EVIDENCE CAN

POOJA PATEL

FALL 2016

THE BASICS 5
Evidence: Sources, Objectives, and Trial Context 5
Burdens and Standards of Proof: Civil, Criminal, and Constitutional; Standard of Appellate Review 7
Burden & Degree of Proof in Civil Proceedings 7
Burden & Degree of Proof in Penal Proceedings 8
R v. Lifchus 8
Standard of Appellate Review 9
Ultimate guilt 9
Witnesses: Competency and Compellability 10
Competency 10
Children 11
CEA S.16.1 (CHILDREN) 11
R v Marquard 12
Adult 13
CEA S. 16 (ADULTS) 13
R v. DAI 14
Spousal Competency 15
R v Salituro 15
Silence 16
McConnell and Beer v Queen 16
R v Noble 16
R v Prokofiew 16
Relevance, Materiality, and Probative Value 17
R v Watson 17
Probative & Prejudice Value 18

CHARACTER: THE BASICS AT PLAY 19
Introduction to the Character of the Accused 19
R v. McNamara et al. (No. 1) 19
Note on R v. Rowton 20
R v. Levasseur 20
R v Mohan 20
Character of the Accused- Similar Fact Evidence 21
Makin v AG for New South Wales (1894) 21
R v Smith (1915) 22
R v Straffen (1952) 22
R v Handy 23
R v Jesse (2012) 25
Character of Witnesses Other Than the Accused 26
R v McMillan 26
R v Scopelliti 26
Sexual Assault Context 27
R v Darrach 27

MR. BIG 28
Mr. Big Operations and the New Common Law Rule 29
R v Hart 29
R v Mack 31

CREDIBILITY 32
INTRODUCTION to CREDIBILITY and SUPPORTING CREDIBILITY 32
R v NS 32

Assessing the Credibility of Children 33
Supporting the Credibility of Your Own Witness: 33
Exceptions to Oath-Helping 33
1) Expert Evidence 34
R v Marquard 34
2) Good Reputation for Veracity in a Criminal Trial 35
3) Prior Consistent Statements to Rebut Allegations of Recent Fabrication 35
R v Ellard 35
R v Stirling (2008) 36
4) Prior Consistent Statements for Narrative 37
R v Dinardo: 37
IMPEACHING CREDIBILITY 38
Browne v Dunn (1893) 38
CEA ss. 10, 11, 12 39
R v Lyttle 40
Expert Evidence 40
Toohey v Metropolitan Police Commissioner 40
Evidence of Witness's Reputation/Veracity in Truth Telling 41
R v Clarke 41
Prior Criminal Convictions 42
CEA S 12 42
Criminal Code S 666 43
Corbett v The Queen 43

HEARSAY 44
What Is Hearsay and Why Don't We Like It? 44
Subramaniam v Public Prosecutor 1956 45
R v Wildman 1981 45
Wright & Tatham 1837 46
R v Baldree 2012 ONCA 46
R v Baldree 2013 SCC 47
The Principled Approach 48
R v Khan 48
R v Smith 49
R v B (K.G.) [called KGB] 50
R v Khelawon 50
Relationship between 'Principled Approached' and Categorical Hearsay Exceptions 51
R v Starr 51
Some Categorical Exceptions to Hearsay 51
Statements of Intent 51
R v Starr 51
Prior Judicial Proceedings 52
R v Potvin 52
Party Admissions 52
Business Records 53
CEA s 30- Business Records 53
Res Gestae 55
R v Clark 55
Statements Against Penal Interest 56
R v Pelletier 56
Lucier v The Queen 56

Speaker's Mental State 57
R v Wysochan (1930) 57

Opinion Evidence 58
Lay Opinion 59
R v Graat 1982 59
Expert Opinion 60
R v Mohan 61
R v Lavallee 1990 SCC 61
R v Trochym 62
White Burgeress Langille Inman v Abbott and Haliburton 2015 SCC 62

Privileges 63
I. Class Based Privileges 63
Solicitor Client 63
Solasky 64
Pritchard v Ontario (Human Rights Commission) 64
Smith v Jones 64
R v Brown 66
Litigation Privilege 67
Blank v Canada (Minister of Justice) 67
Spousal Privilege 68
SETTLEMENT PRIVILEGE 69
Union Carbide Canada v Bombardier Inc 69
II. Case-by-Case Privilege 70
Slavutych v. Baker 70
R. v. Gruenke 71
M.A. v. Ryan 71
Attention to R. v. National Post on pg. 751 72
1654776 Ltd v Stewart, 2013 ONCA 184 72
III. Privilege Against Self-Incrimination 73
R. v. Henry—and note SCC cases therein 73
R. v. Nedelcu 75

Judicial Notice 76
R. v. Potts 77
R. v. Zundel ONCA 1987 77
R. v. Zundel (No. 2) ONCA 1990 77
R. v. Krymowski 78
R. v. Spence 78

THE BASICS

Evidence= information that is offered by a party at trial as a means of establishing its claims.
Law of evidence refers to those statutory, common law, and constitutional rules that regulate which information be offered in cour proceeding, what inferences may be drawn from that information, and how facts are proven.
-burdens and standards of proof, and presumptions

Blue my notes, Black= Hunt's notes
Law of Evidence: Admissibility or Inadmissibility of evidence

Evidence: Sources, Objectives, and Trial Context

Fundamental Rule of Evidence: All evidence is admissible if it is a) relevant and b) there is no exclusionary rule that says it's not.
1) Relevance:

- Factual Relevance: Something is relevant if it tends a matter of logic to make an issue to be more likely to be true (or less likely to be true).
    - Example: victim killed by a 22 calibar gun
        - AR: Accused owns a 22 calibar gun (factual relevance)
            - Shows a point of consistency between the two of them.
        - MR: any dislike, enemy, a fight the night before, etc
- Legal Relevance: that which must be proved as a matter of law.
    - Example: killed someone and subjectively meant to do it (legal relevant issue)
        - AR of 1st degree murder: force used to cause death
        - MR of 1st degree murder: subjectively desired that result
    - If it requires proof, then its legal relevant
    - If it requires logic, then its factual relevance
- Without relevance it's inadmissible

2) Independent Exclusionary Rule:

- 2 Categories of Reasons an Independent Exclusionary Rule may exist
    - **1) INTRINSIC RULES OF EVIDENCE**: intrinsic to the nature of the trial- fairness of the trial
        - Example: Hearsay- motivated by keeping trials fair- hearsay is inadmissible because its inherently unreliable. How can you have a fair trial with unreliable evidence?
            - Molly saying what someone else told her what they say and that person isn't in court- cannot cross examine that person then its unreliable.
    - **2) EXTRINSIC RULES OF EVIDENCE:** even if this evidence is relevant, it can be inadmissible because some other value in society might want to be protected outside of the trial- even if it absolutely proves.
        - Example: privilege- client/attorney privilege
- Laws of Discretion: Inherent jurisdiction in every trial judge to control the fairness of the trial
    - Lots of things they can do- tell people to be quiet, sit down, etc.

3) Balancing probative values and prejudicial effective

- Probative Value: how useful is the information- proving what you want to prove. Persuasiveness of proving what you want.
    - Example: hand writing expert vs DNA expert
        - Handwriting expert- you'd need a lot more- while with DNA expert would pretty conclusive
- Prejudicial Effect: what are the costs of introducing the evidence when looking at the facts.
    - doesn't mean how damaging it is to the accused- it means the prejudicial to the fairness of the trial.
    - Example: introducing very inflammatory evidence- juror hears evidence that is so inflammatory it may effect juror's ability to deliver a fair verdict.
        - McLean article- murder case, evidence of accused's pornography found of computer was inadmissible.
- The two are balanced and then the judge generally decides if the evidence is admissible or inadmissible. Probative value > Prejudiciary Effect→ has to satisfy that for the party bringing the evidence into court (benefits have to outweigh the costs).

Meta Structure of the Course:

1) Is the Evidence Relevant?
    a. Identify the legal relevance
    b. Then the factual relevance (does it help prove what it needs to be proved)
        i. If not relevant then excluded
2) Is there a discrete exclusionary rule of evidence that bars admission?
    a. Intrinsic Rules
    b. Extrinsic Rules
3) Does the Probative value outweigh the Prejudiciary Effect

Sources of Evidence: most of rules are CL but there are some statutory

- Charter: converts positive rights- section 8 (search & seizure), section 7.

Burdens and Standards of Proof: Civil, Criminal, and Constitutional; Standard of Appellate Review

- **Evidentiary burden**: obligation to introduce "some" evidence; generally on plaintiff of civil case and on Crown in criminal case
- **Persuasive burden:** burden to convince you've provided what you needed to prove;
- Sometimes burden's shift→ EB on one party and PB on another party- very rare but happens
    - Happens in criminal law in **self-defence**
        - Crown has EB but Accused has EB of some self-defence, but then Crown has PB to disprove it

Consider two types of burden of proof:

1) the persuasive burden
    - burden borne by the party who will lose the issue unless he satisfies the tribunal of fact to the appropriate degree of conviction
    - civil: plaintiff generally bears persuarisve burden
    - criminal: presuction bears it
2) evidentiary burden
    - it is on the party whose duty it is to raise an issue
    - party under such a burden must adduce/point to some relevant evience capable of supporting a decision in the party's fabour on an issue before that issue can go the trier of fact.
    - Evidentiary burden doesn't have to be in the same place as the persuasive burden
    - Ex: Crim case- crown bears EB & PB for elements of the offence charged, but accused has EB with most the standard of justifications and excuse, once that is satisfied, Crown must disprove the excuse or justification BARD

Burden & Degree of Proof in Civil Proceedings

- Standard in civil proceedings: on BofP→ 50+0.1%
- **Summary Judgment**
    - When can you bring application of SJ: after the pleadings close (either party can bring such an application)
        - What are pleadings? When do the pleadings close? Filing documents, statement of claim and statement of defense- has sent documents have been registered.
    - Is it plain and obvious that one of the party's is going to lose? If you believe there is no serious issue for a trial- you apply for SJ.
        - Usually used as a cost saving approach
        - Reserved for defective pleadings- haven't pleaded facts what they're suppose to plead
    - On an application of SJ- it isn't to evaluate if the evidence is true (because it is assumed to be true at this point)
- **Motions for Non-Suit**
    - Can be brought by D after P pleads their case
    - Even if everything is true, P hasn't introduced evidence in relation to one of the things they have a PB to prove to the court
    - Key: happens after P introduces their case (instead of pleading)
    - Cannot look at the sufficiency of the evidence because the trial is ongoing
- Plaintiff generally bears EB & PB on all the elements of the action
- **Motion for a Non-Suit**: claim that evidence not capable of supporting one or more of the elements of the cause of action
- **Summary Judgment:** claim that the responding party's case is so weak that it is not worth bringing to trial (vs. motion for non-suit which states no evidence capable..)

Burden & Degree of Proof in Penal Proceedings

- **Directed Verdict of Acquittal:** criminal version of civil motion non-suit
  - Crown introduced their case and if they haven't met their PB, a DVA can be applied for
    - if you win the application, judge will acquit
- **"Air of Reality" test:** be cognizant of the defendants rights it is their liberty at stake
  - enables the court to have a gate keeping function
  - hiding certain defenses from the jury
  - no evidential foundation for defense
    - in those situations TJ doesn't want the jury to hear such a defense for prejudicial reasons
  - BUT judge is trier of law and jury is trier of fact- so technically shouldn't be hiding anything from jury and let them sort out the facts
  - Some evidential burden of air of reality→ very low standard
    - Judge assumes all evidence is true and then sees if theres an air of reality and if there isn't then that evidence is not in play.
- **Criminal Standard of Proof: BARD**
  - Articulated in *Lifchus*
  - Holds special meaning in the criminal context and not to be used in ordinary day sense
- **Directed Verdict:** similar to non-suit
  - at the end of the prosecution's case, the accused may ask the TJ to rule that the Crown has not discharged its evidentiary burden
    - BUT accused is not required to elect whether to call evidence before the judge decides the motion

R v. Lifchus

Jury instructions on BARD→ the Don'ts

- **Facts:** Stockbroker convicted of fraud. Appealed his conviction on the basis that the TJ had not properly explained the concept of reasonable doubt to the jury. MCA agreed and ordered a new trial. Crown appealed at SCC
- **Issue:** was the jury properly instructed by TJ about reasonable doubt?
- **Analysis:**
  - **DON'Ts articulated by Judge:**
    - Don't tell the jury that BARD means common reasonable sense
      - For common reasonable sense, in ordinary sense you use probability
      - Which will lower the Crown's burden
    - Don't say reasonable doubt is moral certainty
    - Don't substitute any other words for reasonable doubt
      - Just explain reasonable doubt
  - BARD is higher than BofP in criminal cases than civil cases→ jurors should be aware of this
  - Defendant doesn't need to introduce evidence- on the Crown
  - **Reasonable doubt:** doubt based on reason and common sense which must be based on evidence or lack of evidence
- **Holding:** TJ charge of "proof BARD" was insufficient

Standard of Appellate Review

- 3 standards of scrutiny
- in judicial review judges bring different standards for reviews
- two extremes
  - questions of pure law: what is the test of X; is the evideince admissible→ aka questions of admissibility
    - most of the questions of evience are on pure law- so its easier to appeal
  - questions of findings of fact: given a lot deference by an appellate judge- ex. Credibility
    - palpable error- basically judge makes a decision on evidence that wasn't really introduced

Ultimate guilt

- expression of guilt is a legal question
- ends up being judged on a reasonable standard
- is it a reasonable verdict
- but juries don't write reasons
- could a properly instructed jury have reasonably come to this verdict?

EXAMPLE: JIAN GOMESHI

- legally relevant issue: consent
  - need to prove AR
  - how does the text make legally revelant evidence or not?
    - Can say she said I really like your hands- not a normal rape victim behavior
  - as a part of logic, you need lead evidence on what a normal sexual assault victim behavior is
  - need something to measure against
- credibility: I never talked to him, she says on stand- but untrue because she texted him so 1) liar 2) or mistake maker→ both which of go to reliability
  - whether you ought to be believed is a legally relevant issue
  - if she admitted to the texts, you cannot show texts because its not going to prove anything now.
    - Used for her credibility- doesn't work when she tells the truth.

Witnesses: Competency and Compellability

- In order to lead evidence, you need a witness (general)
    - You need to be competent to take the stand
    - Independent exclusionary rule
- Competency: basic ability of a witness to be entitled take to the stand
- Compellability: the ability to force someone to give evidence
    - Subpoena
- Exemptions-Privileges:
    - Spousal privilege
    - General privileges

Competency

- CL rule historically has had harsh rules around competency
    - Spouses were incompetent for example because they have a self-interest
    - Criminal was incomponetn
    - Accused incompetent
    - Children incompetent
    - BUT CANADA EVIDENCE ACT (CEA) has changed a lot of those
- **Competency:**
    - 1) Capacity: do you have the ability/ mental acuity to be a witness (low standard)
        - can you come in and answer questions.
    - 2) Responsibility: do you understand the importance of telling the truth and the seriousness of the occasion

Children

- S. 16.1 of the CEA deals with children under 14-
- Presumption is in favor of competency for children
- They don’t swear oath or solemn affirmation- they just simply promise to tell the truth
- You cannot inquire further about their ablity to tell the truth after their promise- need to take their promise at face value
- Do they have the mental acuity- according to the Act..
  - **TEST:** they must be able to understand and respond to questions
  -

CEA S.16.1 (CHILDREN)

Person under fourteen years of age
16.1 (1) A person under fourteen years of age is presumed to have the capacity to testify.

No oath or solemn affirmation
(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

Evidence shall be received

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

Burden as to capacity of witness
(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

Court inquiry
(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

Promise to tell truth
(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

Understanding of promise
(7) No proposed witness under fourteen years of age shall be asked any questions 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.

Effect
(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

R v Marquard

Competency of a child; test which helped create the new section

- **Facts:** grandmother charged with aggravated assault for allegedly placing her 3 year old granddaughter's face on a hot stove as punishment. Victim gave two different statements: 1) that she burnt herself with a lighter 2) Her grandmother burned her→ first was a lie and second was apparently the truth. The child testified and under S. 16 (1) (b) of the CEA an inquiry had to take place. She understood the difference between a truth and a lie and demonstrated it.
- **Ratio:** the test under S. 16 (1) (b) is the ability to perceive events, remember events, and recount them to a court. Then once there is a promise of telling the truth the matter is for the jury to decide.
- **Issue:** Did TJ err in failing to failing to conduct an adequate inquiry into whether the complainant could rationally communicate evidence about the injury s.16(b) of the CEA. Whether the child is competent?
- **Analysis:**
    - **McLachlin (SCC)**
        - Child must be able to perceive, remember and communicate the events in question- low threshold→ the very essence of being a witness
            - 1) Capacity to Observe
            - 2) Capacity to Recollect
            - 3) Capacity to Communicate
            - → WITHOUT THESE 3, YOU CANNOT BE A WITNESS
        - Test is to explore whether the witness is capable of perceiving events, remembering events and communicating events to the court
            - More than just a verbal recount but to perceive and remember
            - This goes to the essence of what it is to be a witness
        - **Issue?** Predecessor said you need to be able to communicate the evidence- but now legislation says you need to be able to understand respond to the questions.
        - How can we reconcile the above noted issue?--> How do we apply the test to the new law?
            - Under and respond questions focuses on the behavior in court
            - To perceive and remember focuses on the behavior outside of the court (communication refers in court behavior)
            - There are fundamental requirements, so even though the phrase-ology is different all three requirements are still needed
            - Essentially the new section was based on McLachlin's resposnse

Adult

- Capacity: *Marquard* directly applies to adult
- Presumed to competent
- They do take an oath or a solmn affirmation
    - You can ask questions to see if they understand the oath
    - And if you can prove that they don't understand- then they can just promise
- The advantage of challenge their ability to understand is to show their credibility

CEA S. 16 (ADULTS)

Witness whose capacity is in question
16 (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, 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.

Testimony under oath or solemn affirmation
(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

Testimony on promise to tell truth
(3) A person referred to in subsection (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.

No questions regarding understanding of promise
(3.1) A person referred to in subsection (3) shall not be asked any questions 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.

Inability to testify
(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

Burden as to capacity of witness
(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more 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.

- - Presumed to be competent
- - Challenge competency you have to do so
- - You can challenge their ability to understand the oath and then they can go under S. 16 (3)
- - The promise to tell the truth
- - What's the advantage to challenging? show their credibility
- - Confer a strategic advantage on credibility
- - Ability to communicate evidence
- - Low standard etc...

R v. DAI

s.16- adult mentally incapacitated

Facts: the victim is a 22 year old and her mental age is that of a 3 year old. She was assaulted by her mother's partner. Oath taken and she couldn't understand the difference between telling the truth and lying. She was held incompetent to testify and was dismissed by the TJ- trial collapsed because of the incomptency ruling.

Issue: Whether the TJ correctly interpreted the requirements of the CEA for the testimonial competence of persons of 14 years of age or older (adults w/ mental disabilities)

Holding: Couldn't inquire into whether they understand a lie or not. Appeal allowed- new trial

Analysis:

1. Witness's competence to testify
2. Admissibility of her/ her evidence
3. The weight of the witness's testimony

- They cannot question understanding of what a promise to tell the truth is because they may know the difference but cannot explain it
- Making them promise does show the seriousness of the incident and encourage them to tell the truth
- Point of 16(3) would be futile if you would the witness explain.
    - Failed 16(1) so that's why they got a substitute as 16(3). If 16(3) ends up being the same as 16(1), theres no point for (3)
    - Drafters of 16(3) did not itend for an abstract understanding of duty to tell the truth
- Its admissible but up to the jury/judge as how much weight they want to give to the evidence
- just because they cannot explain the difference between a truth and a lie doesn't mean that they don't understand it
- when you're dealing with an adult that is basically like a 3 year old- what is inherently true is that they are vulnerable people- so we should be careful about battering them on the stand

Spousal Competency

- Everything now is untrue…
- Before at CL spouses where incompetent because of self- interest
- Theres no incompetency issues in civil issues
- In criminal – CEA maintiained incomptency until 2015 (ss. 4- NOW REMOVED)
- SS. 4 (NOW DELETED):
  - It said husband & wife- need to see if they're married or not
  - If youre married, then you are competent to testify for your spouse (defence)
  - But incompetent to testify for the crown
  - Exceptions
    - Threats to life & abuse- domestic abuse, child abuse

R v Salituro

Spousal competency; spouse can testify for Crown (new rule)

Facts: husband & wife- he's charged w/ cheque forgery (her signature). She wants to testify against and help the crown but she's not divorced from him- so she was disqualified

Rule: if you're irreconcilably separate you can testify for the Crown. (new rule created)

Analysis:

- Judge talks about spousal competency- 4 main points about it
  - 1. Preserves marital harmony (irrefutable presumption)
    - still valid
  - 2. Naturally repugnant to speak against each other
    - still valid
  - 3. In law they are the same person
    - wife cannot testify against husband because its self-incriminating
  - 4. Identical interests
- judge says that 3 & 4 no longer make sense
- wanted to make this new rule about irreconably serperate couples vested in Charter values
  - 3 & 4 are inconsistent with Charter values – offensive because it doesn't respect her liberties and doesn't let her do what she wants to do- takes away her autonomy
- Compellability
  - What if she doesn't want to testify?- can she be compelled by the Crown?
  - Usually compellability follows competency
  - He doesn't answer the question.

Silence

- Accused Not Taking the Stand/ Silence- Two MAIN Questions
  - 1) Can Crown or judge comment on you not taking the stand
    - ***CEA* S. 4- neither JUDGE or Crown can comment on it on accused's silence/refusal to take the witness stand**
  - 2) Are they allowed to use your silence as evidence/inference for anything (ex. such as guilt)

McConnell and Beer v Queen

Judges on comment on silence; interpretation of s.4

- **Facts:** 2 accused charged with possession of housebreaking instruments. Neither accused testified/gave evidence.
  - Instructions from TJ to jury at closing→ not to be influenced by the fact that accused didn't take the stand and that the unsworn testimony/explanations given to the cops at the time by accused do not have be accepted.
    - Defense Lost→ **Appealed**: one reason being that judge had commented in regards to silence and offended s. 4 of the *CEA* (which says you cannot comment on silence of
- **Holding:**
  - Majority: **don't take s.4 so literal. Just want to make sure that comments made are not prejudicial**
  - Dissenting judge agreed with appeal

- **2) Can any inferences be drawn from not taking the stand**

R v Noble

Silence used as evidence

- The fact that you are silent cannot be used as evidence as guilt
- Rational:
  - 1) Right to silence
    - Undermine the right to silence- inherently against democratic values to make you talk against yourself
    - At a conceptual level it would be appalling to use what you did say about you against you just as much using what you didn't say about yourself.
  - 2) Goes against presumption of innocence until guilty
    - if we could use silence as evidence, it would lower the Crown's burden because
- Silence is relevant to the credibility of the alibi

R v Prokofiew

Two accused; One silent the other takes the stand

- Facts: Fraud. Two accused. One took the stand and the other silent. In closing defense lawyer of one uses the silence of other- s. 4 doesn't allow Crown to comment but doesn't mention defense.
- Issue: Can we use the silence of one against the other?
- Held: depends on the inference
  - A) If it's an **exculpatory purpose**- X's silence to exonerate Y, then it's permissible
    - 1) defense: my guy took the stand, other didn't- so technically there aren't contradicting issues
    - 2) Two accused but only 1 did it. Can use silence to exonerate the one guy but then cannot use that silence for guilt of other guy.
  - B) CANNOT use for **inculpatory purpose-** using silence to put accused in prison
- Note: it is important to explain these inferences to the jury but the judge didn't do that but was apparently generally rights affirming.

Relevance, Materiality, and Probative Value

- It's the first rule of evidence- if it's not relevant, it's not admissible
- **Legal Relevance:** what we need to show; what are the legal issues; depends entirely on the nature of the proceedings (torts, family law, criminal, etc)
- **Factual Relevance**: does this thing as a matter of logic and human experience help prove the thing that needs to be proved
  - Something is FR if it tends as a matter of logic, human experience, common sense to make a proposition to make it true
  - It is FR or NOT (theres no room for argument)- yields one answer→ BINARY
    - binary because no value in the evidence- you aren't asking about the weight of the evidence
  -
- **Materiality**: intermediate standard (falls between FR & LR)
  - Its just an assertion of the aim of the evidence (ex. Aimed at subjective MR)
  - No inquiry into the assertion of the aim
  - Target is the LR and FR is if it hits the target
  - **Primary Materiality**: is this evidence aimed at satisfying the LR
  - **Secondary Materiality**: evidence is aimed at undermining or enhancing reliability of primary evidence
- Direct v Circumstantial Evidence:
  - **Direct:** if you believe it, it disposes of the issue.
    - If it is a murder situation and charged with shooting the person. If a witness comes in and says they saw the entire thing- if you believe it then it's the end of the issue- directly resolves it.
  - **Circumstantial:** even if you believe it, it just proves one thing and doesn't resolve the matter. Drawing inferences and assumptions but just need to be careful about it- need to be reasonable it
    - Witness testifies and just sees accused standing over the victim with a gun (the dead person).
      - Need to infer other things to presume that the accused did it.
    - SCC- **2016 Villaroman** has said "it needs to be reviewed on a reasonable standard"
  - Road was wet so inferred it was rained- Inferences that may be drawn from this evidence in light of and absence of evidence, common sense, human experience

R v Watson

Facts: accused of aiding and abetting. Drives buddies to warehouse and the two buddies went inside (while he waited outside) and they shot- then they got in the car w/ him and drove off→ no dispute about these facts

- Aiding and abetting- means you were involved in the planning
- He claims that he didn't know about the shooting

Issue: relevancy issue on appeal

- Defense wanted to bring in a witness that said that victim always carried a gun like a wallet- TJ denied because he believed it wasn't relevant
- **APPEAL JUDGE**: victim usually carried a gun relevant because..
  - 1. Makes it more likely that he was carrying a gun on the day in question
  - 2. Helps supports the inference that what happened was not an assassination but was instead a spontaneous shootout
  - 3. Creates a plausible rival theory
- Example of a difficult relevancy problem

Probative & Prejudice Value

- **Probative Value**: benefits of the evidence at achieving the truth
- **Prejudice:** costs associated to the admission of the evidence at trial
- Balancing- depends on the relation
- Its not that one thing rises and the other falls- a thing that can make it prejudice can also make it probative
- Do the benefits outweigh the costs?
- Usefulness of proving or disproving the proposition
- When they say highly relevant, they mean highly probative
- It always depends on context- because its so context specific, the evidence at issue- probative can depdend based on the proposition at play
    - Ex. A woman was killed and DNA was found on the woman
        - Strangers → DNA will have a highly probative value
        - Siblings/Married/Roommate→ DNA won't prove anything- low probative value
- Two parts of probative value:
    - 1) Believability: how it plays into all the other aspects/ evidence
    - 2) Informativeness: how much does it prove that thing (DNA example above)

Sub-dimensions of Prejudice

- 1) Reasoning Prejudice: anything that distracts/confuses the jury from doing their job
    - Undue consumption of time (takes a long time to pursue)
        - Ex. It's a side issue
    - Collateral facts issue
        - You can impeach witness if they lie about something but if its not even important (like what they ate for lunch)- then its collateral
        - Cannot impeach on something that is collateral.
        - Probative value low and high prejudice
    - Arousal of emotion of passion of the jury
        - Like showing pictures of the dead body constantly
    - Prior bad acts
        - Shop lifting,
- 2) Moral Prejudice:
    - Prohibitive inference
        - Ex. Prior bad act- then assume that since they did that, they did the fraud

If these two are engaged then the fairness of the trial is comprised

- 3) protect the dignity of the process
    - bringing the court into disrepute
    - ex. A hard cross examination of a child

If trying to get rid of the defense's evidence- the prejudicial value must be SUBSTANTIALLY greater than the probative value – which isn't the same for getting rid of the Crown's evidence (just needs to be greater- not substantial)

CHARACTER: THE BASICS AT PLAY

- **Character Evidence**: an argument that the person is a certain kind of a person- general personality trait→ dishonest, liar, etc.
    - Why do this? Because people assume that people act similar to that of their character
    - Ex. If an individual is charged w/ fraud, it is helpful to know that they're a liar
    - Police officers make these sorts of general inferences but why aren't jury and judges allowed to think like this?
        - The evidence isn't actually probative:
            - 1) Individual may not act consistent w/ their character most of the time- they may act consistent w/ their character only 10% of the time
            - 2) People change
            - 3) Prejudicial: Moral and General-Propensity reasoning
- **Evidence of Character and Evidence of Habit**
    - Habit is more specific while character is more general
        - Example: smoking a **particular type** of cigarette and that type found as evidence
    - Habit not governed by the rules of character

Introduction to the Character of the Accused

RULES:

- Crown cannot lead w/ bad of evidence of the character
- But if accused opens the door to his character then Crown can respond under the following circumstances:
    - 1) The accused testifies as to their own character using specifics
    - 2) Call a 3rd party witness from the community speaking to their (general) reputation- no specifics
    - 3) An expert witness can be called by the defendant to testify that the accused is unlikely to commit the crime because they don't fit the psychological character

R v. McNamara et al. (No. 1)

Crown cannot lead w/ bad character evidence;
If accused introduces with specific then crown can rebut with specifics

Issue: If the accused gives evidence of specific instance of his own good conduct is the Crown still bound by the *Rowton* rule, which limits proof of character to proof of reputation? **NO.**

Analysis: It remains true that when the accused calls character witnesses, they are confined to giving evidence of the accused's general reputation. BUT if the accused himself gives evidence, he is not confined by such a rule – can testify to his general reputation, or his specific prior good acts. The accused impliedly put his own character in issue by asserting that he was an upstanding businessman who wouldn't do these things. This opens the door for the Crown to respond; but they gave a specific example. Court says YES this is allowed. Crown can bring evidence of specifics when the accused provides specifics himself. Proof of previous bad conduct may have a double effect: it not only rebuts his claim to good character but it directly proves that he lied in the witness box if he has impliedly inserted that he is a law abiding citizen.

Note on R v. Rowton

Crown can bring 3rd party witness to speak to general reputation if accused brings character in issue; No specifics

School master on indecent behavior. Accused calls 3rd party witness that says accused is well conducted man. Crown calls 3rd party witness who says he has a rep for gross indecency. Accused says you cannot do that.

Holding: Judge says you can do that. Crown cannot lead with such a 3rd party witness but can definitely respond once accused opens the door.

Nothing can be more unfair than defense allowing to lead with a good character evidence and Crown not being able to rebut- but with witness you cannot give examples; its just general reputation (unlike if it's the actual accused)

R v. Levasseur

General reputation not restricted to residential community

Facts: Woman charge w/ workplace theft. She brought new boss in as character witness. But Crown said the character witness should be someone from community, workplace is too narrow.
Rule: Evidence of accused's character is NOT restricted only to general reputation in residential community

R v Mohan

Expert witness rule

Facts: Doctor molested children patients in his office. The character dimension is that the accused wants to bring an expert witness that says he not capable of doing this- to bring such an expert in, need to satisfy the test.

Rule/Test:

- 1) Expert needs to establish that to do this thing, requires a distinctive behavioral characteristic (according to science)
- 2) Expert needs to say they've examined the accused and don't believe he has this characteristic

Holding: Court says they don't believe there's a scientific consensus about the behavioral characteristic- so it failed the first part of the test

Note: Assuming you could satisfy the test- the crown cannot respond to the expert witness because it would be so prejudicial (but can probably bring in their expert witness)

Character of the Accused- Similar Fact Evidence

- If you satisfy the *Handy* framework, then Crown may be able to introduce evidence of prior bad acts
- Prior bad acts the Crown wants to lead to generally show that the accused did the thing that they are NOW charged with.
- Courts treat prior bad acts strictly because people change & it may be their behavior 10% of the time but not 90% of the time- doesn't actually define them
- Prejudicial
    - Lengthy historical narratives-If it's so far back in the past- how do you cross examine because memory of it will be
    - General propensity- lowers the Crown's burden on BOP- if you did that then you probably did this is what jury may think
- First 3 cases aren't the law *(Makin, Smith, Straffen)*-
    - Courts back then said in certain narrow incidents you can allow it- under 2 circumstances:
        - **1)Modus Operandi**: Show a hallmark/signature: if you do something in a very particular way and this crime is done in a very particular way- though prejudicial is there but the probative value is so much higher
            - worth the cost of admission
        - **2) Motive**: if you have particular bias to do something to someone
    - essentially what the court was doing was allowing it down 1 avenue.
        - was trying to avoid general propensity, moral
    - Difficulties:
        - 1) very technical & complex
            - lot of onus on the counsel
        - 2) arbitrary
            - does the probative value affect the prejudicial is the main question- you shouldn't have preapproved inferences for that
- **Court has NOW moved towards a principled approach**
    - Its complex
    - More uncertainty
    - But there are **advantages**: it asks the rights questions. Lets dispense the formulas and ask the right questions- relevance, probative value, and prejudicial affect.
        - If done well should generate a proper response

Makin v AG for New South Wales (1894)

Facts: John & Sarah Makin were convicted of the murders of Horace Amber Murray and an unidentified male infant- buried in their backyard.

- Evidence of 12 other infants buried in backyards of their previous residences was offered

Issue: should evidence of the other bodies found be admissible?
Rule: evidence of similar facts can only be admitted if it is both relevant and probative to a degree that it substantially outweighs the prejudicial effect.
Holding: Yes- but only in this case, as a general rule past similar event should not be admissible unless there are exceptional circumstances

R v Smith (1915)

Facts: Smith had married 3 women and each of these women (B,M,A) was found dead in her bath. S stood to benefit financial from each's death. He was charged with M's death and did not testify- but theory of the defence was that M had drowned accidently

- Evidence brought in that he murdered other 2 at a later date. **TJ** allowed this evidence and S appealed.

Issue: was the evidence of the 2 later murders admissible?

Analysis:

- If there is *prima facie* evidence that the accused committed the act charged with (true in this case), then evidence of similar acts become admissible
- If admissible. prosecution only needs to prove that the other two women were found dead in their baths

Holding: YES, it was admissible- appeal dismissed

R v Straffen (1952)

Facts: Straffen was convicted of murdering a young girl. His defence was that he did not kill the victim, Bowyer. Crown wanted to enter the evidence of S's confession of murdering two other girl made to the cops "I know I kileed two little children, but I did not kill the little girl"- assumption made that it was about Goddard and Batstone.

- **TJ** admitted the evidence

Issue: should the evidence of the murder of the other two girls be admitted?

Analysis:

- Many similarities between the death of the two girls and Bowyers

Holding: Yes, it should be admitted – abnormal proppensiy is a means of identification

R v Handy

THE LAW for SFE; TEST for SFE Admissibility
Accused of SA- SFE based on ex-wife

Notes: Very significant, the judge is very clear- "when you are in engaged in similar fact evidence, what you're engaged is in propensity reasoning"- Justice Benne
Facts: Handy was charged w/ sexual assault causing bodily harm. – victim says consensual vaginal sex turned into hurtful non-consensual vaginal and subsequently anal sex and physical abuse.

-Crown tried introducing evidence of his ex-wife about 7 allegedly "similar fact" incidents that occurred during their abusive and violent cohabitation

-TJ admitted the evidence & accused was convicted

-Appeal- H says jury should not have considered the SFE since it was highly prejudicial and felt the similar facts weren't similar at all.

-IMPORTANT: DISAGREED ON WHETHER IT WAS CONSENSUAL OR NOT

Issues:

1) the test for admissible of discreditable similar fact evidence where the credibility of the complainant is the issue

2) the impact of potential collusion on the admissibility of such evidence

Rule: TEST FOR ADMISSIBILITY

-Similar fact evidence is presumptively inadmissible. onus is on Crown to satisfy trial judge on balance of probabilities that in context of particular case the probative value of evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception

-General exclusionary rule: Crown cannot lead prior bad acts however you can lead evidence of prior bad character if *Handy* framework is satisfied.

-Why: the rule is there because prejudicial > probative. But if they're able to prove probative > prejudicial, then it ought to be admissible because the rule was there because the reverse was generally true.

-Prior bad acts are inadmissible unless probative value outweighs prejudicial value

TEST

1) Identify the Issue in Question

a) Identify the legal issue in question

- the general character of the accused and general disposition towards a crime is too broad and needs to be far narrower because it is general propensity reasoning
- more specific/narrow it is articulated, the further you are away from general propensity reasoning
- *Handy*= issue was absence of consent

b) Relevance of the prior bad acts/framing of the evidence

- *Handy*= the materiality is that the Crown will want to say that the bad abusive behavior and sometimes sexual abusive w/ wife shows a propensity towards the behavior of consensual to non-consensual sexual behavior

2) Assess Probative Value (Threshold)

Probative value means how much does the prior bad act indicate a propensity of doing the current act at issue.

i. Collusion: whether there's collusion between the past and the present

-If there is collusion the evidence collapses

- just because they had an opportunity to meet, it doesn't mean that they colluded- need more than that

  - 1) Raise an air of reality of collusion (not a high standard)- based on some evidence.
  - 2) If the #1 is proved, then Burden on Crown to prove on BoP that it didn't happen- which is hard to prove

ii.Stronger the connection between past and present, the stronger the probative value- but not always; it depends on the nature of the application

-One Extreme: Guy has a mask on while sexually assaulting- in that situation if the Crown wants to introduce that accused was in a similar situation in the past- in this case you're going to require *STRIKING* similarity→ its not propensity reasoning, its framing it in a way that its more than coincidence and that its not likely that 2 people are roaming around doing this same weird thing

-Another Extreme: Bob & Timmy hunting. Timmy shoots Bob. Timmy is saying its an accident. You want to show that they have a bad relationship, there's motive, to show it was done on purpose- to rebut the defense

- Doesn't need to be strikingly similar (gun vs knife, etfc) but still has an enormous probative value

ii. Factors (Beenie)

- 1) Proximity in time of the similar acts
- 2) Extent to which the other acts are similar in detail to the charged conduct
- 3) Number of occurrences of the similar acts
- 4) Circumstances surrounding or relating to the similar acts
- 5) Any distinctive feature(s) unifying the incidents
- 6) Intervening Acts
- 7) Any other factors which would tend to support or rebut the underlying unity of the similar acts

3) Assess Prejudicial Effect

-lengthy narrative past can be prejudicial

-moral interprency

-need to compare the past and the present in a moral sense

-was the past thing WORSE than the present?- prejudicial

-narrow vs. general propensity- biggest prejudicial effect

-*Handy* is a propensity case: we are able to say that he goes from consensual to non-consensual sex but we cannot say that he has a generally propensity to sexually assault

4) Balance Probative Value against Prejudicial Effect

-note: not relational (if one goes up, not necessary the other one goes down)

Analysis:

1) Was there consent in the room? The prior abusive behavior towards the wife shows a propensity to behave in a way where the sexual consensual behavior turns into sexual non-consensual behavior

2) Probative (3/10)

-Collusion: accused claims the wife & victim planned this

-prior to the act the victim had met the wife who told her how Handy had done horrible things to her and she received $16,000 in compensation= this raised an air of reality

-BUT Crown was unable to prove on a BoP that there was no collusion (FAILED HERE)

-more similarities between the past & present the better (increases probative value)

1) proximity in time: closer in time, more probative value

2) number of incidents: more times you've done it, greater probative value

3) context: different context/situations (stranger vs ex-wife)

4) acts: the acts are different. The one's that didn't even have sexual undertone, doesn't support the inference

-we aren't sure that the prior acts were committed- diminishes the probative value

3) Prejudice (10/10)

-comparing past to present in moral sense

-you can probably look at the volume (long-term done to the ex-wife may be worse than the 1 sexual assault act to the current victim)

Holding: Evidence was inadmissible

R v Jesse (2012)

SFE; Identity case; Evidence admitted though victim didn't know who did it
Prior act similar to present act

Facts: Jesse charged with sexually assaulting an intoxicated woman by inserting a wine cork into her vagina at a party. The victim had no idea who did it. J lived in the area and was at the same party. All other witnesses were drunk.

-judge case- no jury

-Crown tried to introduce SFE- in 1995 jury convicted J of sexually assaulting an intoxicated woman by inserting two shopping bags. Though he maintained he was innocent, he never appealed the conviction or challenged the sentence

-no evidence EXCEPT for SFE

Issue: was the similar fact evidence admissible?

Rule: Prior conviction would constitute sufficient evidence upon which a trier of fact, on the trial proper, could conclude on a balance of probabilities that an accused was the perpetrator of the prior act that formed the basis of the conviction.

Analysis: Probative value is similar because of the high similarity between prior and present act

Holding: evidence was admissible- appeal dismissed

Character of Witnesses Other Than the Accused

Introducing bad character evidence of someone other than the accused
1) Blaming the victim for aggression-you were reasonable in calibrating it
 -Self defence; Sexual assault- legislative regime instead of common law
2) A rival suspect

R v McMillan

Rival suspect

Facts: man charged w/ killing his baby. He wants to say he didn't do it but wife did it. Claims that there are psychopathic reasons why she may do it.
Issues: Are there any particular constraints about what the expert can say about the wife
Rule: There's nothing particular you need to satisfy. If it's relevant, there's no exclusionary rule and probative value > prejudicial effect, then admissible
Analysis:
 -Legally Relevant Issue: Did he do it?- want to raise a reasonable doubt about whether he did it
 -Material: Want to bring in a witness to raise a reasonable doubt that he did not do it
 -Probative Value**:** Suspicious things were said- she told the neighbors she was happy the baby was dead
 -Prejudice: Doesn't matter- because if you think about horrible things about the wife, it doesn't matter because she's not the accused**.** If it leads to a decision, it is just for the husband.

R v Scopelliti

Self-defense; Need prior knowledge of bad acts

Facts: Goons come into a shop while being violent. Shop owner reacts and shoots them. Shop owner claims self-defense.
Issue: Is the evidence of prior bad acts admissible if the accused wasn't aware of the prior acts?-**NO**
Rule: to have evidence of prior bad acts being admitted in regards to self-defense, the accused need to have known about the prior bad acts.
Analysis:
-to claim self-defense you need to say you were reasonable and calibrated in your response
 -you want to diminish your participation and enhance the victims
-Blacken character of victim by referring to prior bad acts
-court looks at relevance: needs to look at whether you knew about the prior bad behavior
 -Two issues these prior behaviors are going to aim at:
  1) Helps generate a subjective fear
   -goes to the reasonableness of the accused's behavior
   -accused says that his actions were reasonable because he knew what they were capable BUT he actually needs to be aware of their prior bad acts- and in this case he was not
  2) they had a general propensity to be violent and that supports the inference that they were doing that on the day in questions
-Prejudice doesn't matter because the victims aren't standing trial
-Court does say: you need **some evidence** that they were behaving badly on the day in question- low threshold

Sexual Assault Context

- The traditional common law rule was that if the accused was charged with sexual assault they could call witnesses to testify that the victim had a bad reputation for sexual chastity and raise two inferences ('twin myths')

1) Consent- general propensity reasoning that she was more likely to have consented to the alleged sexual assault because she had a history of doing so

2) Credibility- that she is less credible as witness by virtue of her prior sexual experiences (no morality)

-Section 276 of the *CEA* makes it FORBIDDEN to introduce evidence of the complainants sexual history goes to either consent or credibility

-BUT this does not make evidence of sexual history ALWAYS inadmissible if you can find another purpose

-Has caused some difficulty in the law

-Examples of alternative purposes found in *Seaboyer*:

-Modus operandi, ie. the prostitute who says she wants double or she will go to the police (*Seaboyer*)

-defense of honest but mistaken belief in consent- it is a defense so you must raise an air of reality but might be important to engage in prior sexual history between the two people ie. "she didn't mean no when she said no" by looking at history (Goes to state of mind not consent or credibility)

-Section 276(2)(c) does place a CONTROL on this in that it says evidence must have SIGNIFICANT probative value to be admissible

-always have to show probative value over prejudicial effect but here it is a higher standard ie. "significant"

-MUST therefore be capable of raising a reasonable doubt

-would have to be VERY good evidence

R v Darrach

Victim of a sexual assault

Facts: D charged with sexual assault and attempted to introduce evidence of the complainant's sexual history
Rule: Evidence of past sexual activity inadmissible when it is being used to support the two prohibited inferences
Analysis: Constitutional challenge to s.276 was upheld

MR. BIG

Concerns cold cases, mostly murders where there is no proof against the accused

- Must be a serious case because the amount of resources being put together for such an operation
- Must be quite sure that the accused commit the crime
- Also try to ensure that the accused is unsophisticated enough that they will confess during such a scheme.

What's Entailed in a Mr. Big Operation:

- Police Officers pose as gangsters and groom the accused
- They convince the accused that he/she is moving up the ranks and gain their trust
- Eventually the accused is supposed to meet Mr. Big (the big don) and confess a serious crime to Big to gain his trust

Probative value entirely relies on the reliability of the confession

Issues with Mr. Big

- **1) The Danger of an Unreliable Confession**
  - → the confession rule guards against the danger of an unreliable confession but because it requires the Crown to prove BARD that it was voluntary
    - just because accused doesn't know that confession is made to a PO in Mr. Big, doesn't mean that we shouldn't be concerned about reliability
  - a. Accused is seeking a promotion & trying to gain trust
    - -He would be under the assumption that anything you say will be safe w/ Mr. Big since it's assumed that's a gangster and not a cop- so doesn't matter if you lie or tell the truth as long as you make a good impression.
  - b. Threats implied
    - -What if you say you haven't done anything bad? Accused may be under the impression that they may be harmed if Mr. Big doesn't receive the answer expected.
  - c. Inducements
    - -Fancy restaurants, clubs, money, gifts
    - -Accused is marginalized to begin with and now they're living this wonderful life
  - → all these undermine the reliability of the confession- undermines the probative value
- **2) Prejudicial Effect:**
  - - Bad character
    - -Putting the confession into evidence requires showing that the accused wanted to join the criminal organization and he participated in "simulated" crimes that he believed were real
    - - Bad character generates two kinds of prejudice:
      - 1) Moral Prejudice: by marring the character of the accused in the eyes of the jury, thereby creating a risk that the jury will reason from the accused's general disposition to the conclusion that he is guilty of the crime charged, or that he is deserving of punishment in any event
        - -general propensity generates a huge amount of prejudice
      - 2) Reasoning prejudice: distracting the jury's focus from the offence charged, toward the accused's extraneous acts of misconduct
  - -Confession generates so much bias because of the way the accused speaks
    - -The cops talk in 'gangster talk'- so much profanity etc and the accused picks up on this
- **3) Police Misconduct**
  - -Risk that police will resort to unacceptable tactics in their pursuit
  - -Cultivate an aura of violence by showing that those who betray are met w/ violence-can involve threats or acts of violence perpetrated in the presence of the accused (occurred in *Hart*)
  - -Kind of the idea that it would bring the administration into disrepute
- Why do we need this? **Why doesn't the *Oickle* framework work**? Because it is not said to a person in authority- although they're a cop, accused doesn't know that

Mr. Big Operations and the New Common Law Rule

R v Hart

Mr. Big Rule/TEST; Accused allegedly drowns daughters- cops set up gang

Facts: Hart is accused of killing his 2 daughters by drowning them. Officials are unable to prove that H committed the crime but they're sure that he did do it. So POs conduct a Mr. Big operation. They groom H and "H was fully immersed in the criminal life". Eventually H gets to meet Big who asks him how serious he is and H says "very serious" and tells him that he killed his daughters. During the course of the operation, there were 64 scenarios and H was paid $50,000.

RULE: where the state recruits an accused into a fictitious criminal organization of its own making (Mr. Big Operation) and seeks to elicit a confession from him, any confession made by **the accused is presumptively inadmissible**

Analysis:

1) Probative

- Accused was socially isolated, unemployed, and living on welfare
  - Made his incentive to lie much greater because he was forming friendships which was transforming his life→ this will motivate him to lie to keep him going
- Inconsistent Narrative
  - Confessed a few times but when he acted it out it was inconsistent with his story

2) Prejudice

- Being involved in all the crimes during his time w/ the fictitious gang which results in a bad character and him being seen in a negative light.
- Overall prejudicial effect not super high

Balancing→ prejudicial value not high but the probative value is quite low (5 v 1)

3) Abusive:

- The trickery done to a vulnerable person may be sufficient to have crossed the line

Holding: Probative Value < Prejudicial Effect so the presumption was not displaced and confession was excluded. Confession is **inadmissible**.

TEST

Part One:

- **1) Probative Value & Factors:**

  -Examine the circumstances and assess the extent to which they call into the question the reliability of the confession

  -Factors: length of the operation, the number of interactions between the PO and accused, the nature & extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including their age, sophistication, and mental health

  -note: those with mental illnesses or disabilities and youth present a much great risk of falsely confessing- more vulnerable

  -Should consider the detail contained in confession- did it contain anything that was not made public; eg. weapon used→ could provide a powerful guarantee of reliability

- **2) Prejudice**

  -Take what you know and quantify

  -**moral prejudice** may increase w/ operations that involve the accused in simulated crimes of violence or that demonstrate the accused has a past history of violence

  -general desire to live a criminal life, how bad is the particulare stuff that he's doing- will it a shed a bad light on him

  -**reasoning prejudice**: can cause jury to be distracted depending on the length of the operation, the amount of time that must be spent detailing it, and any controversy as to whether a particular event or conversation occurred

  -but risk of prejudice can be mitigated by excluding certain pieces of particularly prejudicial evidence that are unessential to the narrative

- **3) Balance**
  - **If probative value > prejudicial effect then the confession is presumptively admissible**

Part Two: Assuming

- **Doctrine of Abuse of Process**

  -Onus lies on the accused to establish an abuse of process has occurred

  -Police conduct, including inducements, physical violence, or threats of violence, becomes problematic when it approximates coercion

  -The police cannot be permitted to overcome the will of the accused and coerce a confession

  -But also, operations that prey on accused's vulnerabilities- mental health problems, substance addictions, or youthfulness- taking advantage of these vulnerabilities threatens trial fairness and the integrity of the justice system

  -Misconduct that offends the community's sense of fair play and decency will amount to an abuse of process and warrant the exclusion of the statement

R v Mack

Application of *Hart* rule; confession admissible
Intrinsic evidence, not vulnerable, multiple consistent confessions

Facts: Cops hear that Mack is claiming that he killed a certain individual. Cops launch a Mr. B scheme and during the scheme they gave M $5,000 plus expenses. He confessed to the killings.

Rule: *Hart*: where the state recruits an accused into a fictitious criminal organization of its own making (Mr. Big Operation) and seeks to e licit a confession from him, any confession made by **the accused is presumptively inadmissible**

Analysis:

- Probative value:
  - -M made confession to multiple people- cops and others
  - -all the confessions were consistent
  - -there was intrinsic corroborative evidence- the cops when to the burning site that M mentioned and found body bits which matched the victim's DNA and shell casing
  - -M had money and job to begin with- so he wasn't vulnerable (like *Hart*)
  - -M had motive: hated the victim
- Prejudicial
  - -crimes committed during Mr. B were petty
- Balancing: probative value > prejudicial effect

Holding: Confession was **admissible**. Probative value > Prejudicial effect

CREDIBILITY

INTRODUCTION to CREDIBILITY and SUPPORTING CREDIBILITY

- If witnesses are the key players in the common law trial, the assessment of their credibility is the engine that drives the evaluation of their evidence- credibility assessments are important in assessing the probative value of evidence
- Credibility determines who you decide to believe
- Credibility of a witness can be affected by two different kinds of concerns:
  - 1) Is the person telling the truth? [reliability]
  - 2) Is the person a truthful person generally? [credibility]
  - can be credible but unreliable- they are a truthful person generally but have made a mistake in their story
- Unlike Character, credibility is ALWAYS an issue – the whole point of listening to a witness is to see if you believe them
- **Ways to assess:**
  - Look at demeanour (common sense approach)
    - How they answer questions
    - How they respond to cross examination
    - Does the story make sense?
    - Are they confusing things?
  - Measure their evidence against the rest of the evidence
    - Do 3 people tell the same story? And this 1 person tells a different story?

R v NS

Assessing demeanor; niqab; case by case basis

Facts: Witness (sexual assault victim) wants to wear a niqab while testifying. At the preliminary inquiry, defense argued that she should ordered to remove it because to assess credibility of witness, you need to be able to assess their demeanor, which is hard/impossible to do without being able to see their face – argument that this breaches right to a fair trial . On the other side, freedom of religion.

Issue:

1. Is it really true that the "more face you can see, the easier it is to assess demeanor"? Can you still assess demeanor with face covered? **Yes, but you can still assess voice, articulation, body language, eyes; compare evidence with other evidence;**
2. If you make them remove the veil, will that impact their demeanor? **Yes, if she is used to wearing it, then she will be nervous or upset or uncomfortable solely because of the lack of veil. So they may look like they are lying, even if they aren't.**

Decision:

- Balance the rights on a case by case basis
  - Their importance as a witness
  - The importance of the charge
  - Truth seeking benefits of removal vs trust seeking detriments of the removal [hurt or help assess demeanor]

There is a peer reviewed study that shows: Ability of people to spot a liar is actually increased when face is covered

Assessing the Credibility of Children

- Inherently problematic because children think differently
- Assuming they pass the capacity threshold test under 18(1), they are still children – they act and talk differently
- There is no special credibility standard for children, but you need to use common sense when assessing credibility of kids
    - It's not a different rule, but it kind of is a different rule
    - You need to make allowances for the fact that children "are not normal people". They may miss important things. They may not tell stories chronologically. Where that may mean an adult is lying, it doesn't necessarily mean a kid is lying.

Supporting the Credibility of Your Own Witness:

- Counsel begins examination of their witness w/ questions to 'accredit' the witness as a person generally worth of belief, focusing on for example, on the witness's employment, length of residence in the community, credentials, etc- all permissible
- A party may not lead evidence as part of its case where the relevance of the evidence is limited to showing that their witness is credible- oath-helping
- Oath helping – Prohibited from doing this because there is a presumption that a witness is credible, so there is no reason to bolster their credibility
- Until a witnesses credibility is challenged, it is assumed they are telling the truth
- Can't:
    - Call other witnesses to testify to the credibility of your witness
    - Can't introduce prior consistent statements to show they are truthful

Exceptions to Oath-Helping

- 1) Expert evidence
- 2) Good Reputation for Veracity in Criminal Trials
- 3) Prior Consistent Statements to Rebut Allegations for Recent Fabrication
- 4) Prior Consistent Statements for Narrative

1) Expert Evidence

- It is for the trier of fact to assess the credibility of witnesses, but the trier (whether judge or jury) may require the expert assistance to evaluate the credibility of a witness to whom common principles of credibility assessment may not apply
- Must ensure expert passes expert test
- Concern that expert should not be asked to express an opinion on the credibility of the witness, but only to explain the **special phenomena** that the trier of fact should take into account in making the assessment
- Examples:
  - Child
  - Sexual assault victim doesn't complain for a really long time. When they do, some jurors may draw a negative inference on the fact that victim did not complain for a long time. Expert may be able to come in to explain that sexual assault victims sometimes do not come forward right away because they fear revenge, etc.

R v Marquard

Expert witness; cannot cross line and give opinion on credibility;
can only help jury/judge understand special phenomena

Facts: Victim (child) gave two different statements as to alleged aggravated assault by grandmother: 1) that she burnt herself with a lighter 2) Her grandmother burned her

- Crown wants jury to believe the second story, but the fact that she lied first harms her credibility
- Defense calls Dr. Mian to show that when child arrived at hospital she told staff the first story
- On cross-examination, Crown elicited the opinion that the child was lying when she told the first story- she says common for children to give first given accidental explanation of injury and then later a story more consistent w/injury, also said child was withdrawn, non-emotional, and compliant. She suggested the second story she be believed.

Issue: Was the expert's evidence on cross-examination admissible? **NO**
Rule: An expert's evidence may be admissible if it does not directly bolster the witness. Ultimate judgement of credibility lies in the triers of fact.
Analysis:

- Credibility is a matter within competence of lay people. Ordinary people draw conclusions about whether someone is lying or telling the truth on a daily basis.
- Dr. Mian was testifying as the examining physician and an expert witness therefore making it impossible to avoid touching on the girl's credibility
- Relevance of her testimony does not lie in whether or not the Dr thought the girl was lying but rather in her knowledge of the characteristics of the abused children, which led her to the conclusion that the girl may not have been disclosing the truth about her injury
- Ultimately if the Dr. had just given expert opinion on how children initially lie when first asked about injuries at the hospital to the staff , that would be admissible. But in this case the Dr. went **further than this when she said the girl was telling the truth the 2nd time** and that goes to credibility which is the responsibility of jury or judge to analyze.
- It is up to the trier of fact to judge the girl's credibility but with a expert opinion's there will be a natural inclination to believe such an expert and abdicate their responsibility to the expert

2) Good Reputation for Veracity in a Criminal Trial

- Defense in a criminal trial is permitted to lead reputation evidence to establish the good character of the accused for the **purpose of raising a reasonable doubt he/she committed the crime**
- If the accused testifies, the defense can lead evidence of the accused's reputation for veracity/truthfulness for the purpose of enhancing their credibility
- Such evidence can be introduced by the accused (***McNamara***) or by a member of the community (3rd party witness) that speaks to the accused's general reputation of truthfulness (***Rowton***)
- Essentially an accused in a criminal trial can bolster their own credibility by bringing up specific examples of them speaking the truth or may call on a 3rd party
- Character and credibility overlap – this is also allowed more generally under character evidence (but once accused introduces the evidence, it can be cross examined)
- Can bring up prior consistent statements

3) Prior Consistent Statements to Rebut Allegations of Recent Fabrication

- Presumption is that cannot introduce prior consistent statements since there is no probative value- just because you said something 5 times does not mean you've been telling the truth every time, it can just mean you lied 5 times.
- Exception: 1) Criminal Trials; **2) Rebutting express or implied allegations of recent fabrication**
- When one party suggest the other party's witness came up with their story at some point between events at issue and the giving of the testimony- the witness's prior consistent statement is admissible to rebut that allegation
    - Probative value: Prior consistent statement shows that she has consistently maintained the position reflect in their memory- at least for a longer period than opposing counsel suggest
    - Example: allegation that you lied because you were bribed to lie
        - Showing that you told a friend 3 weeks earlier shows that you probably didn't lie and probably weren't bribed

R v Ellard

Rebut allegations;

consistent statements needs to be before defense's claim as to when fabrication occurred

Facts: Witness comes in and says she knows something. Defence tries to challenge credibility by saying she was mistaken. She misremembered because she was exposed to all the rumours that were in the media/community.

- Crown wants to rebut by saying that she had made the same statement before she heard the rumours – so your theory is wrong.

Holding: Didn't work in this case because she was consistent but only since hearing the rumors.

R v Stirling (2008)

Prior consistent statements to rebut allegations has no probative value besides that purpose
Cannot use it for the truth of its content- because of could've lied all other times

Facts: in a single-vehicle accident, two were killed and two survived (Stirling & Harding). Both claim the other was driving- so here S is claiming H was driving.

- Trial: During cross-examination S's counsel questioned H about a pending civil claim he had against S as the driver of the vehicle and drug related charges against H which had been recently dropped
- Defense says that H has a motive to lie because if he admits he was driving then civil suit would be dismissed- all parties agreed that this line of questioning raised possibility that H had motive to fabricate testimony
- So the judge allowed the Crown to admit prior consistent statements to rebut the suggestion: H told police immediately after the accident that he didn't drive & civil suit
- Defense believes that though TJ was correcting in admitting the statements, he erred in considered them for the truth of their contents

Rule: A prior consistent statement that is admitted to rebut the suggestion of a recent fabrication continues to lack any probative value beyond showing that the witness's story did not change as a result of a new motive to fabricate

Analysis:

- Prior consistent statements are generally inadmissible because viewed as lacking probative value and being self-serving BUT several exceptions such as when it is suggested that a witness has recently fabricated portions of his or her evidence
- Though H was consistent- it does not mean he was telling the truth every time it merely shows that it wasn't fabricated as a result of the civil suit or the dropping of the criminal charges
- TJ had acknowledged H had motive to fabricate immediately after the accident and had explicitly stated multiple times that he did not consider the statements for the truth of their contents

Holding: Appeal dismissed- TJ didn't consider statements for the truth of its contents

4) Prior Consistent Statements for Narrative

- You can introduce evidence of prior consistent statements if it goes to narrative and NOT credibility
- Narrative: the idea that prior consistent statements contextualize evidence to providing a logical order/structured narrative-has legit purpose that is independent from its truth value (definition from Dinardo)
- Must identify clearly its factual and legal relevance and explain exactly how it goes to narative
- Must be aimed at telling the witness's story=explains the story from offence to complain to arrest to prosecution (*Dinardo*)
- You have to tell a story to the jury-Narrative puts the sequence of events on the table for the jury
- CANNOT go to :
  - 1) The truth of the content of the statement (otherwise it would be hearsay)
  - 2) Corroborating the current testimony (eg. Witness cannot say "believe me because I have been saying it over and over again"
- Section 275 of the *Criminal Code* relates to prior consistent statement in relation to sexual assault

R v Dinardo:

Prior consistent statements for narrative; cannot be used for truth of its contents

Facts: D was a taxi driver with a sexual assault on a person who was mentally disabled. Victim said D touched her sexually during the ride. She had told the nurse and several others. Her testimony suffered from some inconsistencies- at one point she testified that she may have made up the allegations. Thus Crown called 4 witnesses who testified about the statements that the complainant made around the time of the alleged assault.

- TJ allowed such prior statements and said that he used the to believed her

Issue: Did TJ err in in using the prior consistent statement for the truth of its contents? **YES**

Rule: Prior consistent statements can be used to understand the narrative but cannot go to corroborating evidence and for the truth of its content - She told the nurse, then she told the doctor, so the doctor called the police, and she explained it to police, so they investigated and pressed charges

Analysis: the prior consistent statemetns can be introduced to help understand how she got from the hospital to the court room.

Holding: TJ erred.

IMPEACHING CREDIBILITY

- Impeaching credibility is when you're undermining the credibility of a witness.
- This can be done by bringing in another witness to challenge the witness or show the inconsistency of statements
- Prior inconsistent statements are admissible due to its probative value

There are 4 ways to impeach the credibility of witnesses:

- Expert evidence; Evidence of Witness's Reputation/Veracity in Truth Telling; Prior Criminal Convictions

Procedural

- s. 10 & 11 of CEA
  - 10- Written statements
  - 11- Oral statements
  - puts a limit on impeachment
  - need to elicit a point of contradiction
    - if this isn't shown- there's no probative value
- bring another witness to contradict the other witness

Browne v Dunn (1893)

Establishes duty to cross-examine

- It essentially says that if you plan on impeaching the credibility of a witness you should give that witness the opportunity during cross-examination to give an explanation as it is essential to the fair play and fair dealing of the with the witness
- Rule: before you contradict the witness, you have to put it to the witness that you plan on contradicting
- Though this rule has not been abolished, it is not as strictly applied and in many cases the original witness will just be called back to the stand and given the opportunity to repond
- Rationale:; waste of the courts time and does not advance the truth seeking function of the court

CEA ss. 10, 11, 12

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 or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

Deposition of witness in criminal investigation

(2) A deposition of a witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer shall be presumed, in the absence of evidence to the contrary, to have been signed by the witness.

Cross-examination as to previous oral statements

11 Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

Examination as to previous convictions

12 (1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the *Contraventions Act*, but including such an offence where the conviction was entered after a trial on an indictment.

Proof of previous convictions

(1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

How conviction proved

(2) A conviction may be proved by producing

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if it is for an offence punishable on summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if on indictment, was had, or to which the conviction, if summary, was returned; and

(b) proof of identity.

R v Lyttle

Evidentiary foundation not required when putting a proposition to witness- only good faith

Facts: Victim was beaten by 5 men and identified L as the only unmasked attacker at a photographic lineup. Victim claimed that the beating was over the theft of a gold chain. In cross examination, the defense argued it was drug debt and that the victim identified the accused only to protect the real assailants.

Issue: What level of proof do you require when putting evidence to a witness? Do you need a an indepdent fact or theory? Does counsel have to provide evidentiary foundation for assertions made during cross-examination? Do you need to have evidence before you put a proposition to a witness? **NO- just require good faith**

Rule: A question may be put to the witness on cross examination regarding matters that need NOT proven independently if the counsel has good faith for putting the question to the witness- low standard

Analysis:

- good faith basis relates to the function of the lawyer's belief (ex. If you know what you're asking is false if or if you strong suspect it's wrong, it's bad faith)
- low standard- rationale is that it advances adversarial strategy (might be the only way to access information without putting your client on the stand) and it advances the truth seeking function of the court (allows evidence that would otherwise be inadmissible, ie. hearsay to be admissible)
- purpose cannot be to confuse or embarrass the witness because that would not be good faith
- good faith is

Expert Evidence

- A party may impeach a witness by calling expert opinion evidence that discloses a physical or mental defect affecting the witness's capacity to observe, remember, and communicate- a fault in that witness's capcity
- Such evidence would have to satisfy the criteria for the admission of exper opinion evidence, including requirement for necessity
- When the trier of fact will be able to assess the witness's credibility without epert assistance, expert's evidence impeaching credibility would be inadmissible
    - Psychiatrist can't testify regarding to the reliability of a witness where he has based his assessment primarily on his observation of the witness, and acknowledges that her character flaws would be evidence to and assessable by the trier of fact

Toohey v Metropolitan Police Commissioner

Expert evidence; expert for disease of mind

Facts: T & two others convicted of assaulting victim w/ intent to rob. the victim is found in an alley by police. Police blame the 3 thugs they saw in the alley for the victim weeping in the alley. The defense claims that T was merely trying to help the victim and that the victim is prone to hysterical meltdowns to the slightest thing. They want to bring in a witness that say the victim is prone to hysteria- police doctor said victim had no bruises/injury and was hysterical during the exam.

Issues: Can an expert come into say that the witness/victim has a disease of the mind? **YES**

Rule: Expert evidence is admissible to show that a witness suffers from disease, defect or abnormality of the mind that affects the reliability of the evidence

Analysis:

- as long as it is relevant, you can introduce an expert to testify that someone has a mental illness
- Rationale= it helps to evaluate the credibility of the story
- Knowing an individual has a problem with their eyesight is just as helpful as knowing they are prone to hysterical fits.
- Where trier of fact can assess, its not admissible
- It does not go to the prejudice of the accused

Evidence of Witness's Reputation/Veracity in Truth Telling

R v Clarke

Facts: Law permitted line of inquiry of witness called by defense to impeach the character of the Crown witness 1) Do you know the reputation of the witness as to truth and veracity in the community? 2) Is that reputation good or bad? 3) From that reputation, would you believe the witness on oath?
Issue: Can reputation be used to impeach credibility
- Can you bring in a 3rd party to show that the witness has a reputation for being a liar (not the accused- otherwise it would go to character→ overlap w/ credibility and character and crown cannot lead evidence w/ bad character). - **YES**-sometimes usually
- If the accused the is on trial we don't want any bad bias- so that's why we don't bring any bad character- unless they put good character in issue then prosecution can respond

Rule: No special rule, generally witness testimony on reputation is low probative and prejudicial values. Include how widespread the reputation is and in what community it is in
Analysis:
- Question 3 goes into oath attacking and will very rarely be acceptable. It invites witness to give person opinion on veracity of another witness; prejudicial effect of it will almost always outweigh the probative The court here is just dealing with reasoning prejudice. Also who uses the evidence means the scales of prejudice and probative value are different
- **(1)** This type of evidence has modest probative value b/c it is not particularly informative *i.e.* just because someone has a reputation for being untruthful does not mean they are not telling the truth now. But the prejudicial effect is also rather low: no issue of moral prejudice (not the accused) but *some* amount of reasoning prejudice *i.e.* distraction THUS there is no special rule and it is admissible so long as it is relevant and the probative value outweighs the prejudicial effect (must weigh these on an EXAM). Bear in mind *Seaboyer:* the scales are different depending on whether the proponent of the evidence is Crown or defence — if the defence is the proponent of the evidence then it will only be inadmissible if the prejudicial effect *substantially* outweighs the probative value (court more receptive; deck not stacked evenly). Ways to increase probativity = witness lies about the particular thing/circumstances all of the time (*i.e.* lie when they are motivated to); how widespread their reputation is (the more people who know about it); how long and deep the relationship is. **(2)** Generally speaking the answer to (1) is YES but the witness can generally NOT go further and say that based on this reputation the person should be believed. Probative value and prejudicial effect are both still low but prejudice seems to be a bit higher since there is the potential that the jury will usurp their role to the opinion of the witness. Thus, still requires a weighing of probative value and prejudicial effect here

Prior Criminal Convictions

- Credibility is always a legally relevant issues (*Corbett*). Thus, a criminal conviction is relevant to credibility because it makes a witness less likely to be believed- someone that has been convicted of an offence suggest that they are less reputable and hence less trustworthy
- Historically, cross-examination on prior convications was permitted at common law, NOW statutotry provisions govern- S 12 of the *CEA* – **see below**
- Section 666 of the Code only applies to the accused when their character has been put in issues
- Section 12 applies to ANY witness including the accused and goes to credibility rather than character. Under this section, the moment a witness takes the stand they can be questioned about whether they have any criminal convictions- *Corbett*
- S 12(1.1) is to onfirm that though only releant to the credibility of the witness, the existence of a prior conviction is not a merely collateral matter
- However, while section 666 allows the Crown to engage in all circumstances surrounding the offence, the scope of s. 12 is much more limited. The witness can only be asked about the mere fact of their conviction (ie. yes or no) and can only be rebutted with what is contained in the charge sheet (in the event that they are not honest) *Corbett*
- The court in *Corbett* emphasized there will always be the residual discretion of the TJ to measure the probative values against the prejudicial effect
- Futhermore, if rendered admissible, the judge needs to provide a limiting instruction to the jury that the prior conviction goes to credibility and nothing else *Corbett*
- Conviction= any *Criminal Code* conviction may be the subject of cross-examination and it is equally settled that an absolute or conditional discharge following a finding of guilt cannot be used for impeachment under s. 12 of the *CEA;* same applies for any pardoned individuals- although non-accused witnesses can be impeached on prior discreditable conduct outside the ambit of s 12

Collateral

- Traditional Approach: if its aimed resolving the thing at trial then its material and if it is then it's collateral and not allowed
    - bias can show an exception to the collateral rule
- Modern Approach: to not fuss too much about the technicalities
    - more about the principles than the technicalities
    - is the information we're going to gleam for this worth the cost we're going to spend on this

CEA S 12

Examination as to Previous Convictions

(1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the *Contraventions Act*, but including such an offence where the conviction was entered after a trial on an indictment.

Proof of Previous Convictions

(1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

How Conviction Proved

(2) A conviction may be proved by producing

a) A certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if it is for an offence punishable on summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if on indictment, was had, or to which the conviction, if summary, was returned; and
b) Proof of identity

Criminal Code S 666

Evidence of character

Where, at a trial, the accused adduces evidence of his good character, the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of the previous conviction of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed.

Corbett v The Queen

Ratio: TJ has discretion to exclude evidence of previous criminal record when probative value outweigh the prejudicial effect based on four factors. Discretion favours inclusion UNLESS clear ground of policy/law dictates exclusion.

Analysis: Credibility is always a legally relevant issue. Hunt notes that it is very unusual for the court to accept that it is always relevant but the court puts limits on it: (1) cannot introduce that they have a prior criminal record unless they have taken the stand; (2) there has to be a limiting instruction to the jury that the prior conviction goes to credibility and nothing else; (3) can only permit the mere fact of the conviction and not the circumstances surrounding it; (4) there is always the residual discretion of the TJ to measure the probative value against the prejudicial effect to not allow the prior conviction to be admissible (*this is what needs to be focused on*). Court elaborates on probative value/prejudicial effect. Drivers of probative value = the nature of the previous conviction *i.e.* perjury would be the MOST probative and anything dealing with honesty [theft, fraudster]; temporal remoteness or nearness *i.e.* the more recent the conviction the more probative OR the number of previous convictions. Drivers of prejudice = more convictions (takes up more time); moral prejudice only an issue if the accused is on the stand. The prospect of moral propensity reasoning being engaged would depend on whether there is a real prospect dependent on the similarity between the previous conviction an the offence charged *i.e.* would be enormous because the more similar it is the more likely the jury would engage in general propensity reasoning. In this case, reasoning prejudice would also have an enormous bad person aspect b/c the jury will not like the accused. Must also keep in mind the *Seaboyer* principle = if the defence is the proponent of the evidence then the prejudice needs to be *substantially* higher.

In the context of a jury trial-

- 2) need to be very clear of the acceptable and unacceptable uses
- 3) balance prejudice and probative value on a case by case basis

HEARSAY

HEARSAY EXCEPTION TEST

1) Is it Hearsay?
2) Does one of the categories of exception apply? (next class)
   - if there isn't a category then it can go to step 3 whether admissible or not
   - if there is, then presumptively admissible BUT still must go to step 3 to confirm
3) Principled Approach
   - controls ultimate admissibility

What Is Hearsay and Why Don't We Like It?

- **Hearsay Definition (two parts)**
  1) Hearsay refers to an out of court statement (can be anything such as writing, recording, etc.)
  2) Produced in court for the truth of its content
- If it's hearsay, then it is presumptively inadmissible
- Relevance & probative value depends on the truth- if you're producing it not for the truth but just because want to present that it was just merely said then it is not hearsay
- The very same evidence can be hearsay and non-hearsay- it depends on its purpose
- Policy:
  - Presumptively inadmissible because it is inherently unreliable
  - Witnesses need to come in to say what they saw→ need to be cross-examined
  - 4 dangers of evidence which are corrected when the witness comes in for cross-examine
    - 1) Lying
    - 2) Misremembering
    - 3) Misperceiving
    - 4) Misnarrated
    - → all these can be tested/controlled for in 3 ways if the witness takes the stand:
      - 1) Take an oath
      - 2) Assess demeanor
      - 3) Contemporaneous cross-examination
    - → but in hearsay aren't able to use these controls and therefor is inherently unreliable
  - it would be unfair to admit evidence that is unreliable
- Exceptions: There are other circumstances that make it reliable and warrant it's admissibility
- Whether something is hearsay or not depends on whether it satisfies the definition
  - First part is easy to satisfy- will focus on the second part, whether it goes to the truth of its content
- Some complexities with 1) out of court statement
  - 1) documents in court
    - need the author in court
  - 2) in court has an odd meaning
    - just because the person is in court, doesn't mean the testimony is in court
    - ex. police station she says car is blue and then in court she says car is red
      - testimony from police station is hearsay (not a sworn testimony as is in court)
      - if she was reaffirming what was said and had said that it was blue in court as well, then it wouldn't be hearsay
      - but if she goes from saying red to blue in court- convinced by the attorney- then it can be admitted (and the earlier statement can go for credibility- not hearsay purpose- impeachment is not a hearsay purpose)

Subramaniam v Public Prosecutor 1956

Non-hearsay; state of mind

Duress- truth of content unnecessary; whether accused belief statements

Facts: S appealed a sentence of death for being in possession of 20 rounds of ammunition. He testified saying he was captured by terrorists and was under duress and sought to bring in such evidence.

- If the evidence is admissible- the defence of duress would be permitted under *Criminal Code.*
- TJ said that the evidence was not admissible unless the terrorists could be called as witnesses

Issue: Were the statements made to the alleged terrorists hearsay? **NO-** not produced for truth of its content

Rule: Hearsay: 1) Out of court statement 2) Produced for truth of its content→ but most be satisfied

Analysis:

- The statements made by the terrorists whether true or not could have been believed to be true by the accused
- If it was going for the truth of its content then it would be hearsay
- But here evidence isn't produced to rely on the truth of its content- but just the fact that the accused believed it- doesn't matter if it was true or not
- Question as to whether it was said- then cross-examine the accused
  - Cannot question about the truth
- Relevant only in light of the issue→ pleading duress and the fact that it was said would go to that.
- Whether the thing was said can go to

Holding: evidence admissible

R v Wildman 1981

Non-hearsay; not going to truth of content but just the fact the word was used

If statement explains knowledge or behavior- then relevant

'Hatchet'

Facts: Crown believes that W killed his step-daughter w/ a hatched.

- Proof= W makes a statement that S was killed with a hatchet and that was not public knowledge. Made this statement to a witnesses (neighbors & wife's lawyer) on Feb 20.
  - Therefore theory is that W killed S because he could have only know about the hatchet if he was the murderer
- W wants to enter into evidence a phone call which would indicate that he would have been made aware of the hatchet through the call- phone call on Feb 16.
  - S's mom calls neighbor blaming them and W for killing S w/ hatchet and neighbor told W
- TJ= W's evidence inadmissible as it is hearsay

Issue: Is the telephone conversation hearsay? **NO**

Rule: If second part of the hearsay def'n isn't satisfied then not hearsay

- **If it explains the knowledge or the behavior- then just the fact it was said was relevant (assuming the knowledge or behavior is relevant)**

Analysis: "Here evidence was being adduced NOT to establish truth of what Mrs. Wildman had said, but for some other relevant purpose, namely, to show how the appellant had acquired knowledge on February 16th of the circumstances of Tricia's death and to explain the appellant's subsequent conduct, particularly his statement to the witness Margaret Ruth MacDonald on February 20, 1978..."

- Crown: Cannot bring in the neighbors to testify what the wife said- need to bring in the wife for that who was out of court
- W wants to negate the inference that he is the murderer because he knows about the murder weapon, the hatchet
- Defence is that it is just going in for the fact the word hatchet was said
- Why is it relevant if it is not true? Furnishes an innocent explanation for W using the word hatchet.
  - The neighbors can be cross-examined about what was said to them by the wife (cannot be cross examined about the truth- but that is relevant anyways).
- Timing is relevant as it shows how W would have found out about the hatchet

Wright & Tatham 1837

Implied assertions can also be going to the truth of the content
Therefore hearsay

Facts: Old man who wrote a will and issue was whether it was binding

- To say it's not binding- argue incapacity
- Estate wants to uphold the will and say that he had capacity
  - Want to call in evidence of 3 friends who are also dead
    - Letters from these 3 friends
    - In the view of the letter writers, they believed they were fine- the way the letters were written were quite ordinary
      - Didn't refer to his diminishing mental capacity
  - Are they going for the truth of it's content?
    - If they expressly said that he has mental capacity then it would be going to the truth
    - But they are impliedly asserting it
    - Does hearsay apply? Can there be implied hearsay? **YES**
    - If you're bringing it in for assertion then it is going for its truth of its content

R v Baldree 2012 ONCA

Implied assertion; probative value derives from it being true then it is hearsay
Drug dealer phone call (witness not brought to court)

Facts: Police initially in residence to investigate break & enter. Later they find cocaine and trafficking amounts of marijuana, digital scale, and debt list.

  - PO charge everyone in apartment w/ possession of drugs for trafficking.

- They seize cellphone which rings and PO answer- speak to individual that wants to buy drugs. Caller identified accused by name and stated that accused sold him drugs previously
- PO wants to admit the evidence- the cop testifies about the phone call
- TJ erred in admitting evidence of call as amounting to implied assertion that accused was drug dealer and therefore used for truth of contents of call
  - Single call from unknown person not meeting necessity/reliability requirements of principled hearsay rule
- TJ also erred in failing to consider whether probative value of call outweighed prejudicial effect

Issue: Hearsay?

Rule: Does the probative value derive from it being true? If yes, then it is hearsay

  - Implied assertion can also be going to the truth and therefore hearsay hearsay

Holdings: appeal allowed

- **<u>Feldman</u>**: TJ erred in admitting evidence of one call on basis that it was not hearsay.
  - Initially Crown said they aren't admitting call as evidence for truth of its content- later they used it to help support the fact that accused was drug dealer a
  - The call did not meet the necessity/reliability requirements for hearsay rule
  - TJ did not consider if probative value outweighed prejudicial effect
  - Evidence gets its probative value from the implied assertion that the caller believes accused is a drug dealer
- **<u>Blair:</u>** not necessary to characterize evidence into hearsay vs non-hearsay
  - Focus on criteria of necessity/reliability and prejudice vs. probative value
  - TJ should have conducted both tests and evidence probably would not have survived
- **<u>Watt</u>** (dissenting): <u>not hearsay</u> but <u>circumstantial evidence</u> of nature of the business carried on by the person charged
  - Truth is not relevant
  - Whether call was hearsay doesn't depend on number of calls of which evidence was given – important was the purpose evidence was adduced
  - Evidence was not hearsay instead is evidence of conduct
  - So necessity/reliability test was not necessary

R v Baldree 2013 SCC

Issue: Does the hearsay exclusionary rule apply?
Rule: Hearsay inadmissible unless falls under a traditional exception to the hearsay rule.

- If hearsay does not fall under a hearsay exception, it may still be admitted if, pursuant to the principle analysis, sufficient indicia of reliability and necessity are established on a *voir dire*.

Analysis:

- Defining features of hearsay are:
  - 1) the fact that the statement is adduced to prove the truth of its contents and;
  - 2) the absence of a contemporaneous opportunity to cross-examine the declarant
- Hearsay is presumptively inadmissible and questions is whether hearsay exclusionary rule applies
- Not traditional exception applies and the impugned evidence withers on a principled analysis
  - Single drug purchase call of uncertain reliability
  - No effort made to find the caller

Holding: Appeal Dismissed & new trial ordered.

The Principled Approach

PRINCIPLED APPROACH TEST

1) Necessity: witness is unavailable; reasonable necessity
2) Reliability: factors to consider reliability **(motive, mistake)**; see cases

- Principled approach is an exception to hearsay
- It is important because it is evidences a move in SCC
  - Similar to *Handy* in the sense that you just answer the question and apply instead of having categories and labels
- Difficulty:
  - Hard to apply because they are a *de novo* analysis
  - Requires real thinking and analysis
  - Doesn't have an actual test- just an open question
  - Case by case basis
  - BUT generates a better answer once willing to overcome these difficulties
- Difference between *Handy*
  - In handy the question replaced the categories
  - In the principled approach the categories haven't disappeared- they appear alongside the principled approach
- Why have categories
  - presumptively admissibility- provides some sort of certainty

R v Khan

Test: Necessity & Reliability created; doctor accused of inappropriately touching child patient

Facts: The mom and 3 year old daughter go to doctor khan for a check up. Mom leaves the room and the child is left with the K for a while. In the car on the way home (about 15 mins later) and the mom asks "what did Khan say to you". Daughter responds "he asked me if I wanted a candy and you put his birdie in my mouth and peed"

- Khan's DNA was on the daughter's shirt
- Crown wants the girl to testify but under 16.1 she is incompetent
- Crown then wants the mom to testify about what the daughter told her
  - Hearsay
  - No categorical exception so SCC said they will create a new test that would allow for such exceptions

Issue: Is it hearsay and if so admissible? **Yes it is hearsay but admissible under principled approach**

NECESSITY & RELIABILITY TEST

- **Necessity**
  - Usually necessity means unavailability: dead or incompetent
  - Reasonable necessity- no way to bring the story except for the mom's testimony because the daughter was unable to as she was deemed incompetent
- **Reliability**
  - How do we know its reliable? We would bring the daughter in but we cannot- so in light of the circumstances you determine whether she is reliable
  - Did have in decisia of reliability and therefore admissible
  - Factors considered by the court:
    - Happened right after the incident
    - The mom's question- it was an open question not a leading question

R v Smith

Application of *Khan* PA test; BF accused of killing GF;
Evidence= mother received phone calls; motive

Facts: victim was asked to smuggle drugs by boyfriend, Smith.

- Crown's theory was that girl got cold feet and then the accused left the victim at the hotel and then he comes back and kills her
- Evidence:
  - 3 phone calls that want to be introduced by the Crown (all from the victim to the mom)
  - 1) "he dropped me at the hotel and abandoned"- from the room
  - 2) "im stuck here still and I need a ride"- from the room
  - 3) "he has come back and I don't need a ride anymore"- now in the lobby
- Hearsay? Out of court statement (she is dead) and it is going to the truth of its content- that the girl was speaking the truth.
- Probative value is only if there is truth there

Issue: Is the hearsay statement admissible? **NO- didn't pass principled approach test**

Rule: A hearsay statement is admissible under the principled approach test of necessity and reliability

Analysis:

- 1) Necessity
  - doesn't mean necessary to prove the Crown's case
  - reasonably necessary: in the sense of getting the victims words into court
  - girl is dead- so it is necessary so that the victim's words can be brought into court
- 2) Reliability
  - circumstantial in decesia of trustworthiness
  - substantial negate that the witness was mistaken or lying
  - First 2 phone calls
    - Lying: there is no advantage in lying, totally inocueous statement- she derives no benefits from lying
    - Mistakes: not something you would be mistaken about
  - Last call
    - Victim did not like the person that the mom was sending to picking her up (Larry)- so she may have lied to her mom so she wouldn't have to be with her mom
    - Drug mule that is travelling under fake papers- unreliable
    - She may just not want her mom to know the stuff she was involved with- therefore calling Larry off
    - Why would she be mistaken: she could've mistaken someone else's car for Smith's in the dark in the lobby

R v B (K.G.) [called KGB]

Prior out of court statements that are recanted in court- admissible but must pass PA Test

Facts: 2 good youths are walking down the street and 4 bad youths stab and kill one of the good guys. At the station all 3 blamed the same 1 guy for the action. But then the 3 want to recant their statement in court because they don't want to put their friend in jail.

- Crown wants to introduce evidence that essentially proves the initial statement was the truth
- Hearsay: though the witnesses are in court, the statements are still at the police station

Issue: can you bring previous out of court statement into court? **YES, the hearsay evidence is admissible under PA**
Analysis:

- We aren't talking about in court statements (red/blue car example) or impeachment
- Talking about anyone other than the criminal accused- that has come in and said something to say a police and now are saying something else in court (said red before and now blue)
  - So want to bring in evidence saying the prior statement was truth
- **Necessity:**
  - The recanting is showing that they are holding the truth hostage
  - Because the witness is recanting, they are not going to say what they said before so there is no way to get in the exact evidence
- **Reliability:**
  - Trier of fact is asked to choose between two statmeents from the same witness compared to other forms of hearsay where there's only one account
  - **Key testers of reliability overcome toe hearsay dangers**
    - 1) Oath: frequirent procedure at police stations now; has no power to ensure truthfulness but removes resort of absence of an oath as alleged indication of reliability
    - 2) Demeanor: it was video- taped so the jury can analyze the witness's demeanor
    - 3) Cross-examination: video taped can be shown and the witness is available so can be easily cross-examined on what was said in the videotape

R v Khelawon

Recorded testimony of dead man at police station not admissible;
Reliability- there may have been motive or a mistake

Facts: old man says he has been physically assaulted by the owner of the retirement home. He told a few people, the cook (a friend), doctor, police. Recorded his testimony at the police station

- He died- so can we bring in his statement
- Hearsay: Yes, out of court & goes to the truth of its content

Issue: Is the hearsay evidence admissible? **NO-did not meet reliability threshold of PA test**
Analysis:

- Necessity: He's dead
- Reliability
  - Videotape: But cannot be classified as *KGB* because cannot cross-examine him
  - *Khan* or *Smith* situation
    - He was found to be depressed, his mental capacity was quite low
      - →unreliable
    - Cook- fired by the owner and hates the owner
      - She may be manipulating the old man
    - Doctor- could've fallen and bruised that way
    - Therefore he could've been mistaken

Relationship between 'Principled Approached' and Categorical Hearsay Exceptions

- In *Starr*- it had passed the exception test but failed the principled approach test
- So as iterated earlier, though there are exceptions, hearsay evidence may still not be admissible because it may fail the PA test
- So why have exceptions? Because it allows you to gauge whether the evidence may be admissible.

R v Starr

Passed exception but failed principled approach

Some Categorical Exceptions to Hearsay

Statement of Intent; Prior Judicial Proceedings (Civil or Criminal; Party Admissions; Business Records; *Res Gestae*; Statements Against Interest; Speaker's Mental State

Statements of Intent

- Statements of intent can be admissible to demonstrate the intentions or state of mind of the declarant. But it is only to be used to support that the inference that the declarant followed through on the intended course of action. It CANNOT be used to support the state of mind of other person's.
- Needs to meet reliability- NEW present intention exception now has reliability included in the exception test so if the evidence passes the exception test then it will be more likely to pass the PA test

R v Starr

Statements of Intent; Present intention can only be applied to declarant;
Declarant was the victim but TJ applied to the accused

Facts: Starr charged w/ killing two people in the countryside and threw them in the ditch. The theory is that Starr killed Cook (hells angel) and that woman was just there too. According to the Crown, it happened in the countryside and Starr would've had to taken them out there for an autopac scam

- Crown wants to introduce evidence: Cook tells Giesbrecht that he's going to the countryside for an autopac scam w/ Starr
- An out of court statement that is going for the truth of it's statement- Cook is dead and want to prove they did go to the countryside
- Giesbrecht's testimony goes to that Cook had a present intention to go to the countryside but the TJ erred and applied it to Starr

Issue: can Giesbrecht's hearsay testimony be admissible? **NO- it failed at reliability of PA test**
Rule: present intention can only be applied to the declarant
Analysis

- Failed at Principled Approach:
  - 1) Reliability:
    - a. Lying: Cook was in the car with another girl and Giesbrecht was his on and off GF. So he had a motive to lie- to avoid hurting Giesbrecht's feeling
    - b. Mistaken

NOTE: The court changed the requirement present intention exception to include reliability-
Now the present intention exception: you can use the person's statement that they intended to do what they said if the statement can be sufficiently reliable

  - So generally now if satisfied, then will most likely pass the principled approach test

Prior Judicial Proceedings

- admitting evidence from one judicial proceeding to another.
- **Criminal:** if a witness who gives evidence in 1 proceeding then you have a subsequent proceeding, then you can read in their testimony from the one proceeding to another for the truth of its content if the witness is unavailable
  - **Requirements:**
    - 1) initial testimonty must have been under solemn affirmation (but can probably argue that for children..)
    - 2) must concern the same subject matter
      - mistrial, appeal, or preliminary inquiries
    - 3) witness is unavailable
      - disappeared, dead, amnesia
    - 4) at the time of the first proceeding, the accused had a full and fair opportunity to cross-examine the witness
  - →*Potvin* wants to challenge this because they think #4 violates s. 7 of the *Charter* because though it says full & fair opportunity, accused may have not availed themselves of it
    - Court said it doesn't violate s.7 since they had the invitation to cross-examine
    - Only time you would say that you didn't have a full & fair opportunity is probably at preliminary examination because the judge may not let you cross-examine there- so in that case you wouldn't be able to allow such a testimony
    -
- **Civil:** transcript of evidence, as long as it was sworn under oath, can be read from one proceeding to another, assuming they're unavailable
  - All other rules in Criminal not applied

R v Potvin

Prior judicial exception; challenging cross-examination requirement

- →*Potvin* wants to challenge this because they think #4 violates s. 7 of the *Charter* because though it says full & fair opportunity, accused may have not availed themselves of it
  - Court said it doesn't violate s.7 since they had the invitation to cross-examine
  - Only time you would say that you didn't have a full & fair opportunity is probably at preliminary examination because the judge may not let you cross-examine there- so in that case you wouldn't be able to allow such a testimony

Party Admissions

- **The party admission exception:** any the other party (plaintiffs/defendants in civil; and accused in criminal-not the crown) ever did or say is admissible for the truth of its content as long as it is relevant
  - As an exception to hearsay, the Crown can introduce anything the accused ever did or say assuming it's relevant
- You don't apply the principled approach
- Why do we have this rule:
  - 1) it is inherently reliable to use someone's word's against them
    - people don't usually say or do things against their own interest- means it is reliable if they have done so.
  - 2) ridiculous to say you didn't have an opportunity to cross-examine yourself
    - but what if what you said was misconstrued- you can take the stand to explain but then there are other implications for taking the stand.

Business Records

- May apply where a party is seeking to adduce a form of written evidence and the author is not available to present th eodcuments in court and attest to their reliability.
- The exception is governed by both the common law and statute
- *CEA* s. 30(11) states that the legislation does not abrogate the common law but merely incorporates it.
- the common law and the statutory regime are substantially the same other than a few technicalities
- NOTE: after the 6 conditions you must go to PA test- but most likely will pass as the 6 indicators go to reliability.
- Common Law Rule:
  - 6 Preconditions:
    - 1) Original Entry
    - 2) must have been contemporaneously w/ the event of record
    - 3) must have been made part of the routine of business
    - 4) must have been made by person with direct knowledge of the thing on record
    - 5) recorder must have had a workplace duty to make the record
    - 6) recorder must have not had a motive to lie

CEA s 30- Business Records

Business records to be admitted in evidence
30 (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

Inference where information not in business record
(2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.

Copy of records
(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is
(a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or
(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Where record kept in form requiring explanation
(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is
(a) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Court may order other part of record to be produced
(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.

Court may examine record and hear evidence
(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

Notice of intention to produce record or affidavit
(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

Not necessary to prove signature and official character
(8) Where evidence is offered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

Examination on record with leave of court
(9) Subject to section 4, any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

Evidence inadmissible under this section
(10) Nothing in this section renders admissible in evidence in any legal proceeding
(a) such part of any record as is proved to be
(i) a record made in the course of an investigation or inquiry,
(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,
(iii) a record in respect of the production of which any privilege exists and is claimed, or
(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;
(b) any record the production of which would be contrary to public policy; or
(c) any transcript or recording of evidence taken in the course of another legal proceeding.

Construction of this section
(11) The provisions of this section shall be deemed to be in addition to and not in derogation of
(a) any other provision of this or any other Act of Parliament respecting the admissibility in evidence of any record or the proof of any matter; or
(b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

Res Gestae

- spontaneous utterances
- idea is that you are overcome with emotions to utter what you did
- excludes possibility of dishonesty and calculation
- *Khan*-tried admitting girl's testimony through *res gestae* but failed

R v Clark

***Res gestae*; spontaneous utterances admissible**

Facts: Women kills ex husband's new gf and she claims self-defense

- Crown found wants to call witness (neighbor) that saw the victim ran around saying "help she was murdered"

Issue: Is the testimony of the neigbour, as hearsay admissible under the *res gestae* rule? **YES-admissible**

Rule: if the circumstances of emotional gravity & spontaneity safely exclude fabrication then evidence can be admissible.

Analysis:

- Deceased had made the statement while she was in an extreme circumstance- she didn't have time to fabricate a story
- This is a 50 year old case that never went to the principled approach (because it wasn't there)
  - **Reliability:**
    - Lie: people are more likely to blurt out accusations in times of emotional distress- ex. someone runs over your dog but your dog's fault but you're initial going to blurt out that he killed my dog and blame the driver;
    - Mistaken: may have not been able to assess the difference between self-defence & murder while with a knife stuck in her head

Statements Against Penal Interest

- When the witness is not a party to the proceedings and has made a statement against their own penal (criminal) interest.
- Most commonly occurs when the defense wants to point to a rival suspect who has confessed/suggested that they committed the offense thus raising a reasonable doubt that their client did it
- Rationale= people generally will not lie when it comes to the real chance of penal consequences

Technical Requirement (*R v Demeter*)

1) the statement must be made in such circumstances that the declarant ought to have appreciated the possibility of real penal consequences
2) the possibility of real penal consequence must not be remote at the time that you speak
3) as a finding of fact, overall the statement must be against the person's penal interest
4) overall objective analysis of what was said in the overall circumstances- look at everything to see if it is incriminatory or exculpatory
5) necessity- the declarant must be unavailable to testify
→the first 4 go to reliability
→ *Lucier* introduced that it can only be used for exculpatory reasons

R v Pelletier

Statements against Penal Interest; statement wants to be introduced to point to a rival suspect

Facts: C, P, and D were roommates and C was killed. Police initially tried charging D w/ manslaughter. D in his statement said that after a night of drinking he had come home and assaulted C and C fell over and D assumed C was sleeping but the next morning D found dead in the same spot.

- Later charge P with murder but defense wants to use D's statement but D has now disappeared.
- Defense wants the police to be a witness and testify about what D had said
- Hearsay- because D cannot come in as he has disappeared

Issue: Can the hearsay statement be admissible? **YES**

Rule: penal interest exception- technical requirements from *Demeter* must be met

Analysis:

- Relevance= point to a rival suspect and raise a reasonable doubt that P killed C
- #3) At the time david made the statements he didn't think they were exculpatory, he thought it was helping his case
  - But the Court: the statements were against david's penal interest as he mentioned that he wouldn't mind seeing him dead
- Meets necessity as he was unavailable

Lucier v The Queen

Statements against penal interest exception ONLY to be used for EXCULPATORY reasons

Facts: L's house was destroyed when he was away but shortyl after he had increased his fire insurance policy. L's friend, D, came forward and made a statement admitted that he had personally set the house on fire and that he had been hired to do so by L.

Issue: Is the hearsay statement admissible? **NO-not admissible under statements against penal interest exception**

Rule: under this exceptions only statements that have an exculpatory effect will be admissible.

- Crown cannot use it for inculpatory reasons- that he did do it
- Policy= using an out of court statement to acquit an accused individual vs to convict them

Analysis

- Would satisfy the 5 technicalities but in this case it wouldn't because a new LIMIT was introduced
- It can be used if the information is being used for exculpatory reasons for the accused
  - In this case it was inculpatory

Speaker's Mental State

R v Wysochan (1930)

Utterances went to state of mind

Facts: a woman who is dead; she is shot. Two people there: husband and another guy. One of them did it
- Crown's theory was the other guy did it
- Want to introduce evidence of dead woman: she had said as she was dying "I've been shot and want to speak to my husband"- she reached out to her husband in a loving way. Crown-If the husband had shot her, she probably wouldn't have been so loving.
    - She is impliedly asserting that husband was innocent

Issue: Are her utterances hearsay? **NO**

Rule: Exception- state of mind

Analysis:
- Utterances in question contained NO statement of facts necessary to be proved. They are ONLY evidence more or less strong of certain feeling or attitude of mind, and it was for jury to decide what inferences might be drawn from them
- This is probably wrongly decided- it would be hearsay because being tendered to show that it is less likely her husband short her if she's asking for him- implied assertion that her husband is not the killer.

Would this pass the principled approach?
- Reliable statement? No because she has a self interest and a bias to not convict her husband. Or No because she may have been mistaken- it depends how she was shot; if she was shot when turned around, she may have not seen the shooter and may have assumed it was the other guy. It may also be an act of forgiveness.- unclear what she's asserting

Opinion Evidence

- Independent exclusionary rule of evidence
- Opinions are generally inadmissible
  - Juries are there to form their own opinions and draw their inferences
  - Witnesses gives facts so to offer opinions trenches on the juries jurisdiction
- Inference drawn from an observable fact= opinion

EXCEPTIONS

1) Ordinary witnesses may be permitted to communicate their perceptions in the form of opinion on matters that are:
   a. Common knowledge and
   b. Based on multiple perceptions that can be best communicated in a compendious format
2) Trier of fact requires assistance in order to understand the significance of the evidence, or requires assistance to determine what inferences can properly be drawn from the evidence (Expert may be permitted to provide such assistance in the form of opinion evidence)

NOTE: When admitting opinion evidence, must choose which whether using a lay person opinion or expert opinion. The question is NOT the nature of the person speak because experts can give lay person or expert opinion. This was seen in the KA case where a doctor wants to testify about bruising in a sexual assault case but if the doctor merely says the victim had bruising this wouldn't be considered expert opinion since a lay person would be able to observe such a fact and give the same opinion however if the same doctor wants to say that the bruising is inconsistent with sexual assult then this would be expert opinion

- The reason lay people are allowed to offer opinions is because it is difficult to separate an opinion from a fact so if we insisted on a strict separation, it would be quite difficult and a lengthy voire dire
  - Ex. I saw a car speeding away- Fact or Opinion? - Speed isn't a fact, what they observe is a number of subtle facts that the brain is drawing in
  - Ex. He appeared angry- Comes from observable data- the witness see all things and draws inference
- Expert Witnesses: if expert witnesses just gave data, it wouldn't mean anything to the trier of the facts. The expert needs to draw their opinion on the data they produce. The trier of fact needs the inference drawn for them because they'd be unable to draw it for themselves.

TEST FOR WHICH APPROACH TO APPLY

1) Is it an inference drawn from facts (opinion)- if yes, then presumptively inadmissible
2) Does the matter/inference/opinion, call for a specialist or is all that required for this opinion is an ordinary opinion?

Lay Opinion

- Is an ordinary person able to draw this person? *Graat* is the leading case

R v Graat 1982

Admitting lay person opinion; abandoning ultimate issue rule

Facts: G is charged with impaired driving. PO saw the vehicle weaving. POs formed an opinion from G's breath smell and behavior that he was drunk (breathalyzer not administered). POs want to offer their opinion in court about how they believed G was too impaired too drive.
accused charged w/ impaired driving. PO administered test- act out behaviors and they would give an opinion.

Issue: Can the police officers offer that opinion? **YES but as a lay person.**

RULE FOR ADMITTING LAY OPINION

1) Inference drawn should be the kind of inference that ordinary people can draw. Can comment on the *degree*.
2) Ordinary people can express ordinary opinions as long you can express it as simply being compendiously expressing facts

Analysis:

- Could not go down the expert witness route because this is an opinion a lay person could give. Did not go down the expert route
- Court holds that age, speed, identity, and emotional state will all pass the two-part test (but the list is limited)
- **Important:** The **ultimate issue rule** used to say he couldn't have an expert evidence on the ultimate issue. Here the ultimate issue is impairment and so pre-*Graat*, you couldn't express an opinion about whether someone was drunk in the case of drunk driving as it goes to the issues. But this was seen as trenching on the jury's jurisdiction. Though it was abolished here, it stiil influences other areas of the law
- Note: Also, once expert evidence is given- jury gives more credibility to such an opinion than a lay person opinion

Application of test:

1) The inference/opinion that is to be drawn has to be the kind that ordinary people can draw.

- Drunkenness - this is within common experience
  - people can comment on whether someone is drunk, even if someone has never been drunk. Normal human beings can make a statement to this effect.
- Too drunk to drive = a degree of drunkenness
  - the lay person can comment on whether or not someone is drunk, then they can surely comment on the degree of drunkenness - [whether someone is too drunk to drive]

2) the opinion is a compendious way of stating observable facts. it is a summarized way of stating observed facts.

- If it is a simple thing that an ordinary person can summarize, then it is admissible
- In this case it was putting a bunch of facts together such as the smell of alcohol from the breath, seeing him walk, observing the way he talked.

Note: SCC case RIGHT NOW- On Graat. Whether POs can offer opinion on marijuana- and if so, would it go down expert or lay person route? Law is about impaired. In alcohol you say its within ordinary experience but is marijauana part of the ordinary experience? Alcohol isn't a tough to figure out something as being impaired. What would your qualifications be?

Expert Opinion

FRAMEWORK FOR EXPERT OPINION (*Mohan & Abbey*)

1) Threshold

1) Relevance: Does the inference help support something that matters to the case

2) Necessity: practically or analytically necessary in that the jury cannot draw this inference for themselves- they require for (basically a reproduction of the question of it is requires expert opinion)

- More than *helpful* but not absolutely necessary
- outside the experience of the trier of fact and the subject area is not understood by the ordinary person. The inquiry is such that an ordinary person would not be able to formulate the correct inference.

3) Absent of any other exclusionary rule of evidence that would preclude the admission of the opinion

- Just a rule of caution- this rule does not trump
- Note: expert opinion is an exception to hearsay

4) Expert must be properly qualified

- Qualification= special skill or knowledge through study or experience (*Mohan*)
- In order to pass this condition, the expert needs to be aware that they have a common law duty to provide **objective, unbiased and independent assistance** *(White Burgess)*
- onus is on the proponent of the evidence do show these are all true

2) Cost/Benefit Analysis

a) Probative Value

- if they're the worst in their field then it will be less probative while if they're the best, it will be more probative.
- is it a generally accepted methodology and well established?- and others in the field wouldn't quarrel
- reliability is an inherent aspect to consider
    - credentials- published one or 50 articles?
    - Methodology-
    - novel science- not established
    - nature of science- hard or soft
    - falsification: dealing with something that cannot be falsified, then how widely accepted is it
    - impartiality- is the person invested in this
- Note: the ultimate issue no longer exists because of *Graat* in lay opinion but in expert evidence, if it is going to the ultimate issue, then the opinion requires a greal deal of probative value

b) Prejudicial Effect

- risk= reasoning prejudice. Can cause the jury to be distracted
- undue consumption of time
    - the more complex, the more time you're going to take to teach the juries
    - complex= confusing
- fairness= the more complex then it is tougher to cross-examine, takes time and money
- jury abdication problem- blinded by science
    - when an expert draws an inference for the jury then the jury is inclined they're going to advocate because they're less equipped to evaluate

Note: Even though jury abdication is a huge danger here, it doesn't mean expert opinion evidence should never be allowed. It means that there *needs to be a high probative* value in order to compensate for the high prejudicial effect that is always going to be present in this expert opinion context

R v Mohan

Created a principled approach to expert opinion evidence that required closer judicial scrutiny of evidence. Developed four preconditions: (1) relevance, (2) necessity, (3) absence of an exclusionary rule and (4) properly qualified expert. The problem was that the preconditions were embedded in the cost benefit analysis and it was something that was inconsistently applied. Abbey did not change the test but rather reformulated it in 2 branches

R v Lavallee 1990 SCC

Application of Mohan/Abbey; Psychology; Battered Women's Syndrome

Facts: Accused is in a cycle of domestic abuse- physical & regular over a long period of time. One night, during a house party the partner comes up to the accused and threatens her "im going to get you later" and then she shoots him later.

-Accused pleads self-defence: she needs to prove 1) subjectively appreciate on reasonable grounds that she perceived death or grievous bodily harm 2) believed on reasonable grounds there is no way to preserve herself than doing what she did

-Crown: she had other options such as calling the police

-Defense wants to introduce evidence of a psychologist to show that in her mind she didn't perceive that she had any other options because she suffered from battered women's syndrome.

Analysis:

- Expert evidence in the area psychology. Easier to satisfy in areas of 'hard science' but tougher in cases of psychology

1) Relevance

- Reasonable apprehension of death: if you understand the psychology of somebody that is suffering the syndrome then you would understand that she has a heightened perception when she sees her spouse's face. Otherwise it is difficult for the accused to show that she reasonable feared death when she shot the victim in the back of the head as he was walking away, unarmed
- No other ways to preserve life: she felt trapped- that's part of the psychology of the condition- they feel like a prisoner. Trier of fact incapable of fairly appreciating that she didn't feel like there were any other options because objectively there were other options it is just that she didn't see that.

2) Necessary

- the jury is incapable of appreciating her subjective fear and whether or not it was reasonable. Average person just does not understand the cycle of abuse
- Trier of fact would not be able to draw the inference of the accused's reasonableness in the absence of expert opinion

R v Trochym

Novel evidence: never been admitted in court; apply expert test stringently

Issue: Can novel science be introduce as expert opinion? **YES- but application of test must be stringent**
Rule: Novel in this sense means that it was never admitted in court and the expert test must be applied stringently. It may be a well-established technique/theory outside of the court.
Analysis:
- Just because it is novel in court does not mean it cannot be admitted (there is a first time for everything)
- The *Mohan*/*Abbey* test must be applied more stringently

TEST FOR NOVEL SCIENCE

1) Necessary
- must be essential to the trier of fact (*but really- how different is this?)*

2) Reliability (probative)
- will be subject to more scrutiny
- consider error rates, how widely established is it, published in good journals
- it needs to be VERY CLEAR that the benefits outweight the costs

3) Ultimate issue
- if the novel science is speaking to an ultimate issue, then the novel science must be extraordinarily reliable and absolutely essential (necessity)

White Burgeress Langille Inman v Abbott and Haliburton 2015 SCC

Duty of Expert; Goes to 4th factor of threshold-requiring expert to be qualified

Facts: Tort action. Party is suing his former accountants for being negligent. In order to prove that the accountant made mistakes, they wanted to call another general accountant to speak about accounting standards and behavior. The defendants objected to the expert on the basis of bias (an independent problem from the *Mohan* framework).
- The problem is that the expert accountant is the one that found that mistake initially.

Issue: Does an expert to have be impartial? **YES**

RULE- DUTIES OF EXPERT OF WITNESS

Expert witnesses have a duty at common law to provide the court with objective, unbiased and indepdent assistance. A properly qualified expert must be aware of and willing to carry out the following:
1) Duty to p be impartial in the sense that their opinion is based on an objective assessment of facts
2) Must be independent judgement in the sense that they are not really interested in the outcome of the litigation
3) They must unbiased in the sense that their opinion would not change irrespective of the party

Analysis:
- The problem is that the accountant could be biased: She could have been the one that did the improper job and may be covering it up
- Court says that expert must be aware of these duties and their attestation would be sufficient. However the other party can raise a realistic concern ‘air of reality’ about their independence/impartiality, then the burden is on the other party to show that duty.
- Accountant attested to her impendence and impartiality- so this is good enough unless the other party shows an ‘air of reality’ of concern
- Court is saying that she does not have a direct financial interest in the outcome of the litigation. She just has some speculative possibility that IF she testifies and IF she is rejected than the other side MIGHT sue. She does not stand to gain or lose money by virtue of how the case is decided — if she DID it may be another story.

Privileges

- Preserving the integrity of the privileged relationship. To not allow someone to communicate something that was said within the relationship- preserving that relationship is more important than the truth.

I. Class Based Privileges

- Solicitor Client, Litigation, Spousal, and Settlement Negotiations
- If you fit into the class, the it's a judicially approved class

Solicitor Client

- Highest privilege. Once the Privilege is attached, it is virtually absolute apart from a couple of exceptions
- Part of the reason for the p is tied for the fair function of the administration of justice- intrinsic value
- Key developments is that SCP has been recognized and is a substantive legal rule that is engrained in the Charter

Three Requirements for SCP

1) Communication must be between a solicitor and a client
2) Communication must entail the seeking or giving of legal advice
3) Communication must be intended to be confidential

-Privileges belong to the client, not the lawyer. The only person who can waive the privilege is the client-***Solosky***

Exception to SCP

1) **Criminal Purpose Exception**
    - 1) if the purpose in communication w/ the lawyer or client is to facilitate a future criminal offence then it's not privilege
        - Tax context- "I would like to avoid my tax" vs avasion- you can avoid but no avade
    - 2) if communication itself constitutes as the AR of a criminal offence Meyers- she tells legal aid that she is poor- actually telling of that lie was a crime

2) **Public Safety Exception- *Smith v Jones***
- 1) Clear risk to an identifiable group
    - Clarity on the risk and on the group of people- high degree of certainty
    - <u>Factors:</u>
        - Exactly who is under threat- need to be specific
            - Ex. *Smith v Jones*-downtown east side Vancouver prostitutes= sufficiently narrow group of people to warrant calling it a clear threat
            - Evidence of long-range planning
        - How specific is the plan of attack
            - Ex.*Smith v Jones*- he had established a work vacation as his alibil, he had taken preparatory acts by installing locks in his basement, state that his current sexual assault chargers were just a 'trial run'
        - The person's history of violence- if so, how bad? How much history
        - Vioelcne that you say is being planned- is this similar or different than what he has done before
        - Is it progressing?
- 2) Is there is risk of death or serious bodily harm?
    - Risk of serious bodily harm or death; or <u>very</u> serious psychological harm
- 3) Is the danger imminent?
    - Is there a chilling intensity that this is going to happen?

        - *Smith v Jones*-also stands for the proposition that although one needs to say yes to all 3 factors
    - But the courts have defined imminent basically as "inevitable"-*Smith v Jones*
        - In a case like this, where the other 2 factors were so easily established, one could say that imminent just means inevitable here

3) **Innocence at Stake**
- The innocence at stake exception holds that the SCP will not operate if another person's innocence is at stake-***R v Brown***. The rationale for this exception is that the prospect of a wrongful conviction is very significant. Avoiding a wrongful conviction is the most important part of our justice system
- The test for determining wehether innocence at stake exception will operate is: *R v Brown*
- **1. Threshold:**
    - **1A: The information must not be available from any other source**
    - **1B: A reasonable doubt cannot be raised in the trial without this information**
        - if yes to both, proceed to next stage
- **2. Innocence at stake:**
    - **2A. Is there some evidential foundation for believing the evidence exists? (Air of Reality)**
    - **2B. The trial judge must satisfy himself that the information is likely to raise a reasonable doubt (that the information has an evidentiary basis)**

Solasky

Requirements for SCP to arise
1)communication must be between lawyer and a client (incl agents of the lawyer: secretary, psychologist- client sent to by lawyer, articling student, etc.)
2) attaches to only the seeking or giving of legal advice
3) must be intended to be confidential
-privilege attaches to the client not the lawyer

Pritchard v Ontario (Human Rights Commission)

Facts: woman complaints that someone was discriminatory and goes to OHRC which says that there are no claims. Then she wants to judicially wants to review them and asks for their documents.
Analysis:
-case by case analysis that must be engaged and characterize and is the advice legal advice or some other advice
- in many areas such as corporate, there are lawyers that are giving business advice, political advice but not legal advice
- intended to be confidential:
-if there was any exceptions in legislation, it would be read very restrictively
-can be removed by S.7 of the Charter- Unconstituional

Smith v Jones

Solicitor Client Privilege; Public Safety Exception; Psychologist was recommended by Solicitor- so SCP

Facts: On trial for aggravated sexual assault against prostitute. The defence lawyers sends him to a psychiatrist/psychologist- Dr. S who tells him that its confidential. He tells S that he was planning to assault her again and explained his whole plan of kidnapping prostitutes from downtown and bringing them to his dungeon, he had prepped the house, etc. The doctor wants to break the privilege and disclose what Jones told him.

Issue: Can SCP be broken?- **YES, because of a criminal purpose**

TEST- SCP EXCEPTION: PUBLIC SAFETY
1) Clear Risk to Identifiable Group
2) Seriousness
3) Imminence

Analysis:

- S wants to disclose it to the police. BUT it falls under the solicitor-client privilege because Jones was sent to the doctor by the lawyer- so the doctor is an agent of the solicitor
    - Serious policy considerations for breaking that privilege
- **Clear Risk to Identifiable Group:**
    - Who was the class of people? Prosptitutes in Downtown Eastside Vancouver. This was narrow enough
    - Clear Risk? He had taken time off work; had modified his apartment; the charge is on trial for is described by him as a "trial run"-VERY SPECIFC THREAT
- **Seriousness:** Yes very serious- not arguable
- **Imminence:**
    - Main issue in this case
    - Court says this is not a clear as could be desired but it is imminent- "delivered with a chilling intensity"- inevitable that is going to do it even if it no imminently (tomorrow)
    - Imminence usually means in a temporal case
    - Chilling intensity- where the first two factors are so serious, Imminence in this case means inevitable
- Court says all factors need to be satisfied but say that strength on some factors can make up for weakness on other factors. Here the first two factors are VERY STRONG- so makes up for the weak imminence point.

Holding: broke the privilege- admitted it into court on his current charges. This would make him a dangerous offender and lead to longer sentence

R v Brown

Solicitor Client Privilege; Innocence at Stake Exception

Facts: Brown is accused with murdering a drug dealer. The case against him has circumstantial evidence (no direct evidence) – he was in the vicinity, he bought drugs from him, he had dealer's phone number in pocket. Other guy, Benson, told his girlfriend and his lawyer that he actually did the murder. Defence got ahold of this info and wants to introduce it.

TEST- SCP EXCEPTION: INNOCENCE AT STAKE

1. Threshold
1A. Information not available from any other source
1B. No other way of raising a reasonable doubt?
2. Innocence at Stake
2A. Is there some evidential foundation for believing the evidence exists? (Air of Reality)
2B. The trial judge must satisfy himself that the information is likely to raise a reasonable doubt (that the information has an evidentiary basis) ***extremely narrow and very hard to pass

Analysis:

- **1A. Information not available from any other source:**
  - Problem= he confessed to his girlfriend as well
  - TJ had said the girlfriend's evidence was hearsay- probably not admissible- but he didn't make a ruling on that
    - Not a party admission (she's not a party)
    - Not a statement against penal interest (not a person in authiroty- don't think there's penal consequences)
    - None of the pigeonholes apply- so whether it's admissible it depends on the principled approach
    - But TJ didn't do that
  - SCC sent it back to trial because of this mistake
    - Can only break the privilege if theres no other source→ need to determine that first
    - So TJ should have decided whether girlfriend's testimony would be admissible or not
    - TJ didn't rule on it- he just doubted it
  - **Note: the rest of the test is technically obiter- assuming its only source..continuing..**
- **1B. No other way of raising a reasonable doubt?**
  - This is the part of the case that is quite controversial
  - Note on timing here: this would be raised after the crown has done their case but befor the defence has had the change to argue their case
  - The court takes an extremely narrow approach to this: need to look at the whole crown's case in totality and engage in speculation- it is completely speculative and hypothetical case
  - TJ says don't need this evidence anyways because the crown's case isn't strong-circumstantial evidence- so could raise a reasonable doubt w/o it.
  - Court acknowledges that this a very narrow approach to the exception
    - Its an unfair situation for the defense. Favor privilege over innocence
    - They will tolerate the prospect of a wrongful conviction here because even if an accused is wrongful convicted the accused can always apply to the PM under royal prerogative to pardon the accused from the crown
  - Assuming that this was passed here, go to step 2
- **2A: Is it capable of raising a reasonable doubt?**
  - This is a low threshold- you already have to cross the high threshold in 1B
  - What is difficult here though, once the TJ has gotten to this point the TJ has to satisfy that it is likely to raise a reasonable doubt
  - Here the TJ looked at the evidence in conjunction with the other evidence and he said it could have a cumulative effect
  - Is it the evidence, in itself in isolation, capable of raising a reasonable doubt
    - This piece is quite narrow

Litigation Privilege

- Applies to both civil and criminal contexts
- Litigation privilege refers to information that the lawyer has compiled for the purpose of litigation

Test for when litigation privilege arises:
1) Litigation is already commenced or apprehend in a non-fanciful sense, all of your work produce will be covered
2) Dominant purpose of the document/communication is for litigation (quite broad)- it does not have to be the sole purpose

- Does not have to be confidential information
- Does not have to be communication with the client
- Ie. Can be a research memo

Controversial- it is not entirely clear as to what extent pre-existing documents are covered

- We know that if something is created/compiled by way of intellectual efforts, then it is clearly covered without any question and this very broadly defined
- The trouble is , what if it's a pre-existing document that the lawyer just finds and sticks in the file- ther is no intellectual efforts involved- is this covered by litigation privilege
- *Fish*-suggests that it will only be covered if something is added to it/ there is some contribution to it. If it is purely a pre-existing piece of evience then you probably can't claim it under litigation privilege

Litigation Privilege is waived or ends when:
1) The litigation for which it was created ends, or
2) The lawyer (the one who owns the litigation privilege) wants it to end
BUT if there is something of a related, judicial character then the privilege carries
-an appeal is the most obvious example

Blank v Canada (Minister of Justice)

Litigation Privilege Waived; Juridicial Character; Different trial but same parties

Facts: B was a self-represented litigant whose company was charged with regulator offences. Charges were quashed and B sued the government requesting all records pertaining to the prosecution. Government denied on SCP and argued that it was the same as litigation privilege. Issue was what the defining characteristics of litigation privilege are and what the life span is.

Issue: Has litigation privilege been waived? **YES, because the initial trial ended, and though the parties are the same, the subject matter and juridicial character is different**

Rule: Litigation privilege ends when litigation ends unless there is another related trial with same judicial character
Analysis:

- It applies to any info the lawyer creates OR gathers and modifies
- Does not have to be confidential info [difference from SC privilege]
- Does not have to involve a client – ex/ legal memos, summaries, etc
- Does not have to be communication at all – ex/ legal research
- Litigation privilege is all about lawyer skill and expertise
  - So raises the question of: does it apply to info that the lawyer just collects, but does not modify?
  - Conflicting case law – but simple collection may not be covered
- Ends when litigation ends – evaporates at end [diff from SC privilege which lasts forever]
  - Except it survives litigation if there are parallel proceedings – same juridical character
    - Appeal – obviously
    - Different parties, same issue – maybe
  - Parties the same in Blank, but not same juridical character b/c first time he was being prosecuted for regulatory offence of pollution and this time he is suing for wrongful prosecution
    - Am I a polluter? Vs is Crown wrongfully prosecuting people?

Spousal Privilege

- Spouses used to have spousal incompetency – but don't have this anymore
    - 4(2) CEA not competent so couldn't testify even if they wanted to
    - THIS WAS REMOVED 2015
- This privilege matters now!!!
- This privilege does not go to competence
- **Spouses are competent and compellable, but they make invoke the privilege**
- It is now up to the spouse whether they want to testify or not [if privilege applies]
    - So she can try to evoke the privilege and then would have to pass the test
    - Even if the test would be passed, she can say she wants to testify anyway
- Narrow privilege
- **For it to apply:**
    - **Applies only to married people (not CL)**
    - **Only applies if you are married at time of testimony [if divorced now, doesn't apply]**
        - This is not the law right now. But in the future: Irreconcilably separated spousal exception may apply here. Rationale behind is maintaining marital harmony, and there is not harmony to maintain, so may apply w/ this privilege.
    - **Privilege only applies to "communications within the marriage"**
        - Communication: so it wouldn't apply to anything she saw
        - Within the marriage: communication before the marriage is not privileged

SETTLEMENT PRIVILEGE

- Negotiations aiming at settlement are privileged
- This is to encourage plea bargains and settlements in the civil context
- Test:
  - Matter discussed must be in relation to current litigation or intended litigation
  - Parties must intend that the negotiations will be confidential
  - Privilege only attaches to that which it is aimed at reaching a settlement
    - Ex/ lawyers trying to pick a judge for their case management – one says bad things about judge and it gets sent to Law Society – settlement privilege does not apply b/c this was about procedure and not about trying to settle.
      - But then wouldn't this apply to arbitration too?
      - Hunt says maybe not b/c arbitration is an option – case management is necessary. So privilege may apply to arbitration.

Union Carbide Canada v Bombardier Inc

Settlement Privilege

- Exception: if you have a quarrel about the nature and scope of the deal – can use the negotiations to prove what the deal was / the existence of a deal
  - Eg. when one of the parties reviles from it
- Really only happens in civil cases – not likely for the Crown to resile from a plea bargain
- But here also had confidentiality clause
  - Can that override the exception to settlement negotiation?
- Court said yes – as a matter of freedom of contract
- But will need to be very clear and very express.
  - Not in a general confidentiality clause
  - Which was the case here
- Otherwise it threatens to eviscerate/threaten reaching of settlements.

It is fact specific, but in this case, they did not contract out of it. In this case, it was a general confidentiality statement. To contract

II. Case-by-Case Privilege

TEST – CASE BY CASE PRIVILEGE

***Wigmore*: **provides the 4 part tests that must be met in order for the court to establish a privilege on a case-by-case basis.

1) communication is intended to be confidential
2) confidentiality is crucial to maintaining the integrity of this type of relationship
3) the relationship is one that society should seditiously foster- aka important to society
4) protecting the confidentiality (giving a privilege/making it inadmissible) is more important than getting to the truth of the

Slavutych v. Baker

Professor writes confidential review; upheld privilege;
4th element of test was equal- so consider strength of 1st part of the test

Facts: Dispute. Dept head solicits of one prof in regards to another prof. Dept head says it will be a secret and no one will know. So the professor writes a hard review. So then want to terminate this professor because he says nasty things and part of the evidence they want to bring is in the nasty review he wrote. BUT he says its privilege.

Rule: Wigmore 4

Analysis:

1) **Intended to be confidential**: Yes, the form literally said it was confidential and it would be destroyed. The dept head also said it would only be used at the committee meeting
2) **Confidentiality crucial to maintaining this type of a relationship:** relationship at stake is the between the dept head and the faculty in context of a collegial assessment of a colleague of a tenure application- confidentiality is crucial because there won't be candor- it's hard to say something critical without it having an impact on someone's career and no one will do this unless its confidential. Confidentiality facilitates candor and candor is important in this relationship
3) **Strong public interest**: without confidentiality you wont have candor, and without candor, then the integrity of the process will be compromised. So why care? Tax payer funding involved, important to have good univerities
4) **Protecting privilege more important than truth**: important to have good universities but also important to maintain such confidentiality and relationships. –privilege and truth evenly weighted

- **Court upholds the privilege says that is very close on the 4th element, they can consider the1st element- the stronger the 1st element, then they privilege can be satisified.**

Holding: uphold the privilege

R. v. Gruenke

Class based privilege; confession to pastor; didn't meet the 1st requirement

Facts: complicate relationship. She was nice to him but he started liking her and put her in his will. Then she got BF to beat him up so he would stop hitting on her. She says its privilege because she told a lay pastor at church.
-tried creating a class based privilege by charter values but court rejected that

Rule: Wigmore 4

Analysis:

- **Intended to be confidential**: No. she says she will go to the police station to confess and the confession to the pastor was just to make herself feel better. It is going to make a difference as to who you're confessing too- lay pastor vs a legit pastor (like going into the confession box).
- **Note**: class based privilege for religion: no – they had a charter values argument for this

M.A. v. Ryan

Case by Case Privilege; Disclosures to psychiatrist; sexual assault; Charter Values

Facts: under 18 and gets sexually assaulted by psychiatrist. She goes to another psychiatrist to tell about the first one and she is also suing the first one for tort. So the first one wants to access what she is telling the second- maybe she is saying that she lied or exaggerated.

Analysis:

1) Intended to be confidential: Yes
2) Essential to the relationship: Yes. Arguable more than a normal doctor patient relationship
3) Strong Public Interest: Yes
4) Privilege or Truth:

- Interests served in protecting communications = injury to appellants relationship with Dr. P and future treatment;
- effect on other victims obtaining treatment; impacts on society;
- privacy interests mitigate in favour of confidentiality if we value them as a Charter interest; inequalities perpetuated (s.15 equal treatment — if we were to adopt a rule that did not respect the confidentiality in these situations, it would have a disproportionate effect on women more than men); highly sensitive nature of sexual assault.
- Court took a broad Charter values reading. Interests served in disclosing communications = disclosure (money, reputation; medical life is over — note this is a very weighty interest — if the underlying offence is less significant you would be less inclined to get at the truth if the consequences of getting it wrong are less severe *i.e.* civil and criminal truth are different).
- Here privacy may more easily outweigh defendants interests. Court gives limited disclosure on terms (not all or nothing proposition).

Holding: The disclosure was granted- upheld

Attention to R. v. National Post on pg. 751

Journalist confidential source privilege

Facts: Jouranlist investigated conflict of interest by former PM. Promised sources they would remain confidential

Issue: Should a new class-based privilege for journalists be created? **NO**

Rule: Wigmore 4

1654776 Ltd v Stewart, 2013 ONCA 184

Journalist confidential source privilege

Facts: shady business deal. You need to disclose some stuff before you go public but this company did not. Stewart is a journalist- and writes about the deal. There's a class action from investors who lost so much money- so they ask Stewart for the source but he says no.

Issue: does he have to tell them who their source is? Yes, unless there is a reason not to aka privilege. There is no property in witness. **In this case, NO- because there was privilege**

Rule:

- Make sure to keep step 3 and 4 analytically distinct.
- **At step 3 look at the relationship at a general level-journalist & confidential source- not this particular journalist or source. Don't consider the content at step 3- don't consider what was said.**
- **Step 4 is a matter of common sense and good judgement. Subquestions created- just engage your brain and say things**

Analysis:

1) Yes intended to be confidential
2) Yes essential
3) Yes
4) Prvilege vs Truth: journalism relies on confidential sources. Securities legislation. General public interest in knowing whether the deal was shady. Getting to truth is facilitated in both direction. It ends up being neutral

Note: note the considerations in the case.

Holding: It is not appropriate. Found getting to the truth was adequaltey served without granting disclosure

III. Privilege Against Self-Incrimination

- You don't want to be compelled to answer under oath which would be self-incriminating
- Problem:
  - If you allow a common law privilege- then it will make it thwart getting at the truth (truth seeking function)
  - BUT if you don't have the privilege and a witness is compelled to answer a question in for example a tort case, and she says something incriminating, you may use that against her and charge her. And then transfer the testitmony from the one that wasn't her trial to her trial
- CEA s. 5.1, 2
  - 1) it killed the CL privilege against self-incrimination
  - 2) s 5.2- use immunity. Witness compelled to testify but anything said, cannot be used against her in her own trial subsequently
    - if you want the use immunity to apply you must: witness has to invoke s. 5.1 at the time.
    - A problem if you aren't aware of it
- Charter s. 13 "*a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence"*
  - Basically like s.5 but you don't have to invoke it- applies all the time
  - Its entrenched in the constitution- constitutional
  - So basically no one really invokes CEA s. 5
  - **The proceedings:**
    - 1st proceeding means any proceeding- civil, criminal, administrative
      - any witness- your role doesn't matter
    - 2nd proceeding- a criminal proceeding in which you're a criminal accused.

R. v. Henry—and note SCC cases therein

Initial Framework for Self-Incrimination Privilege- actual test in Nedelcu

- Question: Are you testifying in the 2nd proceeding?
- What happens if they don't testify

<u>**When can be what you said be used against you from a previous proceeding**</u>
Admissible- You weren't a complleable witness in 1st proceeding **Inadmissible-** You were a compellable witness in the 1st proceeding

Rule:

- <u>Accused **doesn't** take the stand</u> in the 2nd proceedings, then they have full immunity from anything said the in the 1st proceedings being against them. Anything they said in the 1st proceeding will be inadmissible
- <u>Accused **takes** the stand</u> in the 2nd proceeding, then what they had will be said in the 1st proceeding will be used only if they were a non-compellable witness in the 1st proceeding. If they were compellable they it will not be admissible
- It all turns on if you're compellable as a witness or not in the previous proceeding and if you take the stand in the subsequent proceeding, then what you said can be used not be against you
- **Rationale:** Because if you were compellable you didn't have a choice in the first trial while non-compellable (you may volunteer to testify but there are cases where you would've been forced anyways too)
- If you were purely voluntary- you were non-compellable
- Non-compellable: right now synonymous with criminal accuse, spouses?

Note on Compellability: because every witness is compellable except the accused, even a spouse (since the competency rule has changed unless spousal privilege is invoked). Compellability does not mean whether or not the witness volunteered. It goes to whether or not the Crown can force them to testify.

- **Because of this, basically a truly non-compellable witness would be the accused himsel**f.

Pre-Henry- all in Henry

- The ***Mannion*** case- first time SCC interpreted s. 13- they took a plain reading. The purpose of the evidence being introduced and if it is being used in the 2nd proceeding for incriminatory purposes, its inadmissible. It is ok to use it to impeach credibility rather than influence guilt it is ok.
    - Difficulty- it does create conceptual difficulties for the trier of fact- it is difficult to focus on the purpose- incriminatory vs impeachment.
        - Other problem is s. 13 only captures incriminatory purposes purely for impeachment, even if the jury can sort of the differences out- overall it does have an impeachment purpose. If they've said stuff that's really incriminatory and all using it for impeachment purposes, problem is its already been said
- *Noel*- took on board criticisms from *Mannion*
    - M said if going to impeachment purposes, its fine. *Noel* puts a limit- cannot have an overall incriminatory effect (along w/ can't have an incriminatory purpose)
        - Difficulty: Crown says generally any good evidence will have an incriminatory effect. The only time you can can introduce a testimony that will basically have no point. The worst thing is that,

R. v. Nedelcu

Rule for Self-Incrimination-using testimony from 1st proceedings

Facts: N took the victim for a ride on his motorcycle on their employer's property. The motorcycle crashed and caused the victim permanent brain damage. N was charged with dangerous driving causing bodily harm and impaired driving causing bodily harm. During his examination for discovery in the civil matter, N testified hat he had no memory of the events from the day of the accident until he woke up in the hospital. At his criminal trial however, N gave a detailed account of the events leading up to and during the accident.
I/C: Protected by section 13? **NO,** the uses on N 's non-incriminating discovery evidence for impeachment purposes could not and did not trigger the application of s.13

The law now:

- 1) if you're purely voluntary (not compellable) in the first proceeding, then everything you said is admissible in the second proceeding, assuming you take the stand in the second proceeding
- 2)if you're a compellable, it may be admitted as long it's not incriminatory
- so then what does incriminatory mean? If you prove it, it can prove one of the essential elements.

TEST for SELF-INCRIMINATION TESTIMONY OF ACCUSED IN OWN TRIAL:

1) 2nd trial has to be the trial of the accused
2) if in the 2nd trial the accused doesn't take the stand, then nothing they said in the previous trial can be used against then- NOTHING IS ADMISSIBLE AGAINST THEM
3) If you put them on the stand
    a. Purely voluntary in 1st proceed- everything may be used against them
    b. Compellable witness (compellable in fact) in 1st proceeding, then in the 2nd proceeding you cannot admit that which is incriminatory but you CAN admit anything that is NOT incriminatory

INCRIMINTORY: By definition, something will necessarily be incriminatory when the previous testimony can be used in a subsequent proceeding against you to prove guilt (*Nedelcu).* This goes to relevance and whether the testimony is relevant in proving the actus reus or mens rea that of the offence that the accused is being charged with. [*i.e.* in *Nedelcu* you could NOT use conflicting testimony as guilt because it does not plug into the actus reus or mens rea].

DERIVATIVE USE IMMUNITY

You cannot have your testimony introduced but can have the physical evidence from your previous testimony introduced? What do you do with that? S. 13 doesn't say anything about. Solution is s.7 of the Charter. S 7 creates a derirative use immunity
TEST:

1) You have to show that you were a compellable witness in the first proceeding
2) If you can show on BoP the police wouldn't have found the evidence but for your testimony.

-if those two are true, then cannot introduce the evidence in you're the 2nd proceeding.

EXCEPTION to S. 13

- There's a huge perjury exception. It is impossible to prove that they are lying on the stand if cannot admit what they said before on the stand.

Judicial Notice

Judicial Notice are situations where court can find a fact in the absence of evidence - everyone knows it, it's obvious, questions of common sense

BINNIE: this is not the exception, this is the rule, it is not unusual, it usually goes uncommented, but in principle it is not an exceptional thing, it is constrained by rules

taking notice of a 'fact' is the accepting of such a fact

there is no prospect that you will have a contrary finding - - this is about efficiency about what everyone already knows; the integrity of the justice system, you should not put judges under the burden of finding things that are very obvious

Spence created different categories - determine what kind of a fact it is AND then proceed

Spence articulated three different categories of facts: adjudicative, legislative and social framework facts. **Adjudicative facts** are facts that are specific to the particular case and particular parties. Generally speaking, a court should not readily take judicial notice of adjudicative facts because they are the very facts that needs to be decided in an adversarial system. ***Spence*** therefore holds that the 'gold standard' of ***Find*** needs to be applied in order to take judicial notice of adjudicative facts. [Examples of adjudicative facts: a camel is a domesticated animal, scientific evidence that there is a consistent rate of alcohol absorption in the human body - ***Chanko***].

Legislative facts are concerned with the policy making agenda of the government. These are relevant in Charter legislation: typically, the court takes judicial notice of a particular problem in society that Parliament wanted to remedy. [Example of legislative fact: gun violence]

Social framework facts are social conditions that help contextualize the evidence in a particular case. [Example of adjudicative facts: battered wife syndrome in *Lavalee* or systematic problems of aboriginal people in the criminal justice system].

Spence holds that a lower standard than the 'gold standard' of ***Find*** needs to be applied when taking judicial notice of legislative and social framework facts. The test for taking judicial notice of legislative and social framework facts is: would such a fact be accepted by reasonable people who have taken the trouble to inform themselves?
Finally, *Spence* holds that where a legislative or social framework fact is dispositive to the case, meaning that it is going to drive the case, the 'gold standard' of ***Find*** must be applied in order to decide whether to take judicial notice of it.

R. v. Potts

Facts: he was going faster than the law on the road; Crown did not lead evidence of what laws apply to the driving regulations, but they never actually proved that he was on the road with the lower speed limit, if he was on the other road, the poor people road, driving limit is higher.

Issue: Can judge take notice of the fact that this roadway fell under these regulations? YES
1) endorsement of the Find TEST, the court may take judicial notice of something so notoriously obvious; the community that is relevant is the Ottawa community (ask the knowledge of which community is relevant?) it does not matter if the judge himself KNOWS, when the community does not, cannot look at the judge's personal knowledge; it is very unlike other rules of evidence where you have to have a voir dire in order to admit the evidence (you don't actually say, as a judge, "I'm taking judicial notice of this fact")

R. v. Zundel ONCA 1987

Facts: he is a Holocaust denier, charged with an offence of spreading false news (no longer an offence), you needed to prove that the news is false and that he knew that the news was false - "it is entirely unfounded that there was an official government policy targeting the eradication of Jews" - what is it that's false about what you're saying - how do you prove that your news is false?

TJ refused to take judicial notice, Court of Appeal upholds - it would be Profoundly Unfair to take judicial notice of this fact, because you will be taking away the burden of proving on behalf of the Crown, because this would mean that the judge would be finding the guilt of the accuse - the Court was right **not to take judicial notice of the essential element of the offence**, as this would create irrecoverable unfairness to the accused. You would not be able to revisit such a finding.

R. v. Zundel (No. 2) ONCA 1990

judge takes notice that 6 million people were killed, but not that it was due to the government policy of extermination. Crown is put under a burden of leading evidence that there was a government policy of extermination. The court DOES NOT have to take notice because it could. You may take notice of historical facts, assuming they satisfy the FIND TEST. Judicial notice is an exception to hearsay - you cannot object to taking of such notice.

Here the court took judicial notice of the bare fact of the Holocaust
-he took judicial notice that 6 mill Jewish people died as a result of the government.
-but declined to make judicial notice that their deaths were the results of a systematic, organized government campaign- CA holds this is correct

Application

- The court should take judicial notice of the Holocaust in a narrow way
- The TJ took judicial notice of the non-contentious historical facts that were background information
- TJ declined to take notice of historical facts that the Crown had to demonstrate in order ot prove the statements in the pamphlet were false

—> inconsistency of whether you take the essential element of the offence within case law, you should decline to take notice of something that goes to the essential element of the offence - there is no LIMIT set, but discretion - they never say you CANNOT do it, but you have a choice not to take notice

—> Potts did not take notice of the AR or MR, all the elements were already made out, but taking notice of the application of regulation, is not the same thing as taking notice of the act itself, therefore Potts would be consistent with Zundol —> how do you interpret 'discretion'? or the very narrow interpretation of the application of regulation

R. v. Krymowski

group of ethnic Roma, awaiting refugee application determination, protestors come and are racist, you cannot promote hatred against an identifiable group, on the charge sheet it says wilfully promoting racial hatred toward Roma, if the Crown has not led evidence on one of the essential elements can apply for direct verdict of acquittal, TJ granted, because there is no evidence to possibly convict the people, the whole time they were yelling "go home gypsies", Roma was not referred to at all. JUSTICE CHARRON: What you need is an identifiable group and you are promoting hatred wilfully, nothing should turn on the words used (would it matter if it were Koreans, and they were being yelled at as "go away gypsies"). Gypsy is just a derogatory term of Roma, take a dictionary and look, that should have satisfied. She is not saying that because the offence does not require that you prove that your racial epithet is correct, therefore if you take notice of Roma meaning gypsy, that does not go to the essential element of the offence.

R. v. Spence

sets out categories of the facts (legislative what was the purpose that the Parliament did something) social factors are facts that help you contextualize, it will be helpful if the obscenity provision is applied in a discriminatory manner (Little Sisters case), it would be easier to prove that the border men were discriminatory IF the community at large is noted to be racist. When selecting a jury peremptory challenges (no justification), but there are challenges for cause (where you give a reason), when you have a white victim and a black accused, the jury that is white, it renders the trial unfair, if such notice is held, then it will be held right off the bat that there should not necessarily be white jury members on such a panel. The test for taking judicial fact of the social fact would such a fact be taken by reasonable people who have taken the time to educate themselves? If I take notice of such racism, this will then allow you to dispose of the fact issue (if racism is accepted), for me to do it would take for that issue to pass the FIND TEST. (dispositive issue) Lavalee - be careful with psychology