ In this case concerned about conduct that resulted in state acquisition of evidence for use at trial.
        o Misconduct more than reliability
      ▪ Ex: Canadian misconduct outside Canada, evidence wasn’t obtained in violation. Used torture. Would create unfair trial. Even if you could corroborate with physical evidence wouldn’t admit.
  o **Private Actor**: Can use same principle to exclude (like private citizen or security guard)
  o Evidence obtained by state actors where *Charter (like right to counsel) right has been suspended.*
    ▪ Normally Charter right would apply but because of circs that application is overridden or superseded by s.1 of *Charter.*
    ▪ This happens when police administer roadside sobriety tests. Detained so have 10b right to counsel but courts said s.1 suspends it
      ▪ While police can use information gleaned from these sobriety tests to justify use of other search of surveillance powers such as breathalyser test that the actual evidence from sobriety testing is not admissible to prove guilt.
        o Can override provision but results can only be used to support further investigative methods and can’t be directly used against you.
        o S.7/11d are used to keep it out of court in perhaps with conjunction with 24(1)
8. Excluding Unfairly Obtained Evidence in the Absence of a Charter Violation

- Recognized in Harrer that improperly obtained evidence in absence of Charter breach
  - Harrer: Statements made to US authorities that if they had been Canadian would have breached. Court said “non-24(2) unfair trial exclusion made out.
  - Rely on following factors
    - 1) whether manner of obtaining the evidence renders it unreliable
    - 2) whether the evidence, by its nature, could be misleading
    - 3) seriousness of the misconduct
    - 4) whether, as a result of the unfair conduct, the accused is compelled to incriminate himself

9. Improperly Obtained Evidence in Civil Cases

- In some cases even in private lawsuits state may have been involved in obtaining evidence that one of the parties wishes to use.
  - In theory, so long as court of competent jurisdiction we could invoke S.24(1) or (2) to have it excluded (very few cases on this)
- If state not involved in obtaining evidence or not party to trial trying to use evidence then can’t use Charter
  - Must rely on CL
  - Traditionally CL took rigid stance and almost never permit exclusion on grounds it was obtained improperly, unfairly, or illegally. However seeing signs from Courts that there is discretion in CL that is informed by Charter Values.
    - Courts willing to consider excluding improperly obtained evidence in purely civil cases.
    - Ex: one party illegally recorded information that shows wrongful courts have said may be willing to exclude on this basis.

Methods of Presenting Evidence 1

- Court entitled to every person’s evidence provided the person is competent
- Two competencies
  - 1) Capacity to give evidence
    - ability to observe, recollect, and communicate the evidence
  - 2) Responsibility
    - Understanding of the importance of telling the truth in court
    - Modified recently: ability to promise of give assurance that testimony truthful

2. Competency Generally

- CL was suspicious of witness ability to give testimony
  - Developed rules that made certain types of witnesses incompetent to testify
    - Those who had direct interest in proceedings (like accused in criminal case) or spouse of accused
    - Anyone convicted of felony
    - Infancy (young people), with some exceptions
    - Insanity – mentally incompetent
- Atheists & “no-oath’ers” (not willing to give oath)
  - Legislatures have eliminated most of these bars

**Adult Witnesses**

- **Alberta Evidence Act S.17**
  - 17(1) If, in an action or on an occasion when an oath is required or permitted, a person called as a witness, or required or desiring to give evidence or to make an affidavit or deposition, objects to taking an oath or is objected to as incompetent to take an oath, if the presiding judge or the person qualified to take affidavits or depositions is satisfied that the witness or deponent objects to being sworn
    - (a) from conscientious scruples,
    - (b) on the ground of the religious belief of the witness or deponent, or
    - (c) on the ground that the taking of an oath would have no binding effect on the conscience of the witness or deponent,
    - the witness or deponent may **make an affirmation and declaration** instead of taking an oath.
  - (2) The affirmation and declaration of that person is of the same force and effect as if that person had taken an oath in the usual form.
  - (3) When the evidence is in the form of an affidavit or written deposition, the person before whom it is taken shall certify that the deponent satisfied the person that the deponent was a person entitled to affirm.

- CL largely preserved – based on ability of adult witness to understand an oath, goes beyond ordinary promise in every day life.
  - Special obligation to tell truth in court

- **Canada Evidence Act S.16**
  - Governs competence of witnesses 14+ years old
  - (1) If a proposed witness is a person of 14 years or older whose mental capacity is challenged, the court shall… conduct an inquiry to determine
    - (a) whether the person **understands** the nature of an oath or a solemn affirmation; and
    - (b) Whether the person is able to **communicate** the evidence
  - **Presumption of capacity for adult witnesses,**
    - burden on party challenging the capacity to establish a lack of capacity
    - Know that if challenge to capacity step 1) gauge where they understand, step 2) whether able to communicate the evidence.
      - Can testify even without both, para 2 says that if we show don’t understanding of nature of oath (but promise to tell the truth) then we can testify assuming we can communicate the evidence
  - (2) A person referred to in (1) who **understands** the nature of an oath or solemn affirmation and is able to communicate the evidence shall testify under oath or solemn declaration
  - (3) if a person referred to in (1) who **does not understand** the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on **promising to tell the truth**
    - If we don’t understand oath then can still testify if we can communicate the evidence then allowed to testify on promise to tell truth
  - (4) A person referred to in (1) who **neither** understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall **not** testify.
(5) A party who challenges the mental capacity of a proposed witness of 14 years or older has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

(3.1) – recent amendment from 2015: A person referred to in subsection (3) shall not be asked any question regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court

- **Empirical evidence has demonstrated that an ability to convey an abstract understanding of what an oath or a promise really means has little if anything to do with the actual accuracy, truthfulness, or reliability of the witnesses evidence.**
  - Even if some issue of mental capacity that makes it difficult to convey the abstract idea of a promise if that person is able to promise to tell the truth and communicate the evidence then that’s enough. Any other issues of capacity will go to weight of evidence.

### Children Witnesses

- **Canada Evidence Act S.16**
  - 16.1(1) amended in 2006 and new provision inserted: A person under 14 years of age is presumed to have capacity to testify
  - 16.1(2) A proposed witness under 14 shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation
  - 16.1(3): The evidence of a proposed witness under 14 years of age shall be received if they are able to understand and respond to questions.
    - So ability to communicate is all that is required
  - 16.1(4) Burden lies with the party challenging capacity to show there is an issue before the court will undertake an examination of the question
  - 16(5): If the court is satisfied that there is an issue as to the capacity of a proposed witness under 14 to understand and respond to questions, it shall conduct an inquiry to determine whether they are able to understand and respond to questions.
  - 16(6): The court shall, before permitting a proposed witness under 14 to evidence, require them to promise to tell the truth
  - 16(7): can’t ask abstract questions about the nature of the promise to tell the truth
    - **Same idea based on empirical evidence.**
      - Just need to communicate evidence and can say they promise to tell the truth.
  - 16(8): fact that there’s no oath or affirmation but merely a promise does not affect (all else equal) the weight or reliability of the evidence.

- **Lingering question:** whether still require some demonstration for child witnesses of an ability to observe and recollect. Statutory provision only requires ability to communicate
  - **Text:** lower court decisions: ability to communicate include inherently some capacity to observe and recollect.

- **Alberta Evidence Act S.19**
  - Somewhat outdated
    - Reflects more of CL approach
19(1): reference to CL concept of child of *tender years* (indeterminate concept that doesn’t rely on specific age cut off)

- Party who challenges capacity who makes argument that you have a child of tender years (may vary) and if allegation that child doesn’t understand nature of an oath then we can challenge capacity of a child to give evidence under oath.
  - BUT even if child doesn’t understand oath, if we can show they have *sufficient intelligence* and understands duty to *tell the truth* then that child can testify
    - Because unworn then following CL then caveat
      - 19(2): No case shall be decided on the evidence unless the evidence is corroborated by other Evidence
      - *Canada Evidence Act 16.1(8)* makes it clear there is no req for corroboration, that’s a substantial difference

3. The Competency and Compellability of Spouses

- **NOT AN ISSUE** anymore.
- Remember spousal privilege!
- CL not competent for the Crown
  - Because they had interest in matter they were not competent or compellable even for the defence
- More than 100 years ago made competent for defence, legislation changes this further
- *Canada Evidence Act S.4*
  - S.4(1): made both accused as well as spouse of accused competent witness for the defence
  - Used to be many exceptions to CL rule that was preserved in *Canada Evidence Act* that spouses were not competent for the Crown.
    - 2015 Amendment Simplification
      - S.4(2): Abolished rule of spousal incompetence and non-compellability for the prosecution.
        - Spouse is both competent and compellable for Crown despite being married to accused.
      - Does not apply to common-law relationship or where couple, legally married, are irreconcilably separated
- *Alberta Evidence Act S.4*
  - S.4(2): *spouses and adult interdependent partners* of accused are competent and compellable to give evidence on behalf of any of the parties.

4. Examination in Chief

- Most evidence through oral testimony of witnesses. Adduced through questioning
- Trying to: 1) bring out the facts, 2) make your witness believable
- Only answer can constitute evidence, not questions itself.
  - Would include context of answer “yes, I have been an officer for 12 years” even if answer just yes.
- **Direct: Not generally permitted to ask leading questions**
  - Exceptions to no leading questions:
    - Introductory/undisputed matters: Matter is peripheral and uncontested (ie introducing the witness)
- **Identification**: Lawyer is asking witness to ID something or someone
- **Comprehension**: Witness is a child or mentally disabled, judge gives leave to ask leading questions
- **Complex Issues**: Matter is complex or technical. Like expert witness who is using technical jargon or complex issues.
- **Memory**: Can’t remember the issue
  - Must be neutral and open ended. Cannot suggest answer or ask questions that presume facts that have not been testified about

- **Cross**: Almost always leading questions
- **Whether a question is leading is not binary**
  - “you checked you mirror before changing lanes, didn’t you?” – very leading, not permitted usually
  - “did you check you mirror?” – still significantly leading
  - “what precaution, if any, did you take to ensure it was safe to change lanes?” – may be acceptable but still fairly leading, suggesting probably should have taken precautions
  - “what happened next?” – not leading, just a prompt to tell story.

- If you ask leading questions during the examination:
  - The other side can object, interrupting your examination
  - If more severe, the jury can be directed to give answers to leading questions less weight
  - In extreme cases, a new trial can be ordered
  - If you ask a leading question that is objected to you just rephrase the question (although witness will likely just repeat your original question in their answer)

### 5. Refreshing Memory

- Treated differently before trial than during trial
  - **General Rule: Before**
    - Refresh memory by any method we can think of
    - Leading questions, not in court
    - Prior statements
    - Documentation, etc
    - **Trochym: post-hypnosis** testimony can generate false memories.
      - Not scientifically established as a way to adduce true memories
      - If memory based, even in part, on hypnosis then not admissible
  - **During Trial – Two Doctrines**
    - Show them the document and let them read it, not shown to court
    - 1) **Past Recollection Recorded**
      - method of bringing in evidence form a witness that the witness currently has no recollection of.
      - No refreshing so they can testify about memory they had at time of giving testimony, INSTEAD bring a past memory as evidence
      - **Requirements** (dangers about reliability)
        - 1) **Necessity**: show there really isn’t a present memory
        - 2) **Reliability**:
          - recorded (original if available)
          - Fresh and vivid memory at the time it was recorded
          - Present confirmation (can at trial confirm it was accurate at the time)
          - Where possible original record should be used
    - How will it be [incorporated into trial](#) (controversy around this)
o Hearsay exception? Probably because there is no current memory so not contemporary affirmation of evidence when it was actually produced
o Form of question/exhibit? Courts use different procedures as to whether evidence gets admitted as an exhibit if it’s in documentary form (like transcript or notes or audio/visual recording) OR whether witness reads out testimony and having that oral evidence admitted in court
o However, will be admitted as evidence if it meets requirements

2) Present Recollection Revived
• Refreshing to testify directly from memory
  o May use document/transcript/recording as tool for refreshing BUT testimony comes from witness and their answers to questions in court
• No real restrictions
  o Sometimes prohibit this evidence if serious question about reliability of recording, timelines of recording
  o Testimony becomes evidence, not the record
  o Refreshing memory with unconstitutionally obtained evidence
    ▪ R v Fliss: obiter that officer would have been entitled to refresh memory prior to trial using that transcript (troubling decision).

6. Cross-Examination
   - Any party who is adverse in interest to the person who called the witness can cross-examine that witness

1) Methods of questioning
   - Leading questions permitted, preferred.
     o Exception: If apparent opposing witness bias to other side (cross-examiner is easily getting favourable testimony), friendly to other party, then leading questions not permitted.
       ▪ Must conduct in chief.
   - Rationale:
     o attempt to illicit favourable testimony
     o impeach witness credibility

2) Cross-examination on Credibility
   - Witness admits to some frailties of the evidence. May not prove definitively innocent but can limit the effectiveness of the evidence
   - Testimonial factors
     o Narrative: ability to tell story reliably and accurately
     o Sincerity: witness’s motives, biases, or conflict of interests or reason that witness may not be telling the truth
     o Memory: ability to recall
     o Perception: capacity to observe events in question and relay those observations
   - Impeaching Credibility
     o Bias: conflict/bias/corruption of witness
     o Previous Inconsistent statements
       ▪ To impeach credibility, not talking about hearsay/truth/KGB exception
       ▪ Watch on exams: combine hearsay issue with credibility issue (separate boxes)
First deal with credibility (Law more flexible in allowing PIS for credibility)
Second opposing party can make application to exclude under principled exception
Third (further down) is impeachment of one’s own witness for PIS
  - More stringent, implicitly vouch credibility for all your witnesses
    - Capacity to perceive
      - Any problems with witnesses ability to observe situation
      - “were you wearing glasses?”
    - Contrary Evidence: see how they respond
    - Contrary to human experience: testimony not inherently plausible or believable

3) Limitations on Cross-examination
   - Irrelevant, prolix or abusive
     - If badgering/abusive/protracted then trial judge has discretion to stop that from continuing
   - Good faith basis
     - If contrary evidence put to witness in cross, must have good faith basis that the alternative or other evidence may actually be true.
     - Don’t have to adduce that it’s true but must genuinely believe it
     - You can’t knowingly assert a fact as true where it cannot reasonably be supported by the evidence – both in law and according to the Law Society Code of Conduct – no misleading the court – Rule 4.01(2)
   - Accused as witness: More specific and restrictive limits that only apply to accused as witness
     - Veracity of Crown Witnesses: can’t ask about accuracy of Crown witness (would ask accused to speculate which is prejudicial).
     - Just because they can’t offer explanation as to why Crown witness is lying doesn’t mean that those witnesses are telling the truth
     - Discreditable Conduct: Credibility of accused, simply apply character rules to cross of accused
     - Pre-trial Silence: failure to advance defence prior to trial, can’t question accused about his or her failure to speak to the police or to advance defence prior to trial.

4) Failure to Cross-examine: Rule from Brown v Dunn
   - If you intend to impeach witness you are bound, whilst he is in the box, to give them an opportunity to make an explanation
     - To preserve fairness and prevent unfair surprise.
     - If going to use extrinsic evidence later to impeach witness’s testimony (opposing) or argue to court that witness testimony should not be believed for a particular reason then we have to ensure that witness has opportunity to respond to evidence
     - Doesn’t require formal putting to of every contradiction or argument that you may later intend to make but you have to ensure that in practical sense a witness has an opportunity to respond.
   - If rule not respected: remedies
     - 1) Recall witness and give opportunity to explain
     - 2) instruction & weight from judge
     - 3) In extreme cirsc may have to disregard that evidence all together

5) Collateral Facts Rule
   - Can’t contradict opponent’s testimony on collateral testimony or collateral matters
     - Answer on collateral matters is final
   - Rationale: Don’t want to bog down court and confuse trier of fact by delving into issues that have little bearing on issues in dispute at trial
   - Applies to proof, not questioning
Proof that witness is not telling the truth, doesn’t restrict scope of cross itself
- Free to put to witness they’re not telling the truth, if evidence contradicts testimony (just needs good faith belief)
  - If witness sticks to testimony and denies contradiction, then if issue collateral can’t attempt to prove witness is not telling the truth by advancing intrinsic evidence.
- Ex: Crossing witness about robber, suggests she was drinking heavily, can do so. Then wants to call witness to testify to this, if collateral they can’t.

Deciding if something is collateral
- No consensus 3 approaches
- 1) Wigmore:
  - Could a fact, as to which error is predicted, have been shown in evidence for any purpose independently of the contradiction?
    - Aka: if the only basis for presenting the evidence is that it contradicts the opponent’s witness, it is inadmissible, but if it assists the trier of fact in some other way, it is admissible.
    - Advance any evidence to contradict witness that goes to either substantive issue in the case or the witness’s credibility
  - Liberal approach
- 2) Phipson
  - Substantive issue only, certain exceptions for credibility
    - Categorical exceptions for credibility: where benefits outweigh the costs
      - Evidence that witness has bias, has conflict of interest, or corrupt
      - Previous convictions (governed by statute as seen bellow)
      - Expert opinion on reliability of witness: go to issue of intellectual capacity or mental illness or condition
- 3) Paciocco & Stuesser (textbook authors)
  - Balancing (costs vs benefits)
    - Look at common sense and ask if underlying question is worth the courts time to advance the evidence

6) Prior Convictions to Impeach Witness Credibility (Corbett Applications)
- Alberta Evidence Act 24(1).
  - A witness may be asked whether the witness has been convicted of a crime and, on being so asked, if the witness either denies the fact or refuses to answer, the conviction may be proved.
- Canada Evidence Act S.12
  - 12(1): A witness may be questioned as to whether the witness has been convicted of any offence…
    - (1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.
      - Proof of previous convictions
- Accused vs Non-Accused
  - S.12 Applies to both but interpreted differently between two types
- Non- Accused
  - Always be able to refer to and adduce evidence of prior convictions for credibility. Only not so in extreme circes.
- Accused (Corbett Applications)
  - “convictions” interpreted narrowly, doesn’t include any discharges or disciplinary findings.
    - MUST be criminal or regulatory convictions.
No details of the crime, mere fact of conviction only
- Good practice for Defense to raise during Direct (reduce shock/surprise)
- Limiting instructions from trial judge to any jury case to ensure prior conviction only used for credibility and **not for bad character purposes**

**R Corbett: Corbett Applications**
- Interpreted s.12 to allow the trial judge to exercise discretion to exclude prior convictions.
- Done on conviction by conviction basis (look at them individually)
- **Presumption of admissibility** (controversial, lots of empirical evidence that prior conviction evidence is very prejudicial)
  - Real danger of forbidden inference (even though give instruction) human beings likely to make it.
- **Prejudice v probative value**
  - Probative value: Shown a willingness to disobey law is inherently less credible witness
  - Huge prejudice (potential for forbidden inference)
  - 4 factors in using discretion: Look at nature of offence
    - **1) Nature of previous conviction**
      - More serious (violence, vulnerable victims, frauds with lots of $$$) then more prejudice and exclude.
      - If offence speaks more directly to capacity for truthfulness and willingness to follow law and obey court or if in contrast that speaks to dishonesty or unwillingness to tell truth then more likely to admit it.
      - If violent offense (even if very serious) not good for inclusion because it doesn’t speak to honesty or credibility
    - **2) Similarity of offence,**
      - Works in opposite manner than it works in similar facts evidence (there more similar more likely to admit)
      - Here opposite: more similar the offense the more prejudicial, more likely trier of fact to infer they must have committed this crime (this is just about credibility, not about truth of whether they actually committed the crime)
    - **3) Remoteness**: further back less we’ll think it has relevance to an accused present ability to testify truthfully.
    - **4) Fairness** to crown (credibility of Crown witnesses), can always cross Crown witness on crim record, generally if this happens then Crown can introduce accused’s record
      - If Defence has attacked crown witnesses on basis of crim records and highlighted that to impeach their credibility then court will OFTEN find considerations of fairness will allow Crown to put accused’s own prior convictions to accused in order to impeach credibility

**7) Prior Inconsistent Statements**
- Always probative regarding credibility
- **Credibility vs Truth**
  - Not talking about principled exception under hearsay approach of PIS for their truth, KGB rule.
  - Only about use of PIS in cross for impeaching credibility
- **Parties vs Non-parties**
Accused: Party witness then PIS is an admission and therefore auto categorical exception to hearsay prohibition. PIS goes in for truth and credibility.

- However crim case, rule against crown splitting its case will generally prevent Crown from introducing a PIS of accused for truth during cross
- In other words, if Crown wishes to adduce statement of the accused for its truth it’s going to have to do that in its case in chief.
  - If introducing PIS in cross-examination against accused
    - Only admissible for purposes of impeaching credibility.

- Also, if admission of accused has been excluded under 24(2) of Charter or voluntary confessions rule then it can’t be used either for truth or to impugn credibility
- Procedure for admitting PIS is set out in statute, and we use different rule for oral and written statements.

Canada Evidence Act S.10 & S.11

- S.10: Cross examination as to previous statements
  - 10(1): On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness’ attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing/tap/other medium for inspection, thereupon make such use of it for the purpose of trial as the judge thinks fit.

- S11: Cross-examination as to previous oral statements
  - 22(1) A witness may be cross-examined with regard to previous statements made by the witness in writing, or reduced to writing, and relative to the matter in question, without the writing being shown to the witness
  - (2) If it is intended to contradict the witness by the writing, the witness’s attention shall, before the contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of contradicting the witness
  - (3) The judge or other person presiding may, at any time during the trial proceeding, require the production of the writing for the judge’s or other presiding person’s inspection, and may on production make any use of the writing for the purposes of the trial or proceedings that the judge or other presiding person thinks fit.

Alberta Evidence Act S.22 & S.23

- S.22: Cross-examination
  - 22(1) A witness may be cross-examined with regard to previous statements made by the witness in writing, or reduced to writing, and relative to the matter in question, without the writing being shown to the witness
  - (2) If it is intended to contradict the witness by the writing, the witness’s attention shall, before the contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of contradicting the witness
  - (3) The judge or other person presiding may, at any time during the trial proceeding, require the production of the writing for the judge’s or other presiding person’s inspection, and may on production make any use of the writing for the purposes of the trial or proceedings that the judge or other presiding person thinks fit.

- S.23: Proof of contradictory Statement
  - 23(1): If a witness on cross-examination with regard to a former statement made by the witness about the matter in question and inconsistent with the witness’s present testimony does not distinctly admit that the witness made the statement,
proof may, subject to (2), be given that the witness did in fact make that statement

- (2) Before that proof is given, those circumstances of the alleged statement that are sufficient to designate the particular occasion shall be mentioned to the witness, and the witness shall be asked whether the witness did make the statement

  o So for recorded statements, we need the statement (s.10); for oral statements, we need a witness (s.11)
  o Procedure similar for both
    - 1) Confirm witnesses present testimony
      - Be clear about what they’re saying
    - 2) read out PIS
      - “there you said”
      - Contradiction is identified. The confrontation involves either introducing the recorded material, or describing the circumstances under which the oral statement was made – sufficient to identify the particular occasion – time, place, other people involved
        o Under s.10 (recorded material), only the part that contradicts the witness needs to be presented

- Two possibilities
  - 1) Witness adopts PIS
    - “now I remember”
    - No longer PIS, becomes present testimony
  - 2) Stick with current testimony
    - “mistaken before”
    - Clearly done a good job of impeaching credibility

8) Incomplete Cross-examination
- Dies, can’t continue, becomes unresponsive (fails to provide meaningful answers)
- Discretion for trial judge
  o Extreme cases: direction to disregard evidence all together
    - Because fundamental unfairness in not having opportunity to fully cross take that witnesses evidence from examination in chief and disregard it
  o Other options: in deciding which to use look at 3 factors
    - 1) Reasons why cross could not be completed?
      - Fault of witness? Fault of party that called witness? Fault of cross-examiner?
    - 2) Impact of failure to complete cross
      - Sense of whether witness would have been vulnerable to attack if cross continued
      - How important is evidence to case? Is there corroborating evidence? How close to completing cross?
    - 3) Mitigating remedies available
      - Maybe responsive in future (like child needing time to gather themselves)
      - Allow chief examination to be considered but give direction to discount the evidence or give it less weight

7. Real Evidence
- Two types of real evidence we may want to adduce at trial
  o 1) Original Physical Evidence (such as murder weapon), 2) Demonstrative Evidence (aids used to help witnesses better illustrate or explain their evidence)

**1) Original Physical Evidence**
- Ex: bloody glove
- Generally entered as exhibit (like an analysis done on a type of clothing
- Trier of fact can examine, listen to testimony about them and draw conclusions from it
- Must ensure properly authenticated
  o Generally won't be admissible unless authenticated by witness
  o Witness must establish continuity
    ▪ Ex: bloody glove, police offer or some other person will have to testify they found it, was continuously maintained throughout.
  o Authentication is a threshold
    ▪ No need to prove onerous standard that it’s 100% accurate evidence. Trier of fact does this, just have to be reasonably confident
- Rare cases prejudicial value of evidence being presented may itself be considered unduly prejudicial
  o Ex: limited circs if there’s graphic crime scene, if there’s way of presenting evidence that’s not as inflammatory that will be preferred

- **Photographs and Videotapes**
  o Requirements
    ▪ 1) **Accuracy**
      • Hasn't been altered or modified
    ▪ 2) **Fairness**
      • Presents the events in a fair fashion
    ▪ 3) **Verification**
      • Verify that the photo or video was taken in proper fashion
  o Anyone at the scene or after scene can confirm so long as authenticity can be established. Need not be the photographer
  o *R v Penney*: requirements not met. Video covertly taken by animal rights group of seal hunt.
    ▪ Was put forward that there was cruelty, were indications it had been edited.
  o Will use video for ID purposes (of accused)
    ▪ Willing to accept this as original evidence of ID
    ▪ *R v Nickolovski*: SCC said he himself viewed tape and could attest that it was of excellent quality and great clarity. Accused depicted for a long time, close up of accused
      ▪ When court is able to make clear ID we don’t need evidence to be introduced by witness
        o Can stand on its own but **still needs to be authenticated**

- **Documentary Evidence**
  o **Needs to be authenticated**: typically by person who wrote or saw it being signed, or person familiar with writer's handwriting.
    ▪ Can be an expert testifying
  o Provisions in *Evidence Acts* for routine admission of public records
  o **Best Evidence Rule** (used much less than it was at CL)
    ▪ Want to have original version (not copy): only if that original version is available and party in possession could have produced it but failed to do so.
    ▪ Exceptions for certain documents under *Evidence Acts*
  o **Computer-Generated Evidence**
Hearsay concerns if created by human beings and typically use business records exceptions (in Hearsay section, either CL or statute)

Don’t need hearsay exception for records purely produced by computer process or algorithm
- Ex: service provider call records
- Computers may also create models (sort of demonstrative aids that assists witness in explaining factual matter to trier of fact)
  - Have to comply with rules about demonstrative real evidence (expert must attest to accuracy of model and show it will aid trier of fact.)
  - Can be challenged by rules under using expert scientific evidence (Mohan Reqs)

2) Demonstrative Evidence (not really real evidence)
- Not actually evidence, not entered as exhibit
  - Testimonial aids, tools rather than evidence themselves.
    - Used to assist witnesses in giving oral testimony
- Use at testimonial Aid
  - Chart/graph/model of some kind
  - Use this to help put into context and explain original testimonial evidence of a witness
  - Typically use when witness can attest that the real evidence (demonstrative evidence) is necessary to help explain testimony
    - “would that diagram help you explain testimony to jury?” “Yes”
  - Probative value > Prejudicial value
- Powerful but how do we critically examine this?
- View:
  - Form of demonstrative evidence
  - Normally when we want to give trier of fact sense of crime scene would use demonstrative evidence like diagram of photograph. Occasionally court may feel its necessary to go to scene to look.
    - Court reporter may record any commentary made at the scene either through court reporter or video/audio recording
  - Different than video re-enactment where police or other persons involved seek to re-enact what they believed happened: generally this viewed as very prejudicial because it’s one side and seen a skewed view of the evidence. Court reluctant for this.
    - MacDonalda: The video permitted the prosecution to put before the jury its own version of what occurred, distilled into a neatly packaged, compressed, and easily assimilated sight and sound bit.
      - Court said no way can we enter this
      - Court didn’t go so far as to prohibit such evidence but must closely look at prob value – prej value.
  - It has been argued that reiterating evidence isn’t proper, but it’s a way of assisting witness and thus we don’t look at the necessity of the evidence.
  - Judge looks at value of conducting view against inconvenience and disruption

8. Judicial Notice
- So uncontroversial or beyond scope of reasonable dispute that we will admit them without hearing any evidence
- Three different types (or three types of fact)
1) Adjudicative Facts
- Closest to CL exception of judicial notice
- Facts that are in dispute in litigation (who, what, when, where, how)
- **Test** (strict, must show either:)
  - 1) **So notorious or generally accepted** that its not subject to reasonable debate (like facts previously found by other courts)
  - OR
  - 2) Capable of **immediate and accurate demonstration** by some indisputable source
    - Like consultation with calendar, map, or dictionary.
    - No controversy about interpretation or application – very clear that this is what it means

2) Legislative Facts
- Facts that are relevant to the processes of law-making, legal reasoning, or policy making
  - Background considerations that go into formulation of the policy of the law and not the resolution of factual disputes
  - Don’t use legislative facts to determine who/what/where/when/how
    - Use to interpret law (ex interpreting constitution for a law that gives police power to stop motorists without suspicion for alcohol impairment)
      - May want to look to statistics like impaired driving rates and changes to determine under s.1 whether pressing and substantial, etc.
  - **Not applying statistics to resolve factual dispute but to help make policy decision**
  - *Desaulniers*: sexual assault involving young girls. Called psychologist, said “well recognized phenomenon in young children this ability to make up stories”
    - Trial judge refused it and used other reports (not brought in evidence). Was using report not for determining what law should be but to challenge witness’s credibility (adjudicative fact) – troubling

3) Social Framework Fact
- kind of hybrid between 1,2
- Justice Dube: social science research that is used to construct a frame reference or background context for deciding factual issues crucial to the resolution of a particular case
  - **Don’t resolve facts directly, but provide context for helping resolve disputatious facts**
  - Ex: Expert testimony on battered women’s syndrome (self-defence),
  - Ex: Systemic background factors (affecting members of various aboriginal communities for sentencing, *Gladue* process), implicit bias or racism in jury selection
- Don’t take as strict of a framework for these as with adjudicative facts
  - **Test**: Get general sense of 2 factors and weigh their relative importance
    - 1) **level notoriety and indisputability** of fact that the party wants the court to take judicial notice of
    - 2) **significance or importance of fact**.
      - If very significant fact then we need a higher level of notoriety or indisputability.
      - If high level of notoriety or indisputability we may be willing to take judicial notice even if very important fact
- May be directly admissible, Court may refer to this evidence on its own but its preferable that this is adduced through expert witnesses.
  - Can be more properly scrutinized through cross-exam

Judicial notice of laws
- All the laws of Canada can be taken judicial notice of and that’s how things work
- Foreign law must generally be proved through witnesses
Some provinces where evidence acts make some exceptions, either for US or other Commonwealth jurisdictions (none for Alberta or Canada Evidence Acts)

- Can’t take judicial notice of subordinate legislation like municipal by-laws

9. Special Procedures of Child Witnesses

- In crim trial in particular where child is complainant in violence case of sexual violence can testifying in front of one’s abuser can be very traumatic
  - Recent decades parliament and in some cases prov legislatures have allowed this testimony to be take place in a more comfortable and safe circumstances.
  - Several provisions in Crim Code and Canada Evidence Act to mitigate

Testifying Outside Presence of Accused

- Criminal Code S. 486.2 –
  - Generally child witness is going to be able to testify in a sexual violence case either with screen in court or in another room via close circuit television
  - 486.2 (1) Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.
    - (2) if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.
    - Application: (2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings.
    - Factors to be considered: (3) In making a determination under subsection (2), the judge or justice shall take into account the factors referred to in subsection 486.1(3).
    - Specific offences: (4) Despite section 650, if an accused is charged with an offence referred to in subsection (5), the presiding judge or justice may order that any witness testify
      - a. outside the court room if the judge or justice is of the opinion that the order is necessary to protect the safety of the witness; and
      - b. outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.
    - Offences: (5) The offences for the purposes of subsection (4) are an offence under section 423.1, 467.11, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;
      - a. terrorism offence;
      - b. an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the Security of Information Act; or
c. an offence under subsection 21(1) or section 23 of the Security of Information Act that is committed in relation to an offence referred to in paragraph (c).

- **Same procedure for determination:** (6) If the judge or justice is of the opinion that it is necessary for a witness to testify in order to determine whether an order under subsection (2) or (4) should be made in respect of that witness, the judge or justice shall order that the witness testify in accordance with that subsection.

- **Conditions of exclusion:** (7) A witness shall not testify outside the court room under subsection (1), (2), (4) or (6) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the witness by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.

- **No adverse inference:** (8) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

- **Factors to be considered** (3): In determining whether to make an order under subsection (2), the judge or justice shall consider
  - (a) the age of the witness;
  - (b) the witness’ mental or physical disabilities, if any;
  - (c) the nature of the offence;
  - (d) the nature of any relationship between the witness and the accused;
  - (e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
  - (f) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
  - (f.1) whether the order is needed to protect the witness’s identity if they have had, have or will have responsibilities relating to national security or intelligence;
  - (g) society’s interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
  - (h) any other factor that the judge or justice considers relevant.

**Videotaped Evidence**

- **Criminal Code 715.1** –
  - In any proceeding against an accused in which a victim or other witness was under 18 at the time of the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

- Two purposes: 1) aids in preservation of evidence and discovery of the truth. More natural setting, free from subsequent influence or suggestion. 2) using video at trial makes it less stressful and traumatic for child.
  - Not redundant or repetition of evidence
  - allows for video recording that was made a reasonable time after the offence was alleged to have occurred if the child is competent to testify, gets up on the stand, and adopts the statement made in video recording.
  - Designed to be both more reliable in terms of capturing evidence of what happened at the time where it may have been much more fresh in memory of complainant child as well as minimize the trauma.
Still subject to cross-exam but child need not have a present memory of the incident, as long as they can recall making the statement and can assure the court that they believe the statement to be accurate and true at the time.
  - Even if not met then potentially video tape can be admissible under principled approach
- Both provisions have discretion for court to require witness to face usual face-to-face examination in chief if these special procedures would in some way interfere with proper administration of justice (ex by preventing the accused from insuring his or her right to full answer and defence)
  - **Conditions: Before admitting video there is a **voir dire** on admissibility**
    - 1) Must be reviewed to ensure any statements made conform to rules of evidence (may include hearsay, would need to be edited out)
    - 2) Court needs to be satisfied that videotape made within reasonable time” – depends on circs
  - **Discretion Factors:**
    - A) form of questions used by any other person appearing in videotaped statement
    - B) interest of anyone participating in the making of the statement
    - C) Quality of video and audio
    - D) presence or absence of inadmissible evidence in the statement
    - E) Ability to eliminate inappropriate material by editing
    - F) Whether out-of-court statements by complainant have been entered
    - G) Whether any visual information in the statement might tend to prejudice the accused (ex: unrelated injuries visible on the victim)
    - H) Whether prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant
    - I) Whether the trial is one by judge alone or by jury alone
    - J) Amount of time which has passed since making tape and the present ability of the witness to effectively relate to the events described

**Secondary Materiality & Your Own Witness**

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

- Ex: Crown calls someone and ask who shot deceased “you are accused?”
  - “it was the accused”
  - Counsel puts police on stand: “why did you arrest accused not someone else”
    - “Because someone else took polygraph”
    - Opposing counsel object because it’s oath helping
      - Sustained, called second witness to confirm what original witness said in testimony (Prior consistent statement)
      - Done solely to bolster credibility

**Exceptions:**

**Accused’s good character**
- Good character when accused chooses to testify (already covered under Character rules)
If we admit good character evidence we admit for truth (less likely to have committed) and credibility
- Breaches oath helping but allow it to ensure minimal possibility of wrongful conviction

Secondarily Material Expert Evidence
- Limited exception for expert evidence that’s relevant to the question of credibility but that’s not really about credibility
- NOT Ex: Expert that says “I concluded that the accused was probably telling the truth when he denied stealing the monkey” as his result of interviewing and testing and applying his expert knowledge, considered oath helping and inadmissible
- HOWEVER, if we have relevant expert evidence that helps us to understand credibility issues as background or context but doesn’t speak directly to credibility of any particular witness then it may be admissible.
  - Ex: “research shows that children often recant allegations of sexual abuse.”
    - Not stating that this particular child/complainant/witness is truthful but it provides context for helping us making that assessment.

Prior Consistent Statements
- Rule:
  - Specific example of general principle against oath helping
  - Witness’s prior statements that are consistent with trial testimony generally inadmissible
    - Ex: shot them in Self-D, can’t put someone else on stand that they told that to in order for them to testify to the same thing.
- Rationale: self-serving and redundant. Repetition gives artificial or patina of reliability.
- Exceptions: where probative value outweighs prejudice of repetition
  - 1) Circumstantial Evidence
    - PCS not being adduced to show consistency but relevant to some other disputed at trial as circumstantial evidence tending to show that issue
    - Edgar case: disordered mind of accused was relevant
      - Mental disorder defense that was being presented. Statement revealed his mentally disordered mind contained the same denials that the accused testified to at trial
        - Technically prior consistent statements in previous statement that the accused wanted to adduce
        - Admissible because independent probative value relating to the disputed issue of the state of mind of the accused (adduced to show disordered mind)
    - PCS must have added probative value, necessary to correct misimpression
  - 2) Recent Fabrication:
    - Where opposing party suggests that the version being offered by the witness was created after the event the witness is testifying about... proof that the witness had ... made a statement consistent with his current testimony, before, that version is alleged to have been created, rebuts the allegation of recent fabrication and can be admitted
    - Need to have a motive to fabricate
    - Does not apply when opposite party simply alleges that the witness was lying from the start.
      - Ie. No allegations of recent fabrication
  - 3) Recent Complaint in Sexual Offences
Traditionally had rule in CCC codified from CL that required trial judge to warn jury in case of sexual complainant where they failed to report the incident at the first reasonable opportunity
- parliament repealed this rule in S.272
- Under very limited circumstances can still question sexual assault victim on a failure to complain
  - If permitted (don’t need to know when) then complainant and Crown are allowed to rebut this allegation with evidence that the complainant did make a complaint at an earlier opportunity

4) Prior Consistent Admissible Hearsay
- Where statement is hearsay we can admit it as exception to rule.
  - Admissible not only for truth but also for credibility
    - Hearsay rule trump PCS rules

5) Statements made by accused when found in possession
- Controversial (found with drugs, contraband, stolen property, etc)
  - Give indulgence to accused and if we make statement denying possession or responsibility for something in act of possession we will allow that even if it duplicates testimony given at trial
  - Rationale: speaker too caught up in the startling event to have the time for reflection necessary to make a false statement.
- Ex: “I didn’t steal the chicken officer. A friend asked me to take care of it for a minute” – will allow them to adduce this statement if it mirrors denial at trial.

6) Exculpatory Statements Made on Arrest
- Recognized by ONCA, not clear how widely accepted (seems to be accepted by most CDN courts)
  - Ex: I didn’t steal the chicken officer. A friend asked me to look after it for a minute” – deny responsibility, as indulgence will allow this testimony to be admitted even though it duplicates
  - Generally exculpating statement made on arrest is admissible.
- Spontaneous out-of-court statements made upon arrest when first taxed with an accusation can be exception to PCS

7) Narrative
- 2 types
  - 1) Pure Narrative
    - Information that may technically be a prior consistent statement but admit it solely as background so trier of fact can understand the sequence of events of the story as it unfolded
      - Not admitted for truth of credibility, merely background that helps us to understand the issues.
    - Only admit statement where it’s absolutely necessary and we like to edit them down so as to keep only the info that’s critical for understanding the story without giving the details of the statement and minimizing the risk of the problematic inference that consistency equals truthfulness
  - 2) Very occasionally narrative may also be relevance for reasons other than consistency or background.
    - Often when you have child sexual assault complainants the fact and timing of the complaint may support credibility for reasons other than mere repetition.
      - Ex: If you have a young person or adult with intellectual disability and they repeat a spontaneous and repetitive statement of abuse
that may support inference that the incident actually happened. Depends on circs and have to be careful not to equate consistency with credibility but in these special circs we may find that the repetition of the same statement does bear on credibility in a way that would outweigh prejudicial effect.

- **Limiting Instructions**
  - Instructions trial judge would have to give to jury **in any case where prior consistent statement is admitted** as an exception against such statements
  - Even if judge alone trial judge should remind themselves of these important points:
    1) cannot use it to enhance credibility
    2) cannot use it to corroborate any other evidence. Are not independent and therefore do not corroborate the testimony
    3) cannot be used for the truth of its contents/hearsay purposes
    4) must describe the legitimate purpose that the statement is being entered for (in case of recent fabrication for ex we would demonstrate that the evidence can only be use to rebut or negate allegation of recent fabrication and not for truth and not for credibility).
  - No instruction required
    1) where the appropriate, limited use to which the statement should be put would be obvious to the jury
    2) or where contents of the statement would not be helpful to the Crown.
    3) Or where defence relies on proof of prior consistent statement
    4) Also not required where it is clear that prior statement was not offered as proof of what it asserts but this exception should be strictly limited to cases where the only concern is with the possible hearsay use of the prior statement.

**Rehabilitating the Credibility of your Own Witness**

- Where opposing counsel has attacked general credibility of a witness, counsel may use approved techniques in an effort to rehabilitate that credibility.
- Techniques include: re-examination of witness who has been attacked, calling evidence about the positive reputation of the witness for trustworthiness, or calling witnesses to negate or weaken expert testimony by opposing counsel relating to the hidden defects said to affect the witness
- **Relevance and methods**
  - When credibility attacked by others can attempt to rehabilitate in a number of limited way
  - Can only do so to rebut specific challenges made to witness’ credibility
    - Must be relevant to issues the other side focused on in impugning credibility
      - Ex: if other side suggested weakens in observational capacity (hearing) then may be able to put on expert witness to put it in context and suggest can hear.
  - If credibility attacked can bring reputation evidence to speak to that witness’ reputation for the relevant trait
  - If witness attacked collaterally on issue of credibility and denies allegation then opponent stuck with witness’s answer, nothing to rebut in that case.
    - Ex: opposing counsel asks our witness “you were drinking heavily on the night you ID’d the robber, weren’t you?”, denies, no attempt to find exception to
collateral fact rules, counsel simply says no further questions then we have nothing to rebut.

- **Softening Blows**
  - Looked at in context of *Corbett* decision and *Canada Evidence Act S.12*
    - Not confined to criminal record evidence
  - In any case where we can **reasonably anticipate that other side will use some discreditable fact against witness in cross then permitted to anticipate that attack and raise the issue in context of direct**
    - Ex: you’re Crown and deal entered into with Crown witness for some kind of reward in exchange for testimony. Can be damaging on cross so will want to raise it in the best light.

**Challenging Credibility of your Own Witness**

**General Rule:** prohibits challenging of own witness’s credibility

  - Implicitly vouch for credibility of that witness. Can’t do it in chief generally
    - *Canada Evidence Act S.9(1)*
    - *Alberta Evidence Act S.25(1)*

1) **General Exceptions (apply across the board)**

  - **Argument:** can always argue to the trier of fact once case is closed or after we have examined a witness that the witness’s evidence should not be accepted and provide reasons for that
    - In a way challenging credibility of our witness but not doing so while on stand
    - Not formally breaking implicit guarantee just arguing it should be put in the context of the trial as a whole

  - **Calling other witnesses who contradict your witness as evidence:** may have other witnesses that contradict witness’s testimony and that may be more favourable and entitled to focus on that evidence

  - **Leading Questions and Refreshing Memory:** Permitted to attempt to refresh memory of witness often using leading questions if genuine issue as to memory
    - If we have uncooperative witness that doesn’t seem to be giving favourable testimony or testimony we expect then if we can categorize this as memory issue and not hostility or adversity then we can use leading questions to refresh

2) **Specific Exceptions (applying to specific acts)**

**Cross-examination of One’s Own Witness**

  - Complex and confusing statutory rules. Try to simplify to reflect how they operate and are interpreted

  - **Hostile Witness**
    - CL Rule Respecting Declaration of Hostility (not established in statutory form)
      - If could show witness who we called exhibited hostile bias/animus/oppositional position toward party that called them (demeanor, attitude, nature of the evidence being given)
        - Then can be given leave to cross witness at large (about anything – any issue that relates to credibility so long as its relevant will be permissible)
        - Having it granted requires fairly high bar
          - If can’t be met we have statutory alternatives

  - “**Adverse**” Witness and *Canada Evidence Act S.9(1)*
If the witness proves adverse, the party may prove that the witness made at other times a statement inconsistent with his present testimony.

Key concepts

- Notion of adversity not as difficult to meet as hostility
  - No animus needed
  - Merely show witness’ evidence is unfavorable to us
    - Must take up position that opposes our theory of the case and our position on disputed issues
  - Can assess:
    - demeanor and attitude,
    - credibility,
    - nature and materiality of inconsistencies as between their testimony and any previous oral or written statements,
    - can look at previous oral or written statements and examine to gauge if unfavorable or opposite to our position

Scope of cross-examination has not been clarified by courts

- Some court in some provs said just like CL
- Alberta/Ontario: limited scope of cross to features of the statement itself, the making of the statement, how it came about, why its inconsistent, and which version is true.
  - Limited to asking questions about the inconsistent statement whether oral, recorded, or written

Can attempt to prove statement: can do so provisionally in order to determine whether witness is actually adverse and once we get declaration of adversity we can prove statement to have it entered as evidence to help limit the credibility or impugned credibility of witness and witness’s in court testimony.

- Cross examination and S.9(2) Canada Evidence Act
  - Where the party producing a witness alleges that the witness made at other times a [recorded (written or electronically recorded)] statement… inconsistent with the witness’ present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement.
  - Must be written verbatim officers notes capturing statement for example
  - No declaration of adversity needed
    - Alternative and in most cases easier procedure than (1)

Ways to use statement

1) If witness adopts no longer inconsistent and testimony now evidence
2) Can impugn credibility of witness
3) If we can admit under principled exception to hearsay (KGB Rule) then can have it admitted for its truth

Scope of Cross

- Somewhat larger in provinces like AB and ON than (1)
- Not only on making of statement itself and the inconsistencies but also on any issue that relates to the adversity of the witness
  - Since (2) is nominally designed to help determine whether witness is adverse, any manner that’s relevant to assessing adversity is fair game for cross.
  - Not quite examination at large but broader than (1)
- Can if we want prove statement if denied by the witness like (1)
S. 25(1) Alberta Evidence Act
- 25(1) A party producing a witness shall not be allowed to impeach the witness’s credit by general evidence of bad character but the party may contradict the witness by other evidence.

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

Courts Discretion
- Don’t have an auto rule that we can cross where declaration of adversity under Canada or Alberta Evidence Acts
  - Court retains discretion to fulfill the ends of justice and deny right to cross
    - Rationale: Many reasons but centre around fairness.
      - Ex: if statement taken under abusive or coercive circs then we may exercise discretion of the court to either prohibit cross or limit its scope.

Procedure and Challenging One’s Witnesses
- Climbing the ladder (don’t need every step)
  - 1) Start with attempts to refresh memory (including mild leading questions)
    - 2) Move to S.9(2) if previous inconsistent written statements or 9(1) if there are not
      - 3) If these techniques don’t work attempt to have PIS admitted pursuant to hearsay exception in KGB

- For S. 9(2)
  - 1) Ask for voir dire
  - 2) Beings with witness being excused and the party who called witness identifying alleged inconsistencies and producing statement for examination
  - 3) Judge does preliminary review of statement and whether it satisfies “inconsistency” and “recorded” statement requirements,
  - 4) If inconsistent and recorded calls party to prove statement was made, witness can be returned to stand and examined on that issue
    - If witness doesn’t admit to making statement and party wants to prove it with other evidence, witness can be stood down and party may call that evidence
  - 5) Opposing counsel may cross witness who’s testimony is being offered to prove the statement and mya call its own evidence to the contrary
  - 6) Party bringing application should be permitted to re-examine on any issues raised during cross of witnesses and cross any evidence called by opposing side
  - 7) submissions made in absence of witness as to whether leave to cross should be granted under s. 9(2) to cross that witness.
    - Probative vs prejudice examination. Will it serve ends of justice.
  - 8) If leave granted trial judge should rule on extent of cross that is to be permitted and commence trial
  - 9) If admits, then proved and it becomes current testimony.
    - If denies party can call evidence from other witnesses to prove statement made.
1) Judge retains discretion to permit all or part of the written statement to be made an exhibit in the proceedings.

- S.9(1) Pg 563 of text

### Corroboration

- **Rule of USE not admissibility**
  - How trier of fact can use evidence
    - Ex: *S.19(2) Alberta Evidence Act*: requires corroboration before trier of fact can rely on unsworn evidence of a minor
      - Not about admissibility but whether trier of fact can rely on unsworn evidence of a minor
  - **CL and former statute**: very strict and utterly prohibited use of certain type of evidence without strict corroboration
    - Corroboration strictly interpreted: Only if it directly provided independent confirmation of the testimony of a witness and directly implicated the accused
      - If it confirmed other aspects of witness testimony but did not directly implicate accused, did not count
      - Ex: if you had witness testifying that he analyzed bodily sample from victims skin and determined through DNA analysis belongs to accused this wouldn’t necessarily count as corroboration if possible there’s innocent explanation of the accused’s bodily sample on the body of the victim.
    - Today it would be
  - **Modern times**: use discretionary warning and interpret corroboration more broadly and liberally
    - Many traditional statutory provisions have been repealed (like doctrine of recent complaint for sexual assault complainants mentioned previously)
      - Rules that do remain have been interpreted in much broad way

### Statutory Rules

- *S.19(2) Alberta Evidence Act*: No case shall be decided on the evidence unless the evidence is corroborated by other material evidence.
- *S.133 CCC*
  - No person shall be convicted of [perjury] on the evidence of only one witness unless the evidence of that is corroborated in a material particular by evidence that implicates the accused
    - Interpreted in modern cases very broadly so as not to require corroboration unless the entirety of the crowns case is based on a single witness’ testimony.
      - If evidence of perjury from any other source, such as out of court statement by the accused then we can consider that evidence and convict without any further corroboration.
  - Scope of provision narrowed to very tight confines (doesn’t require much)

### CL Discretionary Warnings (*Vetrovec* warning)

- Much broader and more helpful way of looking at issues of corroboration
  - Very flexible CL rules
- Potentially require trial judge to warn a jury (only apply in jury cases) that it would be dangerous to rely on the testimony of certain types of crown witnesses
  - “I must warn you of the dangers of relying on the testimony of the Crown’s main witness”
- Not about admissibility, jury will be exposed to this evidence and can potentially consider it
- Discretionary discretion for trial judge. Can judge all factors in a case and decide if it’s necessary to issue a warning.
o No hard and fast rules, no particular categories of crown witnesses who demand a warning of this nature
- Also known as *Vetrovec* warning: “clear and sharp warning” any CL discretionary warnings that judges can issue.

**More dangerous the evidence the more likely appeal court will find that the warning was required.**

- Dangerous means prejudice or probative value
  - More weight than deserves (prejudice). Frailties and defects of evidence wouldn’t necessarily be apparent to trier of fact.
  - Can exclude evidence when we say it has more prejudicial value, OR can admit evidence but give warning in absence of corroboration

**Types of cases where you see *Vetrovec* warning**

- Any kind of Crown witness in criminal trial with a jury can have warning attached

**Most often**

- **Accomplices**
  - *Vetrovec* case itself
  - Have Co-D/accomplice of accused who is giving testimony potentially because of some deal with the crown. Self-interest implicate the accused and needs to be pointed out to jury in many circs with a clear warning.

- **Jailhouse informants**
  - Particularly dangerous
  - *Vetrovec* warning not mandatory but will be dangerous not to issue *Vetrovec* warning because we know that this kind of testimony has real effect on jury despite of fact that there’s real and dangerous frailties to evidence

- **Children Evidence**
  - Not inherently suspect or unreliable
  - But in some cases it’s appropriate to give warning to the specific type of frailties or dangers of childrens evidence
  - Don’t assume they testify in same manner as adults

- **Unsavory Character**
  - Witnesses who may have inherent credibility issues that are not necessarily obvious to trier of fact

- **Content of Warning: What do we have to say to jury?**

  - **What evidence?**
    - Focus on what specific witnesses and what aspects of the testimony those witnesses are of concern

  - **Why subject to special scrutiny?**
    - Must explain this.
    - Underscore dangers and frailties of the evidence and explain why history and judicial experience has shown it to be dangerous

  - **Dangerous to without corroboration**
    - This evidence standing alone should be given very limited weight.
    - Look for confirming evidence to help bolster witnesses testimony.
    - Would have discretion as trial judge to highlight the evidence that tends to confirm reliability of the testimony
      - Can be double edged sword.
        - Looks like *Vetrovec* warning would be helpful for accused but in giving one judge may point out damaging aspects of the case in order to highlight corroborating evidence
- Modern method is not to require the corroboration to directly impugn the accused, simply needs to confirm the witnesses testimony in some material way.

**Identification Evidence**

- Faulty ID evidence is one of the leading causes of wrongful convictions
  - Must be very careful about including this evidence and will issue clear and sharp warning about relying on it too much
  - **Voir dire** conducted to determine whether witness was sufficiently familiar with person being identified.

- **Special Warnings**: When we decide to admit ID evidence must
  - Point out in most circumstances that eye witness ID evidence (especially if witness didn’t know accused prior to the event in question) is **one of the leading causes of wrongful convictions** and point it out in very clear terms to jury
  - Must explain **what science and judicial experience has shown** us of the nature of faulty eyewitness ID evidence, evidence that would not be known by most jurors that’s not intuitive
    - **Confidence does not = accuracy** One of these features is that the level of confidence exhibited by eyewitness in testifying about ID has no correlation with reliability or accuracy of the testimony.
    - Must point out **problems with reliability with this particular ID evidence**
      - What are the frailties
      - What are the problems with the line-up
      - What may have biased or pre-disposed the witness to select the accused as opposed to anyone else
  - In **extreme cases** if we haven’t already decided to exclude evidence may decide that the ID process was so fraught with problems that we have to instruct the jury not to give it any probative value.
    - Evidence may have been admitted and jury exposed to it but this is a way of saying that it probably shouldn’t have gotten in.

**Burdens of Proof & Presumptions**

**Standards of Proof**

- Simply described the degree to which a party must convince the adjudicator on a particular issue that must be proved at trial
  - Estimate of probability

- **Normally in qualitative** terms but sometimes there’s implicit quantitative association
  - BoP is generally 50/50

- **Legal burden vs Evidential burdens**
  - **Legal burden**: element of the action that must be proved by one of the parties according to a relevant standard
  - **Evidential burden**: doesn’t refer to proof per se but simply that party has burden must show that there is **some evidence that raises the issue(s) that will allow them to go forward**
    - If you don’t meet that burden then issue(s) will not be considered by trier of fact
    - Determination as to whether that issue warrants final determination by trier of fact

**Legal burdens**

- **BARD**: Most well-known is what applies to crown in criminal cases
  - Also applies to regulatory or quasi-criminal offenses
o Court have spent a lot of time figuring out what it means conceptually and how meaning of BARD should be communicated to jury in jury trial
o SCC (Lifchus) must be sure and that any reasonably uncertainty must result in acquittal
  ▪ **Starr** case: draw line much closer to absolute mathematical certainty than to BoP standard. Not absolute but very close
o **W(D) Warning:** In criminal case where reliability or credibility of defense evidence is really critical to resolution of issue (includes testimony of the accused) we also have to issue at **W(D) warning** to jury
  ▪ Just a manifestation of BARD standard but explains to jury how they are to approach the testimony of the accused or other D evidence in terms of believability
  ▪ **3 steps**
    • 1) If you believe accused you must acquit
    • 2) even if you don’t believe him, if you have a reasonable doubt but it, you must acquit
    • 3) even if accused doesn’t raise a doubt you must still assess all of the evidence in the case and determine if the accused is guilty BARD for each element of the offense.

- **BoP:** primarily in civil cases
  o Means essentially more likely than not
    ▪ Some suggestion that we might want to shift standard depending on severity of the stakes.
      • Has been suggested that if we have a civil find that would result in very significant stigma against the D (like in crim case) then we ought to raise the standard to something like clear and convincing evidence
      • However, *McDougall* decision: SCC rejected this. Only one standard in civil cases is BoP, doesn’t shift with nature of issues. Burden does not shift.
        ▪ Court did hint that where stakes are high and significant stigma would fall upon losing party that we would have to look particularly careful at evidence in case and to weigh it in determining whether BoP standard was met
  o Also used in criminal cases in limited circs
    ▪ Concept of reverse onus in limited circs on accused
      • When that happens accused simply has to prove that issue on BoP
        ▪ Accused never req to prove anything BARD

**Evidentiary Burdens**

- **1) Prima Facie Case Standard**
  o This refers to evidentiary burden that applies to the entire case
  o Whether there is sufficient evidence on each element of the offense or cause of action that would allow the case to go forward on the determination on the merits
  o **Fontaine** (Fish J): “evidence in the record upon which a properly instructed jury could rationally conclude that the accused is guilty beyond a reasonable doubt”
    ▪ Not a final determination of the evidence.
    ▪ Not permitted to weigh the evidence. Don’t assess credibility of testimony and don’t weigh strength or probity of the evidence
  o Assume the evidence to be true
Two very limited exceptions to this

**Weighing of circumstantial evidence**
- Limited weighing of circumstantial evidence permitted
- Evidence that requires the trier of fact to make some sort of inference in order to determine weight.
  - Don’t have direct evidence of an element of offense or cause of action, simply evidence that requires an inference that would then help prove disputed issue at trial
- Includes something like fingerprint
  - Only evidence of ID is fact that accused fingerprint found on window inside premises. Assuming evidence is reliable.
    - **In assessing if there’s a prima facie case we can look at the strength of that inference.** Have fingerprint, assume is belongs to accused, what does presence of fingerprint prove? If we can show that the accused was regular visitor at premises then innocent explanation and can assess this.
- As opposed to direct evidence like eye-witness ID evidence. Wouldn’t be allowed to weigh evidence, no inference drawn. Even if unconvinced of power of evidence we have to let trier of fact determine it.

**Identification Evidence**
- This is direct evidence and under traditional approach we would always give this evidence face value support in deciding if there’s prima facie case.
- **Seems courts are shifting on this**
  - **R v Hay:** SCC suggested that if procedures that resulted in ID are so shoddy and unreliable then in some cases we may have to direct trier of fact that they are not allowed to rely on evidence.
    - Trial judge can say we can’t rely on this evidence for prima facie case
- Not entirely clear in case law

When do we use prima facie case standard? Three cases

1) preliminary inquiry of criminal case
- Justice will be asked to determine whether enough evidence to justify putting accused on trial and prima facie test used for that

2) During Trial (directed verdict)
- Defense can apply for a directed verdict.
- Normally at close of crowns case defense counsel will have option to making application for directed verdict
  - Trial judge will look at evidence, not weigh it, give it the best interpretation for the Crown with exceptions mentioned and decide whether there’s evidence that a reasonable jury could use to convict. If no, no reasonable jury could convict then case is over and directed verdict of acquittal.
    - Can use this is judge alone trial as well

3) Extradition Hearing
- one further exception to general rule that we can’t weigh evidence
  - slightly broader rule because of the stakes
- if court determines that evidence is unreliable then judge can elect to give it no weight even though applying prima facie case standard

- 2) Air of Reality Threshold
very similar to prima facie case standard in terms of how we conceptualize it.
Standard is the same and principles and rules are as well
Differences
  1) use it when dealing with single issue as opposed to entire case
     - No weighing of credibility or reliability except in case of inference
       associated with circumstantial evidence
  2) Practical difference but not theoretical: air of reality standard is used when
     we put an evidentiary burden on the accused in a criminal trial. Prima facie is
     what is imposed on Crown.

Burdens of Proof
  - simply refers to party that must prove an issue in dispute according to applicable standard of
    proof and if you fail to meet standard you will lose on that issue
  - Lots of discussion about tactical burdens but these aren’t burdens. Just common sense that
    on some matters where you don’t have burden of proof you’re probably going to have to
    present some kind of evidence to avoid having the court find against you on that issue. Not a
    rule of law, no presumption or burden at play, simply a matter of common sense and strategy

Presumptions
  - Key distinction: presumption of law and presumption of fact
    - Presumption of law
      o Know it’s a presumption of law because whether looking at CL or statute it tells us we
        have to presume a certain fact or conclusion. ALWAYS presume this unless other side
        shows some evidence to prove to the contrary according to some specified standard.
      o Law = always presume X, unless contrary is proven according to specific standard
    - Presumption of Fact
      o Subtle difference. Instead of always presuming X we put initial burden on party to prove
        X. Then if party successful in proving X then auto presume Y, flows from X.
      o Fact = IF party proves X, then presume Y unless contrary shown according to specified
        standard
      o X is the basic fact, something the party has to prove with evidence, if successful then
        presumed fact automatically comes into operation by operation of law. Presumed fact is
        typically element of offense.
        - Eases burden (usually on Crown) for efficiency or policy reasons
      o What constitutes evidence on contrary?
        - Depends on what type of presumption we’re talking about
        - Two types (refer to differing standards of proof that would fall to party against
          whom the presumption operates)
          1) Mandatory presumption
            o Rebutted more easily. All you have to do is show some evidence
              to the contrary. Evidentiary burden (sometimes think of this as
              requiring the party against whom the presumption is operating
              merely to show an “air of reality” or “raise a reasonable doubt”.
              o Not having to prove anything, just some evidence that
                contradicts presumed fact and that’ll be enough to shift burden
                back to Crown to prove issue BARD.
            o Language: “in the absence of evidence to the contrary”
          2) Reverse onus
o puts true burden of proof of persuasion on the party that faces presumption (if crim then reverse burden from Crown to accused on BoP)

o **Language**: "unless he or she established that" or "proves that" or "satisfies"
  - Interpreted to mean that you have to prove issue
    - Whenever accused in crim case must prove something it’s always on BoP

- Both 1,2 violate presumption of innocence under 11d but many saved under s1
  - Easier to say save mandatory presumption because onus on accused is only to raise a reasonable doubt. Reverse onus is BoP.