PLEASE NOTE:
As an enhancement to the materials we have created, where possible, external web links to those cases and legislation that were available on the CanLII website. Please note, however, that not all links are reliable. The incorrect links appear to be especially problematic for the statutes, especially if the complete citation for the statute is not present at that exact spot in the materials. If you use the web links, please always double-check to ensure that you are being directed to the correct place.

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NOVA SCOTIA
BARRISTERS' SOCIETY

EVIDENCE

March 2020

Contents

I. BASIC CONCEPTS

1. What Is "Evidence"?

"***Evidence***" is what, in our adversary system, the parties attempt to place before the neutral fact-finder in order to prove their case (or disprove their opponent's case). We follow the principle of party-presentation: parties determine what specific items of evidence are offered for proof, while the impartial judge or decision maker will determine which items are "admissible" evidence, in accordance with principles of law. At the end of the trial or hearing, the fact-finder (jury, judge, tribunal, decision maker) will determine which of those admissible items of evidence are believed or not, in formulating "fact-guesses" or "findings of fact".

A practical classification of "***evidence***":

- witnesses (oral testimony),
- things,
- documents

Another common classification is "***direct***" vs. "***circumstantial***":

- an example of "direct" evidence of fact is "eyewitness evidence of identification",
- while circumstantial evidence requires inferences to be drawn from the item of evidence to the fact in issue.

2. Relevance

"All relevant evidence is admissible unless excluded on clear grounds of law or policy", repeatedly asserted by the Supreme Court of Canada: ***Graat v. R.,*** [1982] 2 SCR 819 (lay opinion); ***Morris v. R.,*** [1983] 2 SCR 190 (basic relevance); ***R v. Seaboyer,*** [1991] 2 SCR 577 ("rape-shield" provisions); ***R. v. B.(F.F.)***, [1993] 1 SCR 697 (character evidence); ***R. v. Mohan***, [1994] 2 SCR 9 (expert opinion).

Relevance is a matter of logic, experience and common sense.

"***Relevant evidence***", Law Reform Commission of Canada (LRC) definition: "evidence that has any tendency in reason to prove a fact in issue in a proceeding"

"***Materiality***" is now seen as a sub-principle of "relevance". To be relevant, evidence must bear upon "a fact in issue", *i.e.*, a fact that is of consequence to the litigation. "***Facts in issue***" are defined by the substantive law, the pleadings and any formal admissions. This notion addresses not the probative value of the evidence, but the relationship between the evidence offered and the legal issues between parties.

"Logical" vs. "legal" relevance: It was once argued that, to be admissible, evidence had to be "legally relevant", *i.e.*, evidence must have some "plus value", something more than a minimum of

logical relevance. After ***Morris***, *supra*, no longer valid: it is not that the evidence must have some additional probative value, but that its probative value must outweigh the countervailing factors.

Instead, we have the principle of "***pragmatic relevance***": "Evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusing the issues, misleading the jury, or undue consumption of time." LRC, s. 5 draft Evidence Code, first resuscitated by La Forest J. in ***Corbett v. R.***, [1988] 1 SCR 670 as part of the trial management powers of the trial judge to ensure a fair trial.

This principle is often shortened to "***probative value vs. prejudicial effect***" in criminal matters, where there is a special concern for prejudice to the accused. "***Prejudice***" is not to be understood as evidence that is "damaging", but as the harm that results when evidence is inappropriately influential because it appeals to the biases or emotions of the fact-finder, out of proportion to its probative value.

In criminal cases, evidence of "after-the-fact conduct" or "post-offence conduct" is a special case of relevance and requires careful instruction about the inferences to be drawn from such circumstantial evidence, e.g. flight from the scene or disposal of a body: ***R. v. White***, 2011 SCC 13; ***R. v. Calnen***, 2019 SCC 6.

In civil matters, there is usually greater concern with other countervailing factors, notably

- confusion of issues,
- undue consumption of time,
- unfair surprise,

consistent with **CPR** 1.01, "for the just, speedy, and inexpensive determination of every proceeding". For example, in a civil case, the admissibility of "evidence of subsequent repair" is assessed through this balancing of probative value vs. countervailing factors: ***Anderson v. Maple Ridge (District)***, [1993] 1 WWR 172 (BCCA) (trial judge erred by excluding evidence, evidence should have been admitted, prejudice could be avoided by limiting instruction to jury).

3. Charter, statutes, common law

There is no statutory codification of evidence law in Canada, despite two major efforts at reform: the Law Reform Commission of Canada, Draft Evidence Code (1975) and the Federal/Provincial Task Force on Uniform Rules of Evidence, proposed Uniform Evidence Act (1982).

Criminal law

Federal ***Code*** and statute offences are governed by: the common law of evidence, overlaid by statute and then the ***Charter***. Applicable statutes: ***Canada*** Evidence Act, RSC 1985, c C-5, ***Criminal Code***

Provincial penal prosecutions: ***Nova Scotia Evidence Act*** applies.

Civil law

Civil matters in "courts other than the Federal Court" are governed by: common law, overlaid by statute. Applicable statutes: ***Nova Scotia Evidence Act***, ***Civil Procedure Rules***. In federal jurisdiction, ***CEA*** applies, unless otherwise stated as in, *e.g.*, ***Divorce Act***, RSC 1985, c 3 (2nd Supp), s. 23 (provincial evidence rules apply).

II. STANDARD AND BURDEN OF PROOF

Defining terms: "***standard of proof***" is "the degree of confidence the fact-finder (judge or jury) must have in factual conclusions at the end of the case"; "***burden of proof***" or "***legal burden***" is "who bears the greater risk of non-persuasion of the fact finder"; and "***burden of leading evidence***" or "***evidentiary burden***" describes "the amount of evidence a party must lead to get an issue to the jury", *i.e.*, past a motion for directed verdict, no case to answer or non-suit.

1. Standard of proof

We know there is no certainty in courtrooms, so the fact-finder reaches an estimate of probabilities, *i.e.*, "a belief of what probably happened". How strong must that belief be?

- Criminal trial: "beyond a reasonable doubt"
- Civil hearing: "on the balance of probabilities" (or "preponderance of evidence")

In ***R. v. Lifchus***, [1997] 3 SCR 320, the Supreme Court required that "reasonable doubt" be defined and explained in a jury charge, along with a suggested form of charge. Jurors are to be told that "a reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence." Everyday examples and ordinary language ought not be used: see ***R. v. Bisson***, [1998] 1 SCR 306.

The ***Lifchus*** guidelines were further elaborated in ***R. v. Starr***, [2000] 2 SCR 144, to include: "an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities". See also ***R. v. Russell***, [2000] 2 SCR 731 and ***R. v. Layton***, 2009 SCC 36. The Supreme Court has struggled with the use of the "rule in Hodge's case", which is not a mandatory instruction but only an elaboration of the reasonable doubt standard in cases of circumstantial evidence and identity: ***R. v. Villaroman***, 2016 SCC 33, explaining ***R. v. Griffin***, 2009 SCC 28.

Where credibility is important, the Supreme Court of Canada has elaborated the appropriate approach to instructing a jury in ***R. v. W.(D.)***, [1991] 1 S.C.R. 742:

> First, if you believe the evidence of the accused, obviously you must acquit.
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

An additional helpful instruction was identified in ***R. v. J.H.S.***, 2008 SCC 30: "If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit." The ***W.(D.)*** instruction applies equally to a judge sitting alone and, for a recent case, see ***R. v. N.M.***, 2019 NSCA 4. For a careful decision proposing further modifications to the ***W.(D.)*** instruction, see ***R. v. Ryon***, 2019 ABCA 36.

In Canada, there is no intermediate standard of proof, like U.S. "clear and convincing evidence". And there is no "shifting standard" of probability in civil matters. In ***F.H. v. McDougall***, 2008 SCC 53, the Supreme Court ruled that "there is only one civil standard of proof at common law and that is proof on a balance of probabilities." That said, a judge "should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences".

Some special situations:

- proof of facts on sentencing, including aggravating factors, is determined under the criminal standard: ***R. v. Gardiner***, [1982] 2 SCR 368;
- proof of criminal offence in civil suit, is determined under the civil standard: ***Continental Ins. Co. v Dalton Cartage Co.,*** [1982] 1 SCR 164.

2. Burden of proof

How is the burden allocated?

- policy,
- fairness, and
- probability.

These are generally determined by substantive law and pleadings (in civil matters).

Rumpole's beloved "golden thread of English criminal law": The burden rests upon the Crown to prove the guilt of the accused on all the essential elements of the offence.

The only "burden of proof" borne by the accused: insanity or mental disorder, s. 16 ***Code***.

The burden of proof is less critical in civil matters, given the civil standard of proof.

3. Burden of leading evidence

The party that bears the ultimate burden of proof usually bears the burden of leading evidence, or else loses.

In ***civil matters***, a motion for non-suit may be made at close of plaintiff's case: ***CPR*** 51.06. The test is: is there any evidence such that a reasonable fact-finder, properly instructed, *could* find for

the plaintiff on a balance of probabilities? ***Johansson v. General Motors of Canada Ltd.,*** 2012 NSCA 120.

In a ***criminal case***, the test on a motion for "no case to answer" or "directed verdict": is there any evidence such that a reasonable jury, properly instructed, *could* find the accused guilty beyond a reasonable doubt? All questions of credibility, weight or "quality" of the evidence are left to the jury: ***R. v. Mezzo***, [1986] 1 SCR 802.

For the accused to raise a defence, *i.e.*, to get the defence put to the jury, there is a dramatically lesser burden: there must be "an air of reality" or "any evidence capable of raising a reasonable doubt": ***R. v. Cinous***, [2002] 2 SCR 3. It includes such defences as:

- self-defence,
- provocation,
- duress,
- alibi,
- drunkenness, and
- necessity.

See also ***R. v. Fontaine***, [2004] 1 SCR 702 on the application of ***Cinous*** to mental disorder automatism.

III. SHORTCUTS TO PROOF

1. Formal admissions

In ***civil cases***, formal admissions are made in pleadings, notices to admit, or by counsel in court: ***CPR*** 20.02.

In ***criminal cases***, formal admissions are made in a plea of guilty, or at trial admitting specific facts under s. 655 ***Code***.

Can even have a trial or hearing on "agreed statement of facts".

2. Presumptions

There are two elements of presumptions:

- basic facts, and
- presumed facts.

Definition: "a ***presumption*** is a standardized practice under which certain facts (***basic facts***) are held to call for uniform treatment with respect to their effect as proof of other facts (***presumed facts***)" (McCormick)

"***False presumptions***": "irrebuttable or conclusive presumptions of law", *e.g.,* survivorship upon simultaneous death; "presumptions without basic facts", really assumptions, *e.g.,* presumption of innocence, or sanity; "presumptions of fact" or "justifiable inferences", *e.g.,* persons intend the natural consequences of their acts, "doctrine" of recent possession.

Rationale: Like the burden of proof, presumptions exist for reasons of

- policy,
- fairness,
- probability, and
- convenience.

Classifications: ***permissive*** vs. ***mandatory***; if "mandatory", presumptions that shift the burden of proof vs. those that shift the burden of leading evidence.

Civil presumptions
Generally civil presumptions are mandatory and shift the burden of proof, *e.g.,* presumption of delivery ***CPR*** 31.16(3), presumption of legitimacy, death, etc.

Criminal presumptions and the *Charter*
Criminal presumptions can be scrutinized under s. 11(d) ***Charter***, from least intrusive to most intrusive:

"permissive presumptions", "justifiable inferences", e.g., doctrine of recent possession, do not offend s. 11(d), as there is no mandatory language: "may, not must, convict". ***R. v. Kowlyk,*** [1986] 3 WWR 511, 51 CR (3d) 65 (MBCA); ***R. v. Russell*** (1983), 56 NSR (2d) 701 (SCAD).

"mandatory presumptions"
These are identified by the language: "in the absence of any evidence to the contrary". These presumptions "only" shift the burden of leading evidence, but if no evidence is led, then the judge or jury **must** convict. Most, if not all, will likely infringe s. 11(d), but many will be saved by s. 1. The comparison will be to the less intrusive "permissive presumption". ***Re Boyle and R.*** (1983), 41 OR (2d) 713, 5 CCC (3d) 193 (Ont CA); ***R. v. Downey***, [1992] 2 SCR 10.

"reverse onus clauses"
Where the accused is required to "establish" or "prove" a fact, this language places an onus or burden of proof on the accused, on the standard of balance of probabilities. These clauses will always infringe s. 11(d), but some will be saved by s. 1. Under s. 1, the comparison will be to the less intrusive "mandatory presumption" as an alternative. ***R. v. Oakes***, [1986] 1 SCR 103; ***R. v. Whyte*** , [1988] 2 SCR 3; ***R. v. Chaulk***, [1990] 3 SCR 1303; ***R. v. Laba.***, [1994] 3 SCR 965.

3. Judicial notice

Judicial notice of adjudicative fact

Definition of "***judicial notice***":

> A court may properly take judicial notice of any fact or matter that is:
> - so generally known and accepted within the relevant community that it cannot reasonably be disputed ("common knowledge" branch); or
> - capable of ready determination by reference to sources of indisputable accuracy ("accurate sources" branch).

An "adjudicative fact" is a fact of consequence between these parties. In ***R. v. Krymowski***, [2005] 1 SCR 101, the Supreme Court considered dictionaries to take judicial notice that "gypsy" can mean "Roma" in a hate crime prosecution. See also ***R. v. Murphy***, 2012 NSCA 92 (judicial notice that "gat" means "gun", justified by reference to case law and various dictionaries).

The leading case on judicial notice is now ***R. v. Spence***, [2005] 3 SCR 458, where the Court held the definition above represents "the gold standard" for judicial notice, to be applied to adjudicative facts: the closer the fact approaches the dispositive issue, the more the court ought to insist upon compliance with these strict criteria..

Once judicial notice is taken, it is conclusive. But before notice is taken, parties must first be given an opportunity to present material: ***R. v. Zundel*** (1987), 58 OR (2d) 129, 56 CR (3d) 1 (Ont CA); ***Cronk v. Canadian General Insurance Co.*** (1995), 25 OR (3d) 505 (Ont CA). If judicial notice cannot be taken, then the fact must be proved by evidence, often by expert evidence.

Judicial notice of legislative fact

"***Legislative facts***" relate to
- substantive law,
- policy choices, and
- social framework of law,

e.g., ***Moge v. Moge***, [1992] 3 SCR 813. The ***Charter*** has expanded this form of judicial notice, especially on s. 1 issues. In ***R. v. Spence***, above, the Court noted that "legislative facts" or "social facts" can be dispositive in a ***Charter*** case and thus may require a more demanding standard for judicial notice.

Judicial notice of law

Notice must be taken of domestic common law and domestic statute law (***Nova Scotia Evidence Act*** , s. 3(3), ***Canada Evidence Act***, ss. 17, 18), N.S. Regulations under s. 9(2) ***Regulations Act***, ***CPR*** 54.03.
Judicial notice of a court order in another file: ***R. v. Tysowski,*** 2008 SKCA 88.
Municipal bylaws must be proved, by certified copy.
Foreign law is a question of fact, formal proof is required. **CPR** 54.04

4. Types and methods of proof

Real and demonstrative evidence

"***Real evidence***": tangible objects, things, persons (*e.g.,* scars)

"***Demonstrative evidence***": primarily to illustrate, assist or supplement oral evidence, *e.g.,* maps, diagrams, models, photographs, sound recordings, videotapes, views, courtroom demonstrations (as in Matlock).

Real evidence

Authentication:
- identification of real evidence, and
- proof of continuity.

Scars, injuries, bloody photos: judicial power to weigh probative value vs. prejudicial effect, ***Draper v. Jacklyn,*** [1970] SCR 92.

Views

Criminal: s. 652 ***Code*** re indictable offences
Civil: **CPR** 51.12, 52.11

Maps, models, charts, diagrams

Authentication:
- identification,
- substantially correct representation,
- exhibit, and
- aid to testimony (need to preserve record).

In civil matters, compliance with **CPR** 51.02(2)(c)

Photographs/videos

Again **CPR** 51.02(2)(c), but note exception re impeaching credibility in Rule 94.09: ***Clark v. O'Brien and Clark*** (1995), 146 NSR (2d) 135 (CA).

Authentication of photo:

- any witness who can identify contents and testify that "fair and accurate representation" of what's shown in photo

Authentication of video:

- requires more detail, especially re "sampling": ***Smith v. Avis Transport of Canada Ltd.*** (1979), 35 NSR (2d) 652 (SCTD). See also ***R. v. Schaffner***, (1988), 86 NSR (2d) 342 (SC AD) re authentication where "automatic video camera" used. "Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence", both as real evidence and to a certain extent testimonial evidence too: ***R. v. Nikolovski***, [1996] 3 SCR 1197.

5. Documentary evidence

Production of documents in ***civil matters***:

- affidavit disclosing documents, **CPR** 15
- affidavit disclosing electronic information, **CPR** 16
- request for admission, **CPR** 20.03;
- use at trial, **CPR** 54.05 (and exception for impeaching, **CPR** 94.09);
- ***subpoena duces tecum***, **CPR** 50.05

Production of documents in ***criminal matters***:

- ***R. v. Stinchcombe***, [1991] 3 SCR 326, if in possession of Crown, or, in possession of third party,
- ***subpoena duces tecum*** via ss. 698, 700 ***Code*** and,
- if third-party record and privacy interest, then two-stage procedure of ***R. v. O'Connor***, [1995] 4 SCR 411 or ss. 278.1 to 278.91 ***Code***
- Production of police discipline/misconduct records: ***R. v. McNeil,*** 2009 SCC 3

Authentication:

- by author, witness to signing, recipient, or proof of signature by lay witness or handwriting expert
- presumptions of authenticity, etc., **CPR** 54.05
- proof of documents, **CPR** 51.11

"***Best evidence***" or "***original document***" rule: "in proving terms of writing where the terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than serious fault of the proponent" (McCormick).

To prove or authenticate a document as an exhibit, where authenticity is not admitted:

- provide a copy to opposing counsel (if not already provided)

- give the original document (or copy) to the clerk, to be marked as an exhibit "for identification" (also provide an additional copy for the judge)
- show the marked document to the witness
- by questions to the witness, establish what the document is, who made it or received it, etc.
- await any cross-examination as to authenticity or admissibility
- make submissions, if necessary
- request that the document be admitted as an exhibit.

To prove or authenticate an electronic record or document:

- Use ***Nova Scotia Evidence Act***, ss. 23A-23H or ***Canada Evidence Act***, ss. 31.1-31.8
- Definition of "electronic record/document": s. 23A(b) or s. 31.8
- Burden on party offering record, "evidence capable of supporting a finding that the electronic record is what the person claims it to be": s. 23C or s. 31.1
- Best evidence rule satisfied by proof of integrity of system: s. 23D(1) or s. 31.2(1) Or if printout of record acted upon, relied upon or used: s. 23D(2) or s. 31.2(2)
- Presumption of integrity if proof of: (a) proper functioning of system; (b) from a party adverse in interest; or (c) third-party business record: s. 23E or s. 31.3
- Proof of these facts may be by affidavit: ss. 23G, 23H or s. 31.6

See ***R. v. Ball***, 2019 BCCA 32; ***R. v. Hirsch***, 2017 SKCA 14; ***R. v. Bernard***, 2016 NSSC 358; ***Saturley v. CIBC World Markets Inc.***, 2012 NSSC 226.

6. Admissibility procedure

Procedure: One party makes an offer of proof; the other party may object, if so, then a **voir dire** (trial within a trial) will be held. The purpose is to determine the admissibility of the evidence. A **voir dire** is usually held in the absence of the jury. The rules of evidence are relaxed or are inapplicable with the exception of privilege.

Burden of proof of "preliminary facts": for facts upon which admissibility is based, the burden is generally upon the proponent (party offering evidence) and the standard of proof is on a balance of probabilities in civil or criminal trials (except for confessions): ***R. v. Evans***, [1993] 3 SCR 653 and ***R. v. B.(K.G.),*** [1993] 1 SCR 740.

A trial before a judge alone or a tribunal offers greater procedural flexibility.

IV. COMPETENCE AND COMPELLABILITY

1. Three distinct concepts

- ***Competence***: Can this willing witness testify?
- ***Compellability***: Can this witness, competent but unwilling, be made to testify?
- ***Privilege***: Can this witness, competent and compellable and already on the stand, be required to answer specific questions?

2. Competence: Oath capacity

A witness may testify under oath, or solemn affirmation as provided in s. 14 **CEA**, s. 62 **NSEA**. Any form of oath that will bind the conscience of the witness is permissible.

3. Competence: Children

- Tests are now entirely statutory under ss. 16 and 16.1 **CEA**. New s. 16.1 governs competence of children under 14 years of age (in force January 2, 2006), leaving s. 16 for those 14 and over.

- Mix of common law and s. 63 **NSEA** applies in civil and provincial penal matters, but children rarely testify.

- No minimum age

Children under 14

One test, on promise to tell truth: The child is presumed to have capacity to testify (s. 16.1(1)) and the burden is upon the challenging party (s. 16.1(4)). No oath or solemn affirmation, just a promise to tell the truth (s. 16.1(2) and (6)), but testimony of "the same effect as if it were taken under oath" (s. 16.1(8)). One test is to be applied, whether the child is "able to understand and respond to questions" (s. 16.1(3)). No formulaic promise required, provided child committed to tell the truth in court: ***R. v. C.C.F.***, 2014 ONCA 327.

Charter challenge rejected: ***R. v. J.Z.S.***, 2010 SCC 1, affirming 2008 BCCA 401.

Children 14 and over

Sworn test: s. 16(2) **CEA**, able to communicate the evidence and understands nature of oath, *i.e.***,** moral obligation to tell the truth: ***R. v. Bannerman*** (1966), 55 WWR 257 (Man CA), aff'd (1966), 57 WWR 736 (SCC). Children 14 and over, presumed competent, s. 16(5).

Unsworn test: s. 16(3) ***CEA***, able to communicate the evidence and promise to tell the truth, no corroboration required. These requirements were explained in ***R. v. D.A.I.***, 2012 SCC 5. "Ability to communicate" relates to whether the witness can relate concrete events by understanding and responding to simple, clear questions. A "promise to tell the truth" is sufficient, without inquiries into the meaning of "promise" or "truth". A new s. 16(3.1) now confirms this view, directing that the person "not be asked any questions regarding their understanding of the nature of the promise to tell the truth": S.C. 2015, c. 13 (in effect July 23, 2015).

No ***Kendall*** warning any longer required re frailties of children's evidence: ***R. v. Marquard***, [1993] 4 SCR 223.

Special provisions to aid children under 18 testifying: screens, s. 486.2 ***Code***, upheld from ***Charter*** challenge in ***R. v. Levogiannis***, [1993] 4 SCR 475; videotapes, s. 715.1 ***Code***, upheld in ***R. v. L.(D.O.)***, [1993] 4 SCR 419 and admissibility issues explained in ***R. v. C.C.F.***, [1997] 3 SCR 1183; 1993 ***Code*** amendments providing for support persons; further extensions in 2006 amendments.

4. Competence: Mental capacity, adults

An adult is presumed competent, unless proven otherwise by "the party who challenges the mental capacity of a proposed witness": ss. 16(1) and (5) **CEA**. Under the **CEA**, an adult unable to testify under oath may testify unsworn, if the requirements of s. 16(3) and (3.1) are met, as described above in ***R. v. D.A.I.*** To determine competency, lay witnesses may be called on the voir dire, to provide evidence of the witness' development and abilities, as may be experts.

The special provisions to aid the testimony of children were extended in 1998 and 2006 to adults with "a mental or physical disability", e.g., screens and closed-circuit television, videotapes, support persons, etc.

In civil or provincial penal matters, the common law presumes an adult to be competent, unless challenged and proven otherwise on a voir dire. There is no unsworn alternative for children 14 or over or for adults with disabilities, either at common law or under the **NSEA.**

5. Spousal competence and compellability

For the defence: A spouse is a competent witness for the defence where his or her spouse is the accused, s. 4(1) ***CEA.*** Compellability is less certain under this section, but likely, as suggested in ***R. v. Couture***, 2007 SCC 28 at para. 40.

Effective July 23, 2015, a spouse is now always a competent and compellable witness for the prosecution: S.C. 2015, c. 13, thanks to a new s. 4(2) ***CEA*** to that effect, repealing the old ss. 4(2), 4(4) and 4(5):

> 4(2) No person is incompetent or uncompellable, to testify for the prosecution by reason only that they are married to the accused.

The privilege for marital communications in s. 4(3) is retained, discussed below under "Privilege".

Spouses will now be treated the same as any other witness, *i.e.*, competent and compellable. Thus, there are no longer issues around who is or is not a "spouse", like those who are married shortly before trial or separated or living common law.

6. Compellability of accused

The accused is not a compellable witness for the prosecution: s. 4(1) **CEA**, s. 11(c) *Charter*.

One co-accused cannot be compelled to testify by another co-accused at their joint trial.

Corporations: An employee – even the directing mind and will of the corporation – can be compelled to testify against the accused corporation, as the corporation is not the witness: ***R. v. Amway of Canada Ltd.***, [1989] 1 SCR 21.

V. EXAMINATION OF WITNESSES

1. Direct examination

Leading questions

Definition: "a question which suggests the answer the questioner desires or a question which assumes a fact in issue not yet proved from this witness".

The rule is against **improper** leading questions. Leading is permitted in some situations:

- introductory, formal or undisputed matters;
- to identify persons or things;
- to allow one witness to contradict another regarding specific statements;
- to refresh the witness' memory, in judge's discretion;
- where the witness suffers from some disability by reason of age, education, language or mental capacity;
- where the subject-matter is complicated, in judge's discretion.

Judicial sanctions for leading:

- rephrase,
- reprimand,
- disallow question.

For a rare appeal case where improper leading questions were one ground for overturning a trafficking conviction, see ***R. v. Rose*** (2001), 53 OR (3d) 417, 153 CCC (3d) 225 (Ont CA). More recently, see the discussion in ***R. v. Muise,*** 2013 NSCA 81, which also noted an exception where leading questions are necessary in the interests of justice.

Refreshing memory

Distinguish ***present memory revived*** vs. ***past recollection recorded***, a distinction explained by the Supreme Court in ***R. v. Fliss***, [2002] 1 SCR 535 and, in more detail in ***R. v. Wilks***, 2005 MBCA 99.

Past recollection recorded:

- no present memory,
- record is the evidence,
- record made or verified by witness at time of event recorded (really an ancient form of hearsay exception):

See ***R. v. Meddoui*** , [1991] 2 WWR 289, 61 CCC (3d) 345 (Alta CA).

Present memory revived:

Any writing may be used, provided it assists the witness in recalling events, and the testimony, not the record, is the evidence: ***R. v. Bengert*** (1980), 15 C.R. (3d) 114 (B.C.C.A.), aff'g (1980), 15 C.R. (3d) 21 (B.C.S.C.).

Opposing counsel can inspect the record prior to cross-examination, as of right where the witness refreshes memory on the stand and as a matter of discretion otherwise.

The record may be made an exhibit at the option of cross-examining counsel, but only for the limited purpose of assessing credibility of testimony.

Impeaching own witness

A party's own witness may be contradicted by other witnesses or evidence called by the party.

Common law "***hostility***": "hostile in mind" as demonstrated by demeanour of witness on stand, out of a desire not to tell the truth; right to cross-examine own witness granted at large. ***R. v. Osae,*** 2010 ONSC 3108.

S. 9(2) **CEA**: prior **written or recorded** inconsistent statement, proof of inconsistency on **voir dire** generally sufficient to give rise to right to cross-examine on statement, ***R. v. Milgaard***, [1971] 2 WWR 266, 2 CCC (2d) 206 (Sask CA), adopted in ***McInroy v. R.***, [1979] 1 SCR 588. Right to cross-examine only on matters in the statement, not at large: ***R. v. S.(C.L.)***, 2011 MBQB 12. S. 9(1) **CEA**: prior **oral** inconsistent statement, witness must be proved to be "***adverse***", *i.e.,* opposed in interest or unfavourable, and judge may look at inconsistent statement as proof of adversity, wider right of cross-examination than under s. 9(2): ***Wawanesa Mutual Insurance Co. v. Hanes***, [1961] OR 495, 28 DLR (2d) 386 (Ont CA), but see also ***R. v. McIntyre*** (1963), 43 CR 262 (NSSC in banco). Right to cross-examine only on matters in the statement, including why witness changed story, but not at large: ***R. v. Figliola***, 2011 ONCA 457 and ***R. v. Figliola,*** 2018 ONCA 578.

Civil matters: written or oral statements, s. 55 **NSEA** (law same as s. 9(1) **CEA** above); also **CPR** 54.06 (cross-examination of adverse party by other party). In ***Founders Square v. Nova Scotia (Attorney General)*** (1999), 175 NSR (2d) 391 (SC), Moir J. held the predecessor Rule applied to a cabinet minister as a "public officer" of the Crown, but not to a former or past officer, as the rule presumes the opposite party to be an adverse witness.

2. Cross-examination

Improper questions

Possible objections:

- irrelevant;
- seeking inadmissible evidence;
- misleading;
- inaccurate statement of testimony;
- false choice;
- ambiguous;
- compound or multiple question;
- argumentative or editorializing;
- "are you saying another witness is lying ...";
- badgering or "asked and answered";
- "let the witness finish answering the question ...".

Basis for cross-examination

A question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question. A "good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used: ***R. v. Lyttle***, [2004] 1 SCR 193;.

Effect of failure to cross-examine

There is a duty to cross-examine where a party intends to call evidence to contradict the witness: ***Browne v. Dunn*** (1893), 6 R 67 (HL); ***R. v. Quansah***, 2015 ONCA 237; ***R. v. Gardiner***, 2010 NBCA 46; ***R. v. Dyck*** (1969), 8 CRNS 191 (BCCA); but see ***Palmer v. R.***, [1980] 1 SCR 759, where the Court held this rule is not absolute, but "depends upon the circumstances of each case". Options available where there is a breach of the "rule" are set out in ***R. v. McNeill*** (2000), 48 OR (3d) 212, 33 CR (5th) 390 (Ont CA) and in ***R. v. Dexter,*** 2013 ONCA 744: party barred from calling contradicting witness, or lesser remedies, e.g. recall witness for further cross or, if not available, goes to weight of evidence of contradicting witness.

Prior inconsistent statements

Written: s. 10 **CEA**, s. 57 **NSEA**. Cross-examiner may question the witness first, without showing the witness the statement; the witness may adopt the statement; if denied, the statement may be proved if "relative to the subject-matter of the case", as an exception to the rule against rebuttal in collateral matters. The statement may be an exhibit, but only to test credibility, not for the truth of its contents (unless it is an admission of a party or the hearsay requirements of ***K.G.B.*** are met).

Oral: s. 11 **CEA**, s. 56 **NSEA**. Same as above, only oral statement must be proved during cross-examiner's case.

Prior convictions

S. 12 **CEA**, s. 58 **NSEA**: A witness may be cross-examined upon prior convictions (*i.e.***,** offence, date, place, sentence) and, if denied, the conviction may be proved. The fact of conviction goes to the credibility of the witness.

What is a conviction? Not a discharge (***R. v. Danson*** (1982), 66 CCC (2d) 369 (OntCA)), not a pending charge (***R. v. Titus***, [1983] 1 SCR 259); but a conviction under appeal o.k. (***R. v. Hewson***, [1979] 2 SCR 82), as is a provincial *Motor Vehicle Act* conviction in a civil negligence suit (***Levin v. Willis*** (1969), 9 DLR (3d) 536 (NS CoCt). An accused may not be asked whether or not he testified at an earlier trial leading to conviction: ***R. v. Geddes*** (1979), 52 CCC (2d) 230 (Man CA). An adult witness may be asked about a finding of guilt under the ***Youth Criminal Justice Act***: ***R. v. Upton***, 2008 NSSC 338, but see ***R. v. Hammerstrom***, 2018 BCCA 269.

The accused is treated the same as any witness, except as provided in ***R. v. Corbett***, [1988] 1 SCR 670, *i.e.***,** the judge may exclude the use of the conviction where its probative value is substantially outweighed by its prejudicial effect, as determined by

- nature of conviction,
- similarity of conviction,
- recency of conviction,
- deliberate attack on credibility of Crown witnesses by accused.

A "*Corbett* application" should be made after the close of the Crown's case, usually by the defence, but it can also be made by the Crown, as in ***R. v. Seymour***, 2005 NSCA 5. If the trial judge believes it necessary, a voir dire may be held in which the defence discloses its intended evidence to permit an informed ruling: ***R. v. Underwood***, [1998] 1 SCR 77.

Any witness, other than the accused, may also be cross-examined on past misconduct and discreditable associations, short of conviction. While a judge has the power to curtail abusive cross-examination, cross-examination on prior criminality and convictions should generally not be restricted: ***R. v. Borden***, 2017 NSCA 45.

Rule against rebuttal on collateral matters

Not a rule against cross-examination on collateral matters, but only as to when a party may call extrinsic evidence to rebut an answer in cross-examination: if "***collateral***", the answer is final, but if it is not "collateral", the cross-examining party may call evidence to rebut in own case as defendant or in reply if plaintiff/prosecution.

When is a fact not "collateral"?

- when relevant to facts in issue,
- when a prior inconsistent statement, as provided in **CEA** or **NSEA**,
- when a prior conviction, as provided in **CEA** or **NSEA**,

- when to show bias, interest, corruption or fabrication by witness,
- when expert evidence of serious impairments of witness' perception or memory,
- when "linch-pin" evidence, *i.e.***,** critical to credibility, but merely some aspect or item of credibility,
- but not when just about "pure credibility" matters.

Real test: Probative value of rebuttal evidence outweighs: consumption of time, confusion of issues, unfair surprise, misleading the jury and undue prejudice to a party.

3. Redirect examination

Redirect is confined to clarification or rehabilitation on matters raised in cross-examination, but not to repeat direct testimony or to raise entirely new matters.

4. The judge's role

The judge is entitled to question the witness, even by leading questions. Judicial power to call witnesses is limited:

- not in civil matters;
- in criminal matters, where necessary in the interests of justice;
- in family matters, in best interests of child.

5. Reply or rebuttal evidence

Plaintiff or Crown may call further evidence after the defence, to contradict or clarify new matters raised in defence case that could not have been reasonably anticipated, but note there is a strong rule against the Crown "splitting its case": ***R. v. Krause***, [1986] 2 SCR 466. For a useful restatement of the principles in civil cases, see ***Stewart v. Kingsway General Insurance*** (2000), 14 CPC (5^{th}) 128 (Ont SCJ).

VI. OPINION EVIDENCE

General rule: Witnesses testify to facts of which they have personal knowledge, but not opinions, subject to two exceptions:

- one for expert opinion and
- another for lay opinion.

1. Experts as witnesses

An expert must be "qualified" as such, after a **voir dire** to determine whether whether expert has the necessary skill based on education, training or experience: ***R. v. Marquard***, [1993] 4 SCR 223. The expert should be qualified in all the areas in which the expert is to give opinion evidence and, if not so qualified, opponent should object: ***Marquard.*** (S.C.C.).

Practical experience was enough for fisheries officers to give expert evidence in ***R. v. Rayner***, 2000 NSCA 143, 189 NSR (2d) 144.

For expert opinion to be admissible, proponent must prove four or five "threshold requirements", followed by a balancing test, all on a "*Mohan* voir dire": ***R. v. Mohan***, [1994] 2 SCR 9, as restated in ***White Burgess Langille Inman v. Abbott and Haliburton Co.,*** 2015 SCC 23. The threshold requirements are:

- relevance, meaning "logical relevance";
- necessity in assisting the trier of fact, *i.e.***,** "essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert"';
- the absence of any other exclusionary rule, *e.g.*, character evidence, credibility rules;
- a properly qualified expert; and
- reliability, where "the opinion is based on novel or contested science or science used for a novel purpose".

If these four or five requirements are met, then comes the balancing stage, where the court balances the benefits and probative value of the expert evidence against its costs and dangers to determine admissibility. Stated Cromwell J. in ***White Burgess***: "The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role" (para. 20). See also ***R. v. Bingley***, 2017 SCC 12 (drug recognition recognition expert). The two-part test in ***White Burgess*** builds upon the analysis in ***R. v. Abbey***, 2009 ONCA 624 (testimony of gang sociologist about teardrop tattoo). In turn, a second appeal in the *Abbey* case elaborated upon the two-part test from ***White Burgess***, this time rejecting the testimony of the same sociologist based upon fresh evidence as to his reliability: ***R. v. Abbey***, 2017 ONCA 640. For applications of ***White Burgess***, see also ***R. v. Dim***, 2017 NSCA 80 and ***Nova Scotia (Minister of Community Services) v. J.M.***, 2018 NSSC 31.

In ***White Burgess***, the issue was where concerns about expert bias, partiality or lack of independence worked into the above analysis. First, an expert who is "unable or unwilling" to fulfil their duty to the court to be fair, objective and non-partisan would not be a "properly-qualified expert" under the fourth threshold requirement above. A mere employment relationship with the party calling the evidence would be insufficient to disqualify the expert at this point. Second, if an expert meets this low threshold test, concerns about bias, partiality or lack of independence can also enter into the balancing stage, as one of the dangers of the expert evidence.

The expert may be asked hypothetical questions. The expert may also rely for opinions upon "material of a general nature which is widely used and acknowledged as reliable by experts in that field": ***R. v. Zundel*** (1987), 56 CR (3d) 1 (Ont CA).The expert may be cross-examined upon scholarly works only if the expert knows the work and acknowledges the work's authority; then parts of the work may be read to the expert and, to the extent they are confirmed, they become evidence. If expert denies knowledge or authority of work, that is end of matter: ***Marquard***.

Notice, disclosure and contents of expert's reports:

- in civil matters, **CPR** 55;
- in criminal matters, by Crown under ***Stinchcombe*** and by both Crown and defence under s. 657.3 ***Code***.

"Ultimate issue" prohibition upon opinion thought to be no longer issue, based upon ***Graat***, but then ***Mohan*** seems to have revived stricter scrutiny of admissibility of expert opinion directed to the ultimate issue, including credibility.

In ***R. v. J.(J.)***, 2000 SCC 51, reference was made to the leading U.S. Supreme Court decision on expert evidence, ***Daubert v. Merrell Dow Pharmaceuticals, Inc***., 509 U.S. 579 (1993) and its factors to be used in evaluating the reliability of expert evidence: (i) whether the theory or technique can be or has been tested; (ii) whether the theory or technique has been subjected to peer review and publication; (iii) the known or potential rate of error or the existence of standards; and (iv) whether the theory or technique used has been generally accepted. In ***J.(J.)*** "novel science" was stated to be subject to "special scrutiny" and the Court held the penile plethysmograph was unreliable as a forensic tool and hence inadmissible. See also ***R. v. Trochym***, 2007 SCC 6 (testimony of Crown witness obtained through hypnosis inadmissible, as underlying science unreliable).

In ***R. v. D.(D.)***, 2000 SCC 43, the Court explained the dangers of expert evidence and the "necessity" requirement. Expert evidence will be necessary "only when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts." A simple jury instruction about delayed disclosure was held sufficient in ***D.(D.)***, avoiding any need for opinion evidence.

The trial judge must ensure that the content of the expert's evidence remains within the proper scope of expert opinion under ***Mohan***, that it is necessary and reliable: ***R. v. Sekhon***, 2014 SCC 15 (expert police officer wrongly testified that in his experience he had never seen a "blind courier" in a drug case).

2. Lay opinion

Lay witnesses testify as to facts, not opinion, but may be permitted to testify in the form of opinion where "the facts perceived by the witness and inferences from those facts are so closely associated that the opinion amounts to little more than a compendious statement of facts": ***Graat v. R.***, [1982] 2 SCR 819. Illustrations of permissible topics; set out in ***Graat***:

- identification of handwriting, persons and things;

- apparent age;
- bodily condition of a person, including death and illness;
- emotional state of a person;
- condition of things;
- certain questions of value;
- estimates of speed and distance, intoxication:

Lay opinion must be based upon first-hand knowledge, since the purpose is to enable clearer testimony as to facts.

3. Expert opinion based on hearsay

Experts are permitted to offer opinions based, not only upon their first-hand knowledge, but also based upon second-hand information, *e.g.*, other opinions, scholarly works, hearsay. Hearsay included in an expert's report is not, however, thereby made admissible, unless admissible under a hearsay exception: ***R. v. Keats***, 2016 NSCA 94.In civil matters, expert opinion is admissible, even if based upon hearsay, subject to weight, with less concern for strict separation of hearsay from non-hearsay basis, *e.g.*, ***City of Saint John v. Irving Oil Co.***, [1966] SCR 581 (expropriation case where real estate appraisal opinions based upon property sales, without calling vendors or purchasers of properties).

In criminal matters there is a greater concern for hearsay basis of opinion, especially where the accused does not testify. In ***R. v. Abbey***, [1982] 2 SCR 24, the Court ruled that expert opinion based upon hearsay was admissible, with the hearsay being admitted only to show the information upon which the opinion is based. In ***R. v. Lavallee***, [1990] 1 SCR 852, the Court explained that not each fact underlying opinion need be proved by admissible evidence for opinion itself to be admissible, as long as there is "some admissible evidence" to support the opinion. The jury is to be cautioned that the amount of inadmissible hearsay underpinning the opinion goes to the weight of the opinion, with identification of hearsay vs. non-hearsay.

VII. CHARACTER EVIDENCE

The ***character evidence*** rule is a specific application of the general principle that probative value must substantially outweigh prejudicial effect. Character evidence is evidence of the disposition, traits or propensities of a person, e.g., honesty or peacefulness, usually offered to prove the conduct or behaviour of the person on a particular occasion.

Evidence that is relevant to a fact in issue may be admitted even though it reflects upon the character of an accused, provided its probative value on that issue substantially outweighs its prejudicial effect and the fact-finder is warned of the dangers of character evidence: ***R. v. Lepage***, [1995] 1 SCR 654; ***R. v. B.(F.F.)***, [1993] 1 SCR 697. A special case is evidence of "post-offence conduct" of the accused that raises character issues, as in ***R. v. Calnen***, 2019 SCC 6, a Nova Scotia case. Evidence of Calnen's burning and disposal of his partner's body was held to be admissible as circumstantial evidence of causation and intent in his conviction for second-

degree murder, provided the jury was given adequate instructions, not only on the use of post-offence conduct, but also on the dangers of propensity reasoning.

Evidence of character must be distinguished from "habit". Habit is a person's regular practice of responding to a particular kind of situation with a specific type of conduct, where that conduct is morally neutral or otherwise non-prejudicial. Habit evidence may be admissible to prove an act: ***R. v. Watson*** (1996), 50 C.R. (4th) 245, 108 C.C.C. (3d) 310 (Ont.C.A.)..

1. Purposes and methods of proof of character

Three purposes:

- character as a fact in issue,
- character evidence as circumstantial evidence of conduct,
- character evidence only as to credibility.

Six methods of proof:

- reputation evidence, *i.e.*, rote questions, based on reputation in community, limited probative value;
- lay opinion, based upon personal knowledge;
- party's own testimony, may be in any form, opinion or acts;
- expert psychiatric or psychological opinion;
- evidence of specific past acts or associations, short of conviction; and
- prior convictions.

2. Character as a fact in issue

If character is a "***fact in issue***", all six methods are permissible.

- In ***criminal cases***, this would be sentencing or dangerous offenders.
- In ***civil matters***, defamation or maybe child custody.

3. Character evidence as circumstantial evidence of conduct

The ***Basic Rule***: "evidence of character in any form – reputation, opinion from observation, or specific acts – generally will not be received to prove that a person engaged in certain conduct or did so with a particular intent on a specific occasion, so-called circumstantial use of character." (McCormick)

This rule is applied in both criminal and civil cases.

There are three exceptions to the rule, but only the third is available in civil cases:

- where the accused puts character "in issue";
- evidence of character of third parties led by the accused;

- similar fact evidence.

Character put "in issue"

Accused may lead evidence of good character, to show he or she is less likely to have committed an offence, from Crown or defence witnesses, including accused's own testimony, *i.e.***,** more than denial or explanation of defence, but crosses over the line to assert honest or peaceable person: ***R. v. McNamara (No. 1)*** (1981), 56 CCC (2d) 193 (Ont CA). Permissible methods of proving good character:

- reputation evidence,
- accused's own testimony,
- expert opinion.

Once accused puts character "in issue", Crown may respond by:

- reputation evidence,
- expert opinion,
- prior convictions (s. 666 ***Code***),
- cross-examination as to specific past acts directly relevant to trait in issue (***McNamara (No. 1)***).

Use and limits of expert opinion, interplay of opinion and character rules:

- Crown not entitled to lead expert opinion as to character or disposition;
- accused may lead expert opinion to show accused less likely to commit offence, *e.g.***,** accused "abnormal" and "normal" offence, or "abnormal" offence and accused "normal", or "abnormal" offence and accused different kind of "abnormal";
- but accused may not lead expert opinion to show accused some kind of "normal" where "normal" offence, *e.g.***,** "normal" peaceableness/violence, honest/dishonesty;
- if accused leads any evidence of good character, not just expert opinion, Crown may rebut with expert opinion, if directed to specific trait or disposition in issue.

See review of law in ***Mohan***.

Where the Crown rebuts the evidence of the accused, the jury must be instructed that the evidence may only be used to rebut or nullify evidence of good character of the accused, but **not** to go further, to infer that the accused is more likely to have committed offence: ***McNamara (No. 1)***.

Character of third party

The accused may lead evidence of character as to a third party to show that party more likely to have committed offence than accused, where other evidence connecting third party to alleged offence: ***R. v. McMillan*** (1975), 23 CCC (2d) 160 (Ont CA), aff'd [1977] 2 SCR 824; ***R. v. Arcangioli***, [1994] 1 SCR 129. By doing this, the accused puts his or her character in issue and the Crown may respond.

The accused may lead evidence of the character of the victim, including specific past acts unknown to the accused, to prove the victim acted in accordance with that character, *e.g.***,** to prove the victim the aggressor and accused acted in self-defence: ***R. v. Scopelliti*** (1981), 63 CCC (2d) 481 (Ont CA). While less clear than with third parties, by doing this, the accused probably puts his or her own character in issue, although this may be less clear after ***R. v. Borden***, 2017 NSCA 45. Where the victim testifies, there is no need for the defence to make a separate application for permission to cross-examine on their character or their prior convictions: ***R. v. Borden***.

Limits upon the ability of the accused to lead character evidence in relation to the complainant in sexual assault cases: ***R. v. Seaboyer***; ***R. v. Gayme***, [1991] 2 SCR 577; subsequent amendments to ***Code***, ss. 276, 276.1 to 276.5, 277. Subsequent amendments to ***Code***, in ss. 276, 276.1 to 276.5, 277, limit evidence of the complainant's sexual activity where it is offered to support an inference that the complainant is more likely to have consented to the sexual activity that forms the subject-matter of the charge or is less worth of belief, subject to specified exceptions, to be established on a *voir dire* that follows specific statutory procedures. For recent elaboration of these provisions in split decisions, see ***R. v. Goldfinch***, 2019 SCC 38, ***R. v. Barton,*** 2019 SCC 33 and ***R. v. R.V.***, 2019 SCC 41.

Similar fact evidence: Criminal cases

The ***modern rule***: Does the probative value of the similar fact evidence substantially outweigh its prejudicial effect? This a change from the old pre-***Boardman*** rule, where there was a list of permissible purposes, *e.g.***,** to show system, to rebut innocent association, etc.

According to ***R. v. B.(C.R.)***, [1990] 1 SCR 717, in criminal cases, where the Crown evidence is suggesting serious criminality or immorality, a considerable degree of probative value is required to overcome substantial prejudice, like the "striking similarity" required by ***Boardman***. But less probative value is required where there is less prejudice, *e.g.***,** where offered by defence or in civil cases.

> Evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.

Categories or catchwords need not be used. On appeal, courts must accord "a high degree of respect to the decision of the trial judge".

The Supreme Court's decision in ***R. v. Handy***, [2002] 2 SCR 908, provided practical guidance on how to balance probative value vs. prejudicial effects.

Probative value:

- strength of the evidence that the similar acts occurred

- some "link" between the accused and the similar acts
- potential for collusion/collaboration
- identification of the "issue in question"
- identification of connecting factors: similarities and dissimilarities between the facts charged and the similar fact evidence:
    - proximity in time of the similar acts
    - extent to which the other acts are similar in detail to charge conduct
    - number of occurrences of the similar acts
    - circumstances surrounding or relating to the similar acts
    - any distinctive features unifying the incidents
    - intervening events
    - any other factor

Prejudicial effects:

- moral prejudice: more reprehensible similar acts than those charged; also reasoning from general bad disposition
- reasoning prejudice: distraction, confusion, unfair surprise
- consumption of time

In ***R. v. Arp***, [1998] 3 SCR 339, the Supreme Court of Canada explained the use of similar fact evidence to prove identity, including the proper procedures to follow in admitting and explaining similar fact evidence in a jury trial on a multi-count indictment. As a general rule, if the acts highly similar such that it is likely they were committed by the same person, the similar fact evidence will be admissible. The occurrence of the prior acts must be proved on the balance of probabilities, consistent with the general rule governing findings of fact preliminary to admissibility, but there need only be some evidence linking the accused to those prior acts at the admissibility stage. For a recent application of the ***Handy*** and ***Arp*** principles, see ***R. v. Jesse***, 2012 SCC 2 (prior conviction for unusual sexual assault some evidence of link of accused to another unusual sexual assault). For applications of ***Handy*** by the Nova Scotia Court of Appeal, see ***R. v. Percy***, 2020 NSCA 11, ***R. v. G.K.N.***, 2016 NSCA 29 and ***R. v. Taweel,*** 2015 NSCA 107.

Where the **defence** wishes to lead similar fact evidence to suggest that an unknown third party has committed the offence, the ***Handy*** analysis does not apply, but rather the ***Seaboyer*** test. The defence evidence is admissible where: (i) the similar fact evidence is logically relevant to a fact in issue, and (ii) its probative value is not substantially outweighed by its prejudicial effects. The defence must show a sufficient connection between the crime for which the accused is charged and the allegedly similar incident suggesting that the crimes were committed by the same person, coupled with evidence that the accused could not have committed the other office, to give an air of reality to the defence: ***R. v. Grant,*** 2015 SCC 9.

Similar fact evidence: Civil cases

It is not necessary to show such high probative value as in criminal cases, since there is a lesser prejudicial effect: ***B.(C.R.)***. There is a greater concern for other countervailing factors, *e.g.*, consumption of time, confusion of issues.

Alternative phrasings of the civil test: "a real and substantial nexus or connection" (***MacDonald v. Canada Kelp Co.*** (1973), 39 DLR (3d) 617 (BCCA)(fraudulent misrepresentations re sale of shares)) or "if is logically probative ... provided that it is not oppressive or unfair to the other side and also that the other side has fair notice of it and is able to deal with it" (***Mood Music Publishing Co. v. De Wolfe Ltd.***, [1976] 2 WLR 451 (CA)(infringement of copyright)).

For two Nova Scotia civil cases, see ***Dhawan v. College of Physicians and Surgeons of Nova Scotia*** (1998), 168 NSR (2d) 201 (NSCA) (professional discipline for sexual misconduct of doctor with patients) and ***J.M.D. v. Nova Scotia (Utility and Review Board)*** (2004), 227 NSR (2d) 277 (NSCA) (criminal injuries complaint of sexual assault by doctor).

VIII. CREDIBILITY

1. Corroboration

Common law corroboration, *e.g.*, respecting an accomplice who testifies for the prosecution, returned to common-sense origins by ***R. v. Vetrovec***, [1982] 1 SCR 811, 67 CCC (2d) 1 : "no magic in the word corroboration"; "something in the nature of confirmatory evidence should be found before the finder of fact relies upon the evidence of a witness whose testimony occupies a central position in the purported demonstration of guilt and yet may be suspect by reason of the witness being an accomplice or complainant or of disreputable character"; "in some circumstances, a clear and sharp warning" to the jury may be required.

In ***R. v. Brooks***, [2000] 1 SCR 237, the Court held that a ***Vetrovec*** warning should generally be given in respect of "jailhouse informants", after considering the credibility of the informant and the importance of the informant's testimony to the Crown's case. As to the content of the warning, see ***R. v. Khela,*** 2009 SCC 4 and ***R. v. Smith***, 2009 SCC 5. As to what can constitute "confirmatory evidence", see ***R. v. Kehler*** , [2004] 1 SCR 328 and ***R. v. Dowe***, 2008 SCC 55.

As a matter of statute law, corroboration requirements are being repealed: already done for unsworn evidence of children, complainants in sexual offences, forgery. What's left? Treason, perjury.

2. No supporting credibility BEFORE impeachment

The conventional law is that a witness' credibility may not be supported or accredited or "bolstered" BEFORE impeachment, as "the credibility of a witness is neither good nor bad until impeached" and any such support has been described as "oath-helping": ***R. v. Beland and Phillips***, [1987] 2 SCR 398.

Exceptions:

- introductory background of witness;
- prior identification of accused.

Prior consistent statements of a witness are not admissible, except prior statements of complainant in sexual offence cases held admissible "as part of the narrative" (but not for the truth of their contents, and not for self-corroboration, but only to explain the progress of events from disclosure to charge): ***R. v. O.B.*** (1995), 146 NSR (2d) 265 (CA).

3. Impeaching credibility of other party's witness

A number of methods available:

- ***self-contradiction of witness***, revealed in cross-examination.
- ***prior inconsistent statements***, ss. 10 (written), 11 (oral) ***CEA***, ss. 57 (written), 56 (oral) **NSEA**, but the prior statement when proved may only be used to nullify credibility of witness' on-stand credibility, unless the statement is adopted or ***K.G.B.*** hearsay exception applies.
- ***prior criminal record***, s. 12 **CEA**, s. 58 **NSEA**, may be proved if denied, subject to ***Corbett*** exclusion of certain prejudicial convictions for accused as witness.
- ***character for honesty of witness*** (other than accused), may be impeached by cross-examination as to character, past bad acts and associations, also by extrinsic evidence in form of reputation evidence (***R. v. S.H.P.***, 2003 NSCA 53), lay opinion (***R. v. Gonzague*** (1983), 4 CCC (3d) 505 (Ont CA)), expert opinion (where abnormality), but rule against rebuttal on collateral matters generally bars extrinsic evidence as to past bad acts or associations.
- ***bias, interest, prejudice, corruption, fabrication*** may be revealed by cross-examination and, if denied, answers may be rebutted: ***A.G. v. Hitchcock*** (1847), 154 ER 38 (Exch Ct).
- ***perception, memory, narration*** (use of language), may be impeached by cross-examination, extrinsic evidence generally prohibited, unless (a) physical or psychological condition, when expert opinion evidence may be called (***Toohey v. Metro. Police Commissioner***, [1965] 1 All ER 506 (HL)), or (b) where probative value not outweighed by consumption of time, confusion of issues, unfair surprise or undue prejudice, *e.g.*, "linch-pin" evidence, as in ***R. v. Brown*** (1861), 21 UCQB 330 (CA).
- ***expert opinion evidence***, extrinsic evidence may be called where physical or psychological condition of "abnormality" that would seriously impair perception, memory, narration or sincerity, but not "normal" or "ordinary" credibility: ***Mohan***,

Marquard. Also "features of a witness' evidence which go beyond the ability of a lay person to understand" or "human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility", if "beyond the ordinary experience of the trier of fact": ***Marquard***.

- ***but not opinion directly as to truthfulness***, *e.g.***,** belief of this witness, this category of witnesses in general, or in form of statistical probabilities: ***Marquard***, ***Mohan***.

4. Rehabilitation AFTER impeachment

The method employed to rehabilitate after impeachment must respond directly to the form of impeachment used by the opponent:

- ***redirect examination***, to explain or clarify new matters raised in cross-examination, including self-contradiction, character for honesty, failings of perception, memory, narration or sincerity, bias, etc.
- ***prior consistent statements***, available when "recent fabrication" alleged or implied and more broadly whenever impeachment: ***R. v. Stirling***, 2008 SCC 10 (also proper use and probative value). See also ***R. v. Willis***, 2019 NSCA 64. Not barred by s. 275 ***Code*** in sexual cases: ***R. v. Owens*** (1986), 55 CR (3d) 386 (Ont CA). There is also a "contextual exception" where a court can look at the consistency of the statements to rebut suggestions of inconsistency by the defence, provided the statements are not used to bolster the truth of the complainant's testimony : ***R. v. Cain***, 2017 NSCA 96, upheld 2018 SCC 20.
- ***evidence of good character for honesty of witness***, where character of witness impeached, can be done by redirect examination or by reputation or lay opinion evidence.
- ***expert opinion evidence***, to respond to impeachment, but not in respect of "mere" or "ordinary" credibility, only where physical or psychological condition of "abnormality", as expanded by ***Lavallee*** to include "implied impeachment" based upon "myths and stereotypes"; but no polygraph evidence, ***Beland and Phillips***.

5. Credibility assessment

R. v. Whyte, [1947] SCR 268 at 272, quoted in ***R. v. Marshall***; ***R. v. Archibald*** (1982), 51 NSR (2d) 165 (SCAD) at 171:

> The issue of credibility is one of fact and cannot be determined by following a set of rules that is suggested have the force of law.... It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.

Different standards may apply to different witnesses, *e.g.***,** children: ***R. v. W.(R.)***, [1992] 2 SCR 122.

The determination of credibility is highly individualistic in nature, with the trial judge permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such as testimony and demeanour, but not on the basis of generalizations: ***R. v. S.(R.D.)***, [1997] 3 SCR 484. Demeanour remains important, important enough that a court should balance *Charter* rights where a witness wears a niqab covering her face for sincere religious reasons, balancing her rights against the right of the accused to a fair trial, including the right to effective cross-examination and assessment of credibility, to determine whether she must remove the niqab while testifying: ***R. v. N.S.***, 2012 SCC 72.

But demeanour should not be the sole basis for judging credibility: ***R. v. Norman*** (1993), 26 CR (4th) 256, 87 CCC (3d) 153 (Ont CA); ***R. v. S.H.P.***, 2003 NSCA 53. And a witness should not be presumed to be telling the truth unless shown otherwise: ***R. v. D.(S.O.)***, 2013 NSCA 101. Out-of-box demeanour, i.e. the demeanour of a party in the courtroom when not testifying, should not be significantly relied upon in assessing credibility: ***R. v. N.M.***, 2019 NSCA 4.

IX. THE HEARSAY RULE

1. The Rule

Hearsay is an out-of-court statement, offered for the purpose of proving the truth of the matter asserted in the statement. In its recent decision in ***R. v. Baldree***, 2013 SCC 35, the Supreme Court provided a careful analysis of the most basic question: what is or is not "hearsay".

The other leading Supreme Court of Canada decision on hearsay is ***R. v. Khelawon***, [2006] 2 SCR 787, which summarizes all of the Court's hearsay law to that date, in the course of finding the videotaped statements of the deceased complainants inadmissible. More recently, the Court has yet again restated hearsay law in ***R. v. Bradshaw***, 2017 SCC 35.

The ***rationale for the exclusion of hearsay*** is the lack of opportunity of the opponent to cross-examine or test the declarant at the time of the out-of-court statement, as revealed by Prof. Morgan and affirmed in both ***Baldree*** and ***Khelawon***. Morgan emphasized the "four hearsay dangers" of

- faulty perception,
- inaccurate memory,
- errors in narration or use of language, and
- insincerity,

essentially the testimonial abilities of the declarant, leading to his test: "does the offered evidence require the court or jury to rely upon the out-of-court declarant's perception, memory, narration or sincerity?"

Other rationales mentioned:

- absence of oath,
- absence of witness' personal presence in court,

- distrust of jury's ability to weigh and evaluate hearsay.

Non-hearsay purposes:

- where fact of statement being made has probative value;
- where "verbal acts", *e.g.*, words of contract, loan, threat, etc.;
- where to explain subsequent behaviour or acts;
- where to prove "reasonable and probable grounds" to believe;
- where circumstantial evidence of state of mind; etc.

In ***R. v. Baldree***, above, the Supreme Court of Canada held that "implied assertions" or "non-assertive statements could constitute hearsay. The Court characterized a call to the accused's cellphone, requesting "weed", as an implied assertion that ***Baldree*** was a drug dealer and hence hearsay and inadmissible under any exception. On the principled approach, there was no necessity or reliability in a single telephone call, especially where the caller provided his address. The Court in ***Baldree*** expressly stated that it was not dealing with whether non-assertive conduct could amount to hearsay. In general, Canadian courts have held such conduct is not hearsay. For a Nova Scotia application of ***Baldree*****:** see ***R. v. Gerrior***, 2014 NSCA 76 (text messages sent to accused's cellphone from three unidentified buyers, admitted in part proof of possession for the purpose of trafficking).

2. General structure of hearsay exceptions

The Supreme Court of Canada has adopted Wigmore's explanation of hearsay exceptions, namely that they are all based upon necessity and reliability. After ***R. v. Khan***, [1990] 2 SCR 531 and ***R. v. Smith***, [1992] 2 SCR 915, hearsay is admitted on a principled basis rather than a general prohibition followed by a series of pigeonhole exceptions. That said, the Supreme Court has directed that admissibility under the traditional hearsay categorical exceptions be considered first, before moving to admissibility under the broader principled approach.

Prior to admitting hearsay, a voir dire is required, where certain "preliminary facts" must be proved by the hearsay proponent on a balance of probabilities, and the admissibility ruling is then made by the trial judge. Where the trial is before a judge alone, an outline or *precis* of the hearsay may avoid the judge hearing the detailed contents before determining admissibility. Admissibility is a question of law for the judge.

There are three general groups of categorical hearsay exceptions:

- admissions,
- exceptions where the declarant or the testimony is unavailable,
- exceptions that are not dependent upon availability.

In ***R. v. Starr***, [2000] 2 SCR 144, the Court held that the principled approach prevailed over the traditional categorical exceptions, to maintain trial fairness and the intellectual coherence of hearsay law. Hearsay falling within a traditional exception is presumptively admissible. The party challenging admissibility within a traditional exception bears the burden of proving: (i) the limits of the categorical exception should be reconsidered; or (ii) "in some rare cases", an

individual hearsay statement falling within an otherwise valid exception may be excluded if it does not meet the requirements of necessity and reliability.

3. Admissions

An ***admission*** is a statement, by a person now a party to the litigation, which is offered by an opposing party, **against** that party.

No first-hand knowledge is required, the statement may be in the form of an opinion: ***R. v. Streu***, [1989] 1 SCR 1521. It need not be against the party's interest when made, unavailability of the party is not required, there is no requirement of reliability – a very broad hearsay exception.

"Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability or his or her own statements": ***R. v. Evans***, [1993] 3 SCR 653.

Limitations:

- an admission is evidence only against the party making the statement (***R. v. Schmidt***, [1948] SCR 333; and
- the whole of the relevant statement must be admitted, not just the damaging part (***Capital Trust Co. v. Fowler*** (1921), 64 DLR 289 (Ont CA).

Adoptive admissions. A party may expressly or impliedly adopt the statement of another. In civil matters, silence in the face of an allegation that calls for a denial or objection may imply adoption: ***MacKenzie v. Comer*** (1973), 44 DLR (3d) 473 (NSSCAD). But silence in the same circumstances in criminal matters will only rarely be so interpreted: ***R. v. Eden***, [1970] 2 OR 161 (CA).

Vicarious admissions. One partner's admission is admissible against the partnership. An employee's admission will be admissible against the employer where the statement is made in respect of a matter within the scope of the employee's duties or employment, provided there is proof, independent of the admission, to prove such employment: ***R. v. Strand Electric Ltd.***, [1969] 1 OR 190 (CA)(dissenting judgment of Laskin J.A. probably states modern law).

"Statements by co-conspirators" or persons with a common purpose: a three-step process, involving

- proof of conspiracy beyond reasonable doubt,
- proof of individual's membership on balance of probabilities on basis of evidence "directly admissible" against the one accused, and
- if membership in a conspiracy is established, then hearsay exception applied and evidence of acts and declarations of co-conspirators done in furtherance of object of conspiracy admissible against accused to prove guilt beyond reasonable doubt: ***R. v. Barrow***, [1987] 2 SCR 694.

Exception upheld on a ***Starr*** challenge: ***R. v. Mapara***, [2005] 1 SCR 358.
See also ***R. v. Potter***, 2020 NSCA 9 and ***R. v. Kelsie***, 2017 NSCA 89.

4. Exceptions where declarant unavailable

Meaning of "***unavailability***":

- death,
- insanity,
- grave illness,
- out of jurisdiction,
- unable to locate (even practical inconvenience sometimes in civil matters).

This creates the necessity for Wigmore purposes, as the choice is between the hearsay evidence or no evidence at all, so that a lower threshold of reliability will often be required for admissibility.

Declarations against interest

The declaration may be against pecuniary, proprietary or penal interest: ***R. v. O'Brien***, [1978] 1 SCR 591.In ***O'Brien***, it was also elaborated that the declarant must know it to be against interest, it must in fact be against interest at the time it was made, the declarant must know it will be used against declarant, and the consequences of its use must not be too remote. If a declaration consists of parts against and in favour of interest, the declaration will be admitted if it is on balance against interest. And declarations against interest will only be admitted in criminal cases where their effect is to exculpate the accused: ***Lucier v. R.***, [1982] 1 SCR 28.

Dying declarations

A declaration as to the cause of death, on a charge of murder, manslaughter or criminal negligence causing death, where the declarant possessed "a settled hopeless expectation of immediate death" at time statement made: ***Chapdelaine v. The King.***, [1935] SCR 53.

Former testimony

In civil matters, apart from unavailability of former witness, proponent must show:

- identity of party against whom offered the same,
- identity of issues, and
- there was full opportunity of cross-examination on earlier occasion:

Serediuk v. Kogan, [1976] 5 WWR 31 (Man CA). The real test is whether there was an opportunity for cross-examination on the earlier occasion by someone with a similar motive and interest to test the evidence. For use of discovery evidence at trial in civil matters, see **CPR** 18.20.

In ***criminal matters***, use of prior testimony more often admissible under s. 715 ***Code***:

- evidence taken at previous trial on same charge, any other offence "on same proof" or preliminary;
- witness is unavailable or refuses to be sworn or refuses to give evidence;
- taken in presence of accused;

- burden of showing no full opportunity to cross-examine upon accused.

R. v. Potvin, [1989] 1 SCR 525 explained operation of s. 715, including discretion in trial judge to deny admissibility where unfairness in obtaining the testimony or unfairness in its use at later trial and requirement for warning of its frailties compared to live testimony.

Business records

The common law exception is now principally used as a fallback in criminal cases where no seven-day notice has been given under s. 30(7) **CEA**, as the statutory exceptions of s. 30 **CEA** or s. 23 **NSEA** are more frequently used for such records.

Requirements for common law exception, after ***Ares v. Venner***, [1970] SCR 608 and ***R. v. Monkhouse*** (1987), 61 CR (3d) 343 (Alta CA), repeated and reaffirmed in ***R. v. Keats***, 2016 NSCA 94:

- an original entry,
- made contemporaneously,
- in the routine,
- of a business,
- by a recorder who has personal knowledge of the matter recorded or receives information that originates from a person who did or observed the matter,
- where the maker and the informant are under a duty to take care.

Statutory exceptions:

- "act, transaction, occurrence or event" **NSEA**, "matter" **CEA**;
- record made in the usual and ordinary course of business;
- "business" broadly defined, as in "regularly kept records";
- record made "at the time or within a reasonable time thereafter" ***NSEA***, implied in ***CEA***;
- to admit fact (including lay opinion), but not expert opinion.

On both the common law and statutory exceptions, see ***Setak Computer Services Corp. Ltd. v. Burroughs Business Machines Ltd***. (1977), 76 DLR (3d) 641 (Ont HC).

Expert opinion: not admissible under business records: ***Setak, Colley v. Travellers Insurance Co.*** (1998), 179 NSR (2d) 176 (NSSC), ***Bezanson v. Sun Life Assurance Co of Canada***, 2015 NSSC 1.

Multiple hearsay issues: both informant and maker or recorder must be under business duty to be careful, under business records exception, or statement by informant to "business" recorder must fall within another hearsay exception, *e.g.***,** admissions, state of mind or ***Smith***: ***Setak***.

Investigative records: the common law exception is available to admit investigative records despite the statutory exclusion found in s. 30(10)(a)(i) **CEA**: ***R. v. Keats***, above.

5. Exceptions not dependent upon unavailability

Spontaneous statements or excited utterances

Necessity from absence of evidence of same quality today, reliability from spontaneity and contemporaneity. Statement must be made while still under stress or pressure of dramatic or startling act or event and relating to that event. After ***R. v. Khan***, below, exception narrowed once again to nearly contemporaneous statements. Statements admitted under this narrowed exception in ***R. v. Shea***, 2011 NSCA 107 (wiretapped phone call from forcibly confined drug dealer/victim to his brother stating that the accused were "strapped", *i.e.*, armed).

Child abuse hearsay

R. v. Khan, [1990] 2 SCR 531: "hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met ..."

Necessity and reliability are to be determined on a voir dire. Necessity may be established by the unavailability of the child's testimony, by reason of inability to testify, or harm or trauma to the child, based on what has happened at the trial or on the basis of extrinsic evidence: ***R. v. F. (W.J.)***, [1999] 3 SCR 569. Or where hearsay necessary for a full, frank and accurate account from child: ***Khan v. College of Physicians and Surgeons (Ontario)*** (1992), 9 OR (3d) 641 (Ont CA)..

Reliability is assessed only in a threshold sense, including timing, demeanour, personality of child, intelligence and understanding of child, absence of any reason to expect fabrication, absence of prompting, precocious knowledge of sexual acts, corroboration by physical evidence, etc. On the assessment of threshold reliability, see ***R. v. P.S.B.***, 2004 NSCA 25 , 222 NSR (2d) 26.

More relaxed standards of necessity and reliability in child custody and family law matters, *e.g.*, in child protection, ***Children and Family Services Act***, s. 96(3).

Declarations about physical, mental or emotional state

Necessity from absence of any other means of determining condition (and often declarant is unavailable) and reliability from contemporaneous description of state.

Also may be used to admit statement to prove current intention of declarant to do future act, but not to establish past acts referred to in statement: ***R. v. Smith***, [1992] 2 SCR 915.

A statement of "present intention" cannot be used to prove the intentions of someone other than the declarant and, further, it must not be made "under circumstances of suspicion": ***R. v. Starr***, [2000] 2 SCR 144. Under this exception, the statement must not be made under "circumstances of suspicion", a modification introduced in ***R. v. Starr,*** above, and confirmed in ***R. v. Griffin***, 2009 SCC 28.

Prior inconsistent statements

The orthodox rule restricted prior inconsistent statements to being used in respect of credibility, not for truth of contents. That changed with the Supreme Court's decision in ***R. v. K.G.B.***, [1993] 1 SCR 740 and, later, ***R. v. U.(F.J.)***, [1995] 3 SCR 764. The "Cory limits" in ***K.G.B.*** were accepted by the full Court in ***U.(F.J.)***. Requirements:

- witness must be available to testify and meaningful opportunity to cross-examine at trial: ***R. v. Devine***, 2008 SCC 36
- prior statement given under oath, affirmation, warning or to police where liability to prosecution;
- accurately recorded;
- if to person in authority then must be "voluntary" and not bring administration of justice into disrepute,

all proved on a balance of probabilities on the voir dire.

Used to admit prior inconsistent testimony on preliminary: ***R. v. Hawkins***, [1996] 3 SCR 1043 (necessity and reliability discussed); ***R. v. Biscette***, [1996] 3 SCR 599.

Also used to admit prior written statements to police: ***R. v. U.(F.J.)***, ***R. v. Letourneau*** (1994), 87 CCC (3d) 481 (BCCA). Motive to lie is central to the reliability analysis: ***R. v. Scott***, 2004 NSCA 141 , 228 NSR (2d) 203. For a recent discussion of "opportunity to cross-examine" in ***K.G.B.*** cases, see ***R. v. Weldekidan***, 2019 MBCA 109.sear

In ***R. v. Youvarajah***, 2013 SCC 41, a majority of the Supreme Court held that the juvenile accomplice's strong motive to lie meant that the agreed statement of facts from his Youth Court sentencing was not admissible under ***K.G.B.*** and the principled approach when he recanted at the trial of Youvarajah, especially as the cross-examination of the accomplice would be limited by solicitor-client privilege.

Smith/Starr/Khelawon **and the principled approach to admit hearsay**

Necessity and reliability may be considered in determining admissibility of individual hearsay statement, even if does not fit within any categorical exception, after a voir dire held by the judge.

Necessity means not just unavailable, but also when evidence of same quality not available.

The greater the reliability of the hearsay, the lower may be the threshold for necessity, as was the case for the fisheries records (not admissible under the common law exception or s.30 ***CEA*****)** in ***R. v. Wilcox***, 2001 NSCA 45.

"Necessity" was further considered by the Supreme Court in ***R. v. Parrott***, [2001] 1 SCR 178, where the hearsay statements of an adult Downs syndrome complainant were improperly admitted in a sexual assault case without her testifying: "If the witness is physically available and there is no suggestion that he or she would suffer trauma by attempting to give evidence, that

evidence should generally not be pre-empted by hearsay unless the trial judge has first had an opportunity to hear the potential witness and form his or her opinion as to testimonial competence."

Threshold reliability is a matter to be determined by the trial judge as a condition of admissibility, and not to be deferred to the jury: ***R. v. Scott***, above. ***Scott*** also cites ***R. v. Czibulka*** (2004), 24 CR (6th) 152 (Ont CA), for its analysis of threshold reliability and motive to lie. The factors to consider in determining threshold reliability are also discussed by the Nova Scotia Court of Appeal in ***R. v. P.S.B.***, above; ***R. v. Johnson***, 2004 NSCA 91 , 225 NSR (2d) 22; ***R. v. Williams***, 2006 NSCA 23; and ***R. v. Ord***, 2012 NSCA 115.

After ***Starr*** (2000), so-called "extrinsic evidence" was not to be considered at this stage, e.g. corroborating or conflicting evidence, but only "the circumstances surrounding the making of the statement". This holding was expressly over-ruled in 2006 in ***R. v. Khelawon***: "Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather the court should adopt a more functional approach, ..." ***Khelawon*** also stated that there were two overlapping routes for a statement to demonstrate threshold reliability:

- the presence of adequate substitutes for testing reliability (a process-based test), e.g. ***K.G.B.,*** prior testimony
- its inherent truth and accuracy from the circumstances (a content-based test), e.g. ***Khan, Smith.***

For further discussion and application of ***Khelawon***, see ***R. v. Couture***, 2007 SCC 28 (taped statements to police by wife about accused's admissions of murder to her held unreliable and inadmissible) and ***R. v. Blackman,*** 2008 SCC 37 (statements of 18-year-old son, murder victim, to his mother held reliable and admissible).

In ***R. v. Bradshaw***, 2017 SCC 35, the Court elaborated upon the use of corroborative evidence in assessing threshold reliability, in a case where the hearsay came from an individual who had pleaded guilty to committing the murders with Bradshaw. Karakatsanis J. set out four steps to assess the corroborative evidence on admissibility, to avoid the dangers of reasoning from the merits of guilt backwards to the substantive reliability of the hearsay statement. The holding in ***Bradshaw*** itself is undercut by the Court's subsequent decision to admit hearsay in very similar circumstances: ***R. v. Larue***, 2019 SCC 25. For some other post-***Bradshaw*** cases on the use of corroborative evidence, see ***R. v. R.A.***, 2019 NSSC 319; ***R. v. N.W.***, 2017 NSPC 33; ***R. v. Bernard***, 2018 ABCA 396; and ***R. v. Poony***, 2018 BCCA 356.

X. CONFESSIONS

1. The common law of confessions

The ***common law rule***: A statement, by an accused, to a person in authority, shall not be admitted to prove guilt, unless it is first proven on a voir dire beyond a reasonable doubt to be "voluntary".

What is a ***"statement"***? Older definitions used to distinguish between full confessions vs. partial admissions, inculpatory vs. exculpatory, used for truth vs. credibility, "obviously volunteered" vs. result of questioning. Now it is accepted that **all** statements by the accused to a person in authority, whatever the form or use, are subject to the rule: ***Erven v. The Queen.*** , [1979] 1 SCR 926 . See also ***R. v. Mantley***, 2013 NSCA 16 (utterances by accused to self in police interrogation room and recorded require voir dire). Statements tendered in a voir dire only to determine the constitutionality of state action under the *Charter*, as opposed to determining guilt, do not engage the rationale for the confessions rule: ***R. v. Paterson***, 2017 SCC 15.

Person in authority

Typically, "those formally engaged in the arrest, detention, examination or prosecution of the accused," such as police officers, prison officials or guards. Also, "those persons whom the accused reasonably believes are acting on behalf of the state and could therefore influence or control the proceedings against him or her," assessed from the viewpoint of the accused, taking into account the accused's knowledge of that status and the existence of a reasonable basis for that belief: ***R. v. Hodgson***, [1998] 2 SCR 449. The defence must raise the "person in authority" issue with the trial judge, with the accused bearing the initial evidential burden on the voir dire of demonstrating a valid issue for consideration. In extremely rare cases, the trial evidence may objectively demand that a trial judge of his or her own motion raise the issue and direct a voir dire.

The voir dire

A trial within the trial, held to determine admissibility in the absence of the jury. The voir dire may be expressly waived by the defence: ***Park v. R.***, [1981] 2 SCR 64. The voir dire ensures a functional separation, permitting the accused to testify on the voir dire, but not the trial: ***Erven***. This voir dire is required both on the preliminary and on the trial, in order to admit the statement, with proof of voluntariness beyond a reasonable doubt. No voir dire is required to admit the statement on a bail hearing or sentencing or when introduced by a co-accused or in any civil proceeding (where the statement would just be an admission by a party).

Voluntariness

The contemporary "voluntariness" rule was authoritatively restated in ***R. v. Oickle***, [2000] 2 SCR 3, under four headings: threats or promises, oppression; operating mind; and other police trickery. The majority admitted Oickle's confession and restored his conviction.

The traditional core of the rule relates to threats or promises as stated in ***Ibrahim v. R.*** [1914] AC 599 (PC) for statements "obtained … either by fear or prejudice or hope of advantage exercised or held out by a person in authority". Obviously, imminent threats of torture. An offer to procure a reduced charge or sentence in return (a very strong inducement, usually warranting exclusion). An offer of psychiatric assistance or other counselling in exchange. Threats or promises to third parties, with close relationship to accused. Phrases like "it would be better if you told the truth" do not automatically make the statement involuntary. Nor would the use of moral or spiritual inducements. Involuntary "only when the inducements, whether standing alone or in

combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne", where "a quid pro quo offer by interrogators".

An atmosphere of oppression can be created by depriving the suspect of food, clothing, water, sleep or medical attention; denying access to counsel; excessively aggressive, intimidating questioning for a prolonged period of time. Police use of non-existent evidence is "very dangerous", but in ***Oickle*** it was not improper to exaggerate the strength of the evidence, to use a failed polygraph test or to fail to inform the accused that polygraph evidence is inadmissible.

A voluntary statement must be "the utterance of an operating mind" as in ***Ward v. R.***, [1979] 2 SCR 30, 44 CCC (2d) 98 and ***Horvath v. R.***, [1979] 2 SCR 376 , 44 CCC (2d) 385. Like oppression, this is not a discrete inquiry. In ***R. v. Whittle***, [1994] 2 SCR 914 , 32 CR (4th) 1, the operating mind test only required the accused to possess a minimal degree of cognitive ability.

The police use of trickery to obtain a confession does require a distinct inquiry, to maintain the integrity of the criminal justice system. A confession may be excluded when the police tricks are "so appalling as to shock the community".

The Court applied these factors in ***R. v. Spencer***, 2007 SCC 11: A police offer of leniency for the accused's girlfriend was held to be a *quid pro quo* for his confession, but not a strong enough inducement to raise a reasonable doubt about whether the will of the accused was overborne and thus the accused's statement was admissible.

In ***Oickle,*** the court noted the common law of confessions has a broader scope that the ***Charter*** not just on arrest or detention, but whenever a person in authority questions a suspect. Under the common law, the Crown must prove voluntariness beyond a reasonable doubt, whereas the ***Charter*** burden is upon the accused to prove a breach on the balance of probabilities. Finally, a violation of the confessions rule always warrants exclusion of the statement.

For a recent discussion of the confessions rule, where the accused was interviewed by her government supervisor and two accountants about missing funds before any police involvement, see ***R. v. MacDonald-Pelrine***, 2014 NSCA 6 (interviewers persons in authority, but statements correctly held voluntary after a voir dire, police not involved until 11 months later). See also ***R. v. Thomas***, 2015 NSCA 112.

"Mr. Big" confessions

The common law confessions rule does not apply to "Mr. Big" confessions, nor does the *Charter* apply. In these cases, an accused is befriended by undercover police officers posing as criminals and is eventually interviewed for membership by Mr. Big, the purported crime boss. Historically, these statements were routinely admitted as "admissions" by a party. In ***R. v. Hart,*** 2014 SCC 52, the Supreme Court created a new common law rule of evidence. A "Mr. Big" statement is treated as presumptively inadmissible, unless the Crown can establish on the balance of probabilities that the probative value of the confession outweighs the prejudicial effect. Even if a "Mr. Big" statement can meet this first test, it might also be excluded if the police conduct would amount to an abuse of process. The confession was excluded in ***Hart***, but not in ***R. v Mack***, 2014 SCC 58.

2. Statements by young persons

Section 146 of the ***Youth Criminal Justice Act*** sets out more demanding statutory requirements for the admissibility of confessions or statements by young persons, i.e. persons aged 12 to 17 at the time of the making of the statement: ***R. v. J.(J.T.)***, [1990] 2 SCR 755 (interpretation of predecessor s. 56 under *Young Offenders Act*). To be admissible, not only must the statement be proved to be "voluntary", but the Crown must also prove compliance with the other requirements in s. 146 beyond a reasonable doubt: ***R. v. L.T.H.***, 2008 SCC 49.

3. Self-incriminating statements and the Charter

Since 1986, the admissibility of self-incriminating statements has come to be almost entirely determined by the ***Charter***, namely the rights entrenched by ss. 7, 10(a) and 10(b).

- Upon arrest or detention, the accused must be informed of the reason for arrest and of the right to retain and instruct counsel: ***R. v. Therens***, [1985] 1 SCR 613.

- Any waiver of the right to counsel must be voluntary, knowing and intelligent, with an awareness of the consequences: ***Clarkson***.

- Section 10(b) imposes at least two duties upon police, in addition to the duty to inform of rights:
    - the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay; and
    - the police must cease questioning or otherwise attempting to elicit evidence from the detainee until he or she has a reasonable opportunity to retain and instruct counsel: ***R. v. Manninen***, [1987] 1 SCR 1233.

- The detainee is entitled to the counsel of his or her choice, absent urgency: ***R. v. Leclair and Ross***, [1989] 1 SCR 3, 46 CCC (3d) 129 , 67 CR (3d) 209 .

- Where the extent of the detainee's jeopardy is changed, the detainee is entitled to be reinformed of rights under ss. 10(a) and 10(b): ***R. v. Black*** (1989), 93 NSR (2d) 35 (SCC).

- Once the detainee has been afforded the right to counsel, the detainee must exercise reasonable diligence in contacting counsel and, if not, the correlative duties of the police are suspended: ***R. v. Smith*** (1989), 50 CCC (3d) 308 (SCC).

- The reading of rights must include informing the detainee of the availability of legal aid and duty counsel: ***R. v. Brydges*** (1990), 74 CR (3d) 129 (SCC).

- The rights of the detainee include the right to silence under s. 7, namely the right to freely choose whether or not to make a statement to the police and, once having asserted that right to silence, not to have that right negated by a statement being elicited by an agent of the state (police or pre-arranged informer) while in detention: ***R. v. Hebert*** (1990), 57 CCC (3d) 1 (SCC); ***R. v. Broyles*** (1991), 68 CCC (3d) 308 (SCC)

- The police have a duty to inform the detainee of any 24-hour, toll-free number for duty counsel, where in existence: ***R. v. Bartle*** (1994), 33 CR (4th) 1 (SCC). There is no constitutional duty to provide such a service, but if no such service exists, police are under a duty to "hold off" trying to elicit incriminating evidence from the detainee until he or she has an opportunity to reach counsel, and police are required to reinstruct the detainee of their duty to hold off before detainee waives right to counsel: ***R. v. Prosper*** (1994), 33 CR (4th) 85 (SCC). In ***R. v. G.T.D.***, 2018 SCC 7, the Court held that the question at the end of the standard caution, "Do you wish to say anything?", violated this duty to "hold off".

- Section 10(b) prohibits the police from belittling the detainee's lawyer with the express goal or effect of undermining the detainee's confidence in and relationship with counsel: ***R. v. Burlingham*** (1995), 38 CR (4th) 265 (SCC).

- Section 10(b) mandates the Crown or the police, whenever offering a plea bargain, to tender that offer directly to accused's counselor to the accused in the presence of counsel, unless the right to counsel is expressly waived: ***Burlingham***.

- The right to silence under s. 7 does not require the police to refrain from questioning a detainee who states that he or she does not wish to speak to police, even if stated persistently by the detainee: ***R. v. Singh,*** 2007 SCC 48. A finding of voluntariness under the common law of confessions will be determinative of any section 7 right to silence where the detainee is interrogated by an obvious person in authority.

- Section 10(b) does not mandate the presence of defence counsel throughout a custodial interrogation. In some limited changed circumstances, the detainee may have to be given an opportunity to re-consult counsel, e.g., new procedures involving the detainee, a change in jeopardy, or reason to believe the detainee may not have understood the initial advice of counsel. Otherwise, the Supreme Court held that an initial warning and a reasonable opportunity to consult counsel once will satisfy s. 10(b), even if the detainee repeatedly asks to speak again to counsel: ***R. v. Sinclair***, 2010 SCC 35.

For a Nova Scotia Court of Appeal decision that considers both the common law of confessions and the *Charter* right to counsel, see ***R. v. Grouse*** (2004), 226 NSR (2d) 321, 23 CR (6th) 77 (NSCA). For a recent application of ***Sinclair***, ruling that no right to reconsult counsel was required, see ***R. v. Fogarty***, 2015 NSCA 6.

XI. UNCONSTITUTIONALLY OBTAINED EVIDENCE

1. The "all the circumstances" approach: Grant

In July 2009, the Supreme Court of Canada completely revised its approach to the exclusion of evidence under s. 24(2), in ***R. v. Grant***, 2009 SCC 32 and its companion decision, ***R. v. Harrison***, 2009 SCC 34. In ***Grant,*** the Court reversed its long-standing approach previously summarized in ***R. v. Stillman***, [1997] 1 SCR 607, rejecting its "two-box" or "two-rule" approach in favour of a more flexible (and less predictable) "all the circumstances" approach. No longer is the classification of evidence as "conscriptive" or "non-conscriptive" determinative of the outcome.

2. The threshold requirements

Grant did not change the threshold requirements for the exclusion of evidence under s. 24(2). The burden of proof rests upon the accused to prove, on the balance of probabilities in a voir dire:

- a ***Charter*** right of the accused has been infringed, and
- the admission of the evidence would bring the administration of justice into disrepute: ***Collins v. R.***, [1987] 1 SCR 265.

Grant also reaffirmed that the accused must prove that the evidence was "obtained in a manner" that infringed ***Charter*** rights. A causal connection is sufficient, but not required. A temporal and contextual connection can be sufficient, provided it is not too remote: ***R. v. Strachan***, [1988] 2 SCR 980.

3. The three lines of inquiry

Grant makes clear that the rationale for s. 24(2) is to maintain the integrity of, and public confidence in, the justice system. Its focus is long-term, prospective and societal. The Court identifies three lines of inquiry to balance the societal interests involved:

- the seriousness of the ***Charter*** breach,
- the impact on the ***Charter***-protected interests of the accused, and
- society's interest in an adjudication on the merits.

The Court calls this a "decision tree", intended to be a more flexible test than the old ***Collins/Stillman*** approach. Appeal courts should show considerable deference to the trial judge's balancing of these three factors.

The first factor, seriousness of the breach, looks at the police conduct, whether it is willful/flagrant/reckless/deliberate or inadvertent/minor/technical and whether the police acted in good faith, bad faith or neither. The second factor, impact on the interests of the accused, depends on the kind of evidence involved, described below. The third factor generally favours inclusion, as it emphasizes the reliability of the evidence and its importance to the prosecution case.

In ***Grant***, the Court looked at different kinds of evidence and fact patterns, to give more guidance to trial courts in balancing the three factors. Statements by the accused will still be presumptively excluded. The exclusion of bodily evidence will depend upon the degree of intrusion, ranging from a body cavity search to a breath sample or fingerprinting. Non-bodily physical evidence is reliable and will still generally be admitted, unless a serious breach has taken place. Derivative evidence, i.e. real evidence found as a result of an unconstitutionally-obtained statement, will be approached more flexibly, no longer be excluded if it is not "discoverable". Since real or physical evidence is reliable, the seriousness of the breach will be important for derivative evidence, as will be the strength of the causal connection and "discoverability" may still be relevant.

In the result, in ***Grant***, the gun found on the accused as a result of his self-incriminating statement was not excluded, in a close case, despite breaches of ss. 9 and 10(b), as the gun was reliable and the officers' acts were erroneous but understandable. By contrast, in ***Harrison***, the accused was acquitted when 35 kilos of cocaine were found in his vehicle after breaches of ss. 8 and 9 and subsequent misleading testimony from the arresting officer. The new approach to s. 24(2) has produced different results in subsequent Supreme Court decisions: ***R. v. Beaulieu***, 2010 SCC 7 (gun found in accused's car when police installing authorized listening device, s. 8 violated, gun admitted); ***R. v. Morelli***, 2010 SCC 8 (illegal search of accused's home computer, misleading "information to obtain" by police, child pornography excluded, acquittal entered); ***R. v. Cote***, 2011 SCC 46 (wife charged with murder of husband, illegal search of home and yard, guns and physical evidence obtained, finding of bad faith, discussion of discoverability, evidence excluded); ***R. v. Aucoin***, 2012 SCC 66 (stop for motor vehicle offence, unreasonable search, cocaine found**,** breach of s. 8, officer good faith, mistaken, evolving law, cocaine admitted, 5-2 decision); ***R. v. Spencer***, 2014 SCC 43 (police request for disclosure of IP address, child pornography, evidence admitted despite privacy concerns); ***R. v. Taylor***, 2014 SCC 50 (hospital blood samples excluded, no opportunity to speak to counsel first); ***R. v. Fearon***, 2014 SCC 77 (search of cell phone incident to arrest, breach of s. 8, evidence admitted by 4-3 decision).

For two recent Nova Scotia Court of Appeal decisions under s. 24(2), see ***R. v. Spin***, 2014 NSCA 1 (certificate of analysis excluded where breaches of right to counsel, right to silence and rights against unreasonable search and seizure) and ***R. v. Hiscoe***, 2013 NSCA 48 (data dump from smart phone one month after arrest unreasonable search and excluded).

XII. PRIVILEGE

1. General principles

Privilege is a rule of exclusion based upon grounds of social policy unrelated to reliability or fact-finding.

It is important to distinguish between "***a 'blanket', prima facie, common law, or 'class' privilege*** on the one hand, and a ***'case-by-case' privilege*** on the other", to quote Lamer C.J.C. in ***R. v. Gruenke***, [1991] 3 SCR 263. In the former, whole classes or categories of evidence or relationships are protected from disclosure, *e.g.***,** solicitor-client privilege, whereas the latter "requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case": ***Gruenke***.

"***Class***" privileges will be reserved for "compelling policy reasons", namely those "essential to the operation of the legal system" or "communications inextricably linked with the very system which desires the disclosure", various "legal" privileges like:

- self-incrimination,
- solicitor-client,
- litigation privilege,
- settlement negotiations,
- informers,
- judicial immunity,
- a subset of public interest privilege.

"***Case-by-case***" privilege is all that is available for all the other claims or confidential relationships. The four Wigmore criteria provide the framework for deciding privilege in any case, of which only the fourth really matters:

- the communication must originate in confidence,
- confidentiality must be essential to the relationship,
- the relationship must be one which ought to be fostered, and
- "the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation".

Only the "holder" of the privilege can waive the privilege, e.g., the client for solicitor-client privilege. Waiver can be express or implied, but disclosure by mistake or inadvertence does not usually amount to waiver, e.g., ***CPR*** 14.06.

2. Privilege against self-incrimination: The accused

The right of the accused not to testify is preserved by s. 4(1) **CEA** and has been constitutionalized by s. 11(c) of the ***Charter***.

Section 11(c) does not afford any protection to an employee, officer or principal of a corporate accused, as the corporation is an artificial entity and cannot be a witness: ***R. v. Amway Corp.*** (1989), 56 DLR (4th) 309 (SCC). Further, ***Amway*** does away with any relic of self-incrimination in civil matters.

Section 4(6) **CEA** prohibits any "comment" by the Crown prosecutor or the judge on the accused's failure to testify in a jury trial, but equally the accused is not entitled to any positive instruction to the jury not to draw an adverse inference from the failure to testify: ***R. v. Boss*** (1988), 46 CCC (3d) 523 (Ont CA) (***Charter*** s. 11(c) does not compel such an instruction). Section 4(6) does not prohibit a trial judge from affirming an accused's right to silence, but not in every case, only where there is a realistic concern that the jury may place evidential value on his decision not to testify, such as when a co-accused's counsel invites such an inference: ***R. v. Prokoview***, 2012 SCC 49.

3. Privilege of a witness against self-incrimination

At common law, the witness had a right to refuse to answer any question that would tend to incriminate him or her. In 1893, in Canada, this right was replaced with s. 5 **CEA**, namely an obligation to answer the question coupled with protection against subsequent use of the answer in criminal proceedings against the witness. But s. 5 required the witness specifically to object to answering at the earlier hearing in order to obtain the subsequent protection. Section 13 of the ***Charter*** entrenches our s. 5 model, but no longer requires the objection, providing the subsequent protection automatically. Section 13 excepts a prosecution for perjury or for the giving of contradictory evidence.

In ***R. v. Henry***, [2005] 3 SCR 609, the Supreme Court of Canada reconsidered and completely restated its s. 13 jurisprudence of the past 20 years, distinguishing for the first time between two situations: (i) the retrial of an accused, where the accused has previously testified voluntarily in his or her defence at the first trial; and (ii) the subsequent trial of an accused, who was compelled to testify as a witness at the first trial of another accused. Greater s. 13 protection is given in the second situation than the first.

In either situation, section 13 applies to prohibit the Crown from introducing a transcript of the accused's previous testimony as part of its case in chief and ***Dubois*** is affirmed: ***Dubois v. R.***, [1986] 1 SCR 366.

Where the accused is being retried, however, section 13 does not bar the Crown from cross-examining the accused at the retrial on the inconsistent testimony the accused volunteered at the first trial. The Court's earlier decision in ***R. v. Mannion*** (1986), 53 CR (3d) 193 (SCC) is overruled. The Court's decision in ***R. v. Kuldip*** (1990), 61 CCC (3d) 385 (SCC) is then

extended. The Crown is not restricted to cross-examination using the earlier inconsistent testimony only to impeach credibility, but also to prove guilt, and s. 13 does not preclude the trier-of-fact from drawing any inference as to guilt from the contradiction of the accused.

Where the accused was compelled to testify as a mere witness at the first trial, the Court's decision in ***R. v. Noel***, 2002 SCC 67, 168 CCC (3d) 193 applies with full force. The general rule is that an accused cannot be cross-examined on the basis of his or her prior compelled testimony as a witness for any purpose, not even to impeach credibility. There is no longer any ***Kuldip*** exception in this situation. Further, in ***Noel***, the Court ruled that no reference should be made, in cross-examination of the accused, to his or her awareness of s. 13 of the *Charter*.

The ***Henry*** restatement was modified and complicated in ***R. v. Nedelcu***, 2012 SCC 59. In civil discovery, Nedelcu testified that he had no memory of the motorcycle accident where his helmet-less passenger suffered permanent brain damage. At his subsequent criminal trial, Nedelcu gave detailed testimony of the day of the accident and he was cross-examined on his memory, using the discovery transcript. The Supreme Court upheld his conviction for dangerous driving causing bodily harm. His discovery testimony was held to be non-incriminating, when used for impeachment purposes. As the dissenting judges pointed out, this appears to resuscitate the ***Kuldip*** exception.

Section 7 of the ***Charter*** affords additional protection beyond the simple-use immunity of s. 13. After ***R. v. S.(R.J.)*** (1995), 36 CR (4th) 1 (SCC) and ***B.C. (Securities Commission) v. Branch*** (1995), 38 CR (4th) 133 (SCC), there is a partial derivative- use immunity for evidence that would not have been obtained "but for" the compelled testimony. Once the accused shows a plausible connection between the two, the burden rests upon the Crown to show that the derivative evidence would have been found regardless of the compelled testimony. There may also be rare cases where the witness will be exempted from compellability, where the witness proves that the predominant purpose of calling the witness is to obtain incriminating evidence against the witness rather than some legitimate public purpose.

Where the subsequent use of the earlier testimony is in a criminal or provincial penal proceeding, s. 13 of the ***Charter*** full covers s. 5 **CEA** and the penal aspects of s. 59 **NSEA**. Where the subsequent use of the testimony is in a civil or administrative proceeding, s. 13 has no application, but s. 59 **NSEA** applies, which means that an objection or claim must be made at the first hearing, in order to obtain the subsequent protection: ***Smerchanski v. Lewis*** (1981), 31 OR (2d) 705, 58 CCC (2d) 328 (Ont CA). There remains some doubt about the scope of protection offered by s. 59 **NSEA** in matters of civil liability.

4. Solicitor-client privilege

The right to communicate in confidence with a legal adviser is "a fundamental civil and legal right" and such confidential communications are privileged. The privilege arises from the mere fact of consultation and communication of information, with no formal retainer required: ***Descoteaux v. Mierzwinski***, [1982] 1 SCR 860.

Privilege does not attach where the solicitor is consulted in a capacity other than his or her legal capacity. The privilege can be waived by the client, who is the holder of the privilege. Once privileged, always privileged.

There are three exceptions to this privilege:

- communications criminal in themselves or to further a criminal purpose: ***Descoteaux***; and
- where the innocence of an accused is at stake, only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction, following the procedure set out in ***R. v. McClure***, [2001] 1 SCR 445 and, more recently, in ***R. v. Brown***, 2002 SCC 32, 50 CR (5th) 1 .
- the "public safety" exception: where there is a clear risk of imminent serious bodily harm or death to an identifiable person or group of persons: ***Smith v. Jones***, [1999] 1 SCR 455.

Solicitor-client privilege has been transformed from a rule of evidence to a substantive rule, a principle of fundamental justice and a civil right of supreme importance, stated the Supreme Court, in the course of finding s. 488.1 of the ***Criminal Code*** unconstitutional for its restrictions upon the privilege in the exercise of law office search warrants: ***Lavallee, Rackel & Heintz v. Canada (Attorney General)***, 2002 SCC 61 , 216 DLR (4th) 257 . See also ***Canada (Attorney General) v. Federation of Law Societies of Canada***, 2015 SCC 7 (provisions of *Proceeds of Crime (Money Laundering) and Terrorist Financing Act and Regulations* infringe ss. 7 and 8 of *Charter* in their impact upon solicitor-client privilege); ***Canada (Attorney General) v. Chambre des notaires du Quebec***, 2016 SCC 20 (income tax requirement for notaries and lawyers to provide information about clients infringes s. 8 of *Charter*, sections struck down, as were those attempting to legislate exception to privilege for accounting records); ***Canada (National Revenue) v. Thompson,*** 2016 SCC 21 (same); ***Alberta (Information and Privacy Commissioner) v. University of Calgary***, 2016 SCC 53 (Commissioner can't require university to disclose documents to review whether solicitor-client privilege properly claimed, statute not specific enough).

The privilege may be waived by the client, or by counsel on behalf of the client, expressly or impliedly, but only if a clear intention to forgo the privilege has been demonstrated: ***Hartford Accident and Indemnity Co. v. Maritime Life Assurance Co.*** (1997), 161 NSR (2d) 78 (CA), affirming (1996), 160 NSR (2d) 161 (SC). See **CPR** 14.06. Where the client impugns the conduct of its solicitor, as did the Premier and Attorney General in public statements about Cameron acting without instructions or contrary to instructions, then the privilege will have been impliedly waived: ***Cameron v. A.G.(N.S.)***, 2019 NSCA 38, leave to SCC refused [2019] S.C.C.A. No. 214.

5. Litigation privilege

Once thought to be part of solicitor-client privilege, litigation privilege is now seen to serve distinct purposes, although there is overlap between the privileges. ***Litigation privilege***

- need not involve confidential information,
- applies only in the context of actual or pending litigation,

- is based upon the need to afford the lawyer a protected area to facilitate investigation and preparation of a case, and
- is temporary, until disclosure in discovery or courtroom.

Litigation privilege is a class privilege, with clearly-defined exceptions. It is a fundamental principle of the administration of justice. Like solicitor-client privilege, litigation privilege cannot be abrogated by inference and cannot be overridden absent a clear, explicit and unequivocal statutory provision to that effect: ***Lizotte v. Aviva Insurance Co. of Canada***, 2016 SCC 52.

For this privilege to arise, litigation must be under way or in reasonable contemplation. The purpose of the privilege is to provide a zone of privacy for parties and counsel to investigate and prepare for litigation in our adversarial system. A dispute alone, or a vague anticipation of litigation, is not enough. There must be a definite prospect of litigation: ***Sable Offshore Energy Project v. Ameron International Corp.***, 2015 NSCA 8 (discusses litigation privilege, common interest privilege settlement privilege and statutory privilege in production of documents); ***Hatch Ltd. v. Factory Mutual Insurance Co.***, 2015 NSCA 60; and ***MacDonald v. Acadia University***, 2001 NSSC 109.

Litigation privilege will protect from disclosure reports from third parties where the ***dominant purpose*** is to submit the report to the solicitor for purposes of actual or pending litigation: ***Davies v. Harrington*** (1980), 39 NSR (2d) 258 (SCAD) and ***Economical Mutual Ins. Co. v. Italian Village Ltd.*** (1981), 45 NSR (2d) 280 (SCAD). This dominant purpose test was affirmed by the Supreme Court of Canada in ***Blank v. Canada (Minister of Justice)***, 2006 SCC 39.

Because this privilege is intended to ensure the efficacy of the adversarial process, it may be claimed not only by clients and their lawyers, but also by self-represented parties: ***Blank***, above, and ***Aviva***, above.

A third party's communications to counsel may fall under solicitor-client privilege, but only where the third party acts as a conduit or channel of communication between solicitor and client. If the third party acts as an investigator or channel to the outside world, like an insurance adjuster or an expert witness, litigation privilege will apply: ***General Accident Assurance Co. v. Chrusz*** (1999), 180 DLR (4th) 241 (Ont CA). Disclosure by a party to another party or individual who is opposed in interest, as opposed to a mere witness, may fall under the "common interest privilege" branch of litigation privilege: ***General Accident v. Chrusz***, above. Common interest privilege averts waiver, because the documents are exchanged in furtherance of a joint interest against a third party: ***Sable Offshore Energy Project***, above.

Litigation privilege will also protect the "lawyer's brief" or "work product", *i.e.*, those materials assembled by the lawyer exercising legal knowledge, skill, judgment and industry, even if copies of public documents or documents originally obtained from the other party: ***Hunt v. T & N plc*** (1993), 15 CPC (3d) 134 (BCCA).; ***General Accident v. Chrusz***, above.

Litigation privilege can be asserted against, not only parties to the specific litigation, but also against third parties and others outside the litigation, even if the third parties have a duty to treat the information confidentially: ***Aviva***, above, and ***Blank***, above.

If a document is not prepared for the dominant purpose of litigation or contain confidential information received from or sent to legal counsel, there is no general exclusion or privilege for documents containing pre-trial strategies*:* ***Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.*** 2000 NSCA 96, 188 NSR (2d) 173. A number of issues of privilege, both litigation and solicitor-client, are discussed in ***Mitsui***.

Litigation privilege is only temporary and ends upon the termination of the litigation that gave rise to the privilege, absent closely-related proceedings. Closely-related proceedings include separate proceedings that involve the same or related parties and arise from the same or a related cause of action or juridical source: ***Blank v. Canada,*** above.

The specific exceptions that apply to solicitor-client privilege also apply to litigation privilege: public safety, innocence at stake and criminal communications. In ***Blank***, above, an exception was recognized for "evidence of the claimant party's abuse of process or similar blameworthy conduct". There may be an exception based upon urgency or necessity: ***Aviva***, above.

6. Privilege for settlement negotiations

This privilege is intended to encourage good faith negotiations between parties with a view to settling disputes. The privilege was discussed at length in ***Brown v. Cape Breton (Regional Municipality)***, 2011 NSCA 32. It is a blanket or class privilege, subject to specified exceptions. The public policy reasons that support the privilege in civil cases have also been used to extend the privilege to cover plea negotiations (plea bargaining) in criminal cases.

The privilege is a joint one, with the holders being the parties to the negotiations: ***Leonardis v. Leonardis*** (2003), 36 CPC (5th) 82 (Alta QB). This privilege has been extended to include mediators engaged in mediating settlement discussions and judicial settlement conferences, e.g., ***Union Carbide Canada Inc. v. Bombardier Inc.***, 2014 SCC 35; and **CPR** 10.16. Fraud and dishonest dealing in negotiations are not protected under this privilege: ***Bertram v. Canada (Minister of National Revenue)***, [1996] 1 FCR 756 . Both ***Leonardis*** and ***Bertram*** discuss the use of the term "without prejudice" in settlement communications.

In ***Sable Offshore Energy Inc. v. Ameron International Corp.***, 2013 SCC 37, the Supreme Court held that this privilege applied to protect the negotiated amounts in three Pierringer settlement agreements with some of the defendants, from disclosure to Ameron in Nova Scotia proceedings, as the rationale was no less applicable where an agreement was reached in this context.

The privileged documents may be reviewed to determine if there is a binding agreement as alleged by one party: ***Begg v. East Hants and N.S.*** (1986), 75 NSR (2d) 431 (SCAD). Equally, the court may consider the documents after judgment, on the issue of costs, even if the

formalities of "offers to settle" are not met: **CPR** 10, esp. Rule 10.03. The Supreme Court discussed this exception in ***Union Carbide Canada Inc. v. Bombardier Inc.***, 2014 SCC 35.

The privilege may also be lost or over-ridden, if one party negotiates in bad faith or where a failure to consider the negotiations would result in misleading the court. There is an "innocence-at-stake" exception to the privilege in criminal matters, similar to that applicable to solicitor-client privilege: ***R. v. Delorme*** (2005), 32 CR (6th) 128 (NWTSC).

The privilege may be asserted against third parties, even after settlement, in any subsequent litigation connected with the same subject-matter, whether between the same or different parties: ***Brown v. Cape Breton (Regional Municipality)***, above; ***Rush & Tompkins Ltd. v. Greater London Council***, [1988] 3 All ER 737 (HL); ***Middelkamp v. Fraser Valley Real Estate Board*** (1992), 10 CPC (3d) 109 (BCCA).

There is also an exception to avoid double recovery, where a plaintiff settles one action and continues another for the same or related injuries: ***Brown v. Cape Breton (Regional Municipality)***, above.

7. Privilege for informers

The identity of police informers is privileged in both criminal and civil proceedings. "The public interest which requires secrecy regarding police informers' identity is the maintenance of an efficient police force and an effective implementation of the criminal law." ***Bisaillon v. Keable***, [1983] 2 SCR 60. The privilege is usually claimed by a police witness, who cannot be compelled to disclose the identity of the informer, nor can a witness be compelled to so disclose. The privilege applies in civil proceedings, including a civil suit where the informer is a plaintiff suing for negligent disclosure by police officers: ***John Doe v. Halifax (Regional Municipality)***, 2017 NSSC 17.

The privilege is that of the Crown, but the Crown or a prosecutor cannot waive it, without the informer's consent. There is a duty upon the judge to enforce, even on his or her own motion if necessary: ***Keable***.

Exceptions are:

- if the informer is a material witness;
- if the informer is an agent provocateur and the defence of entrapment is claimed, providing an evidentiary basis is established; and
- if the accused seeks to establish unreasonable search under s. 8 ***Charter***: ***R. v. Scott***, [1990] 3 SCR 979.
- if the Crown can prove that the person who gave the anonymous tip is the accused, to divert attention during a police investigation: ***R. v. Durham Regional Crime Stoppers Inc.***, 2017 SCC 45.

In a recent restatement of these principles in ***R. v. Leipert***, [1997] 1 SCR 281, the Court emphasized the importance of this privilege and held that anonymous tip sheets should not be

edited with a view to disclosure unless the accused can come within the "innocence at stake" exception, and then only after first giving the Crown the option of staying the proceedings. See also ***Named Person v. Vancouver Sun***, 2007 SCC 43 and, on procedure, see ***R. v. Basi***, 2009 SCC 52. See also ***R. v. Brassington***, 2018 SCC 37.

The privilege also applies to informers who report alleged child abuse to a child protection agency under the ***Children and Family Services Act***: ***D. v. National Society for the Prevention of Cruelty to Children***, [1978] AC 171 (HL), approved in ***Canada (Solicitor-General) v. Ontario (Royal Commission of Inquiry into Confidentiality of Health Records in Ontario)***, [1981] 2 SCR 494.See also ***D.L. v. New Brunswick (Minister of Family and Community Services)***, 2007 NBQB 218.

8. Professional and confidential relationships

Wigmore's four-part test was used to determine new categories of "class" privilege until ***Gruenke***, *e.g.*, ***R. v. S.(R.)*** (1985), 19 CCC (3d) 115 (Ont CA)(no privilege for family counselling in cases of child abuse).

An example of a class privilege, established by statute, is that for confidential communications of spouses with third-party marriage counsellor with a view to effecting reconciliation: ***Divorce Act***, ss. 10(4) and (5); ***B.(L.M.) v. B.(I.J.)***, 2005 ABCA 100 , 18 RFL (6th) 237.

In ***Gruenke*** (1991), the Supreme Court held there was no class privilege for religious communications in a murder case, but Wigmore's four conditions could be used to determine whether case-by-case privilege in any particular case. In this case, the accused's communications with her pastor and counsellor did not even originate in confidence, the first of Wigmore's conditions.

For an application of ***Gruenke*** in the civil context, to create a form of "partial privilege", see ***M.(A.) v. Ryan***, [1997] 1 SCR 157. A blanket privilege for psychotherapeutic records was rejected, but ***O'Connor***-style "balancing" of relevance-vs.-privacy was pursued under the fourth Wigmore condition. To effect this partial or case-by-case privilege, a judge may examine documents as a group or even individually and, where documents are disclosed, the judge may impose restrictions upon who may see or use the documents, to preserve confidentiality.

More recently, the Supreme Court of Canada has applied its case-by-case privilege analysis to the journalist-source setting in ***Globe and Mail v. Canada (Attorney General)***, 2010 SCC 41. Under the crucial fourth Wigmore condition, the lower court would have to balance the importance of disclosure in the proceeding against the public interest in maintaining journalist-source confidentiality. See the *Journalistic Sources Protection Act*, S.C. 2017, c. 22, adding s. 39.1 to the *Canada Evidence Act*.

9. Constitutional balancing in criminal cases

In ***R. v. Beharriell*** (1995), 103 CCC (3d) 92 (SCC) and ***R. v. O'Connor***, [1995] 4 SCR 411, the Court rejected any class privilege for private records of complainants in sexual assault criminal proceedings. Rather than using case-by-case privilege, the Court developed, as a matter of constitutional law, the balancing of, on the one hand, the ***Charter*** rights to privacy of the sexual assault complainant with, on the other hand, the accused's ***Charter*** rights to a fair trial and to full answer and defence. The law in ***O'Connor*** continues to apply to offences other than the sexual offences to which the statutory or ***Mills*** regime now applies.

Effective May 12, 1997, the ***Criminal Code*** ***(Production of Records in Sexual Offence Proceedings) Amendments***, S.C. 1997, c. 30, came into force, adding ss. 278.1 to 278.91,which adopt the two-stage procedure created in ***O'Connor***, but adhere more closely to the procedures and factors set out in the minority opinion in that decision:

- First, the accused must satisfy the trial judge that the third-party records are likely to be relevant and their production to the judge is necessary in the interests of justice, by a written application setting out the specific grounds for production. Section 278.3(4) lists off eleven assertions that "are not sufficient on their own to establish that the record is likely relevant". The application must be served on the persons who have a privacy interest in the records as well as the Crown. The application and a subpoena duces tecum must also be served on the third party custodian of the records. Third party records in the possession of the Crown are also subject to these provisions, a change from ***O'Connor***, unless the complainant or witness has expressly granted a waiver. Section 278.5(2) lists off the "factors" for the judge to consider in ordering production.
- Second, the trial judge is to review the records *in camera*, balancing the factors set out in s.278.5(2) again in weighing full answer and defence vs. privacy and equality, to determine whether the record should be produced to the accused, subject to conditions set out in s. 278.7.

In ***R. v. Mills***, [1999] 3 SCR 668, the Supreme Court of Canada declared these statutory procedures to be constitutional, despite their different approach from the majority in ***O'Connor***. The Court provided guidance to trial judges in the interpretation of the new provisions. These provisions were interpreted after ***Mills*** by the Nova Scotia Court of Appeal in ***R. v. L.(W.D.)*** , 2001 NSCA 111, 45 C.R. (5th) 150. For a helpful practical guide, see Paciocco, "A Primer on the Law of Third Party Records" (2005), 9 Can. Crim. L. Rev. 157. The ***Mills*** regime was applied to police occurrence reports about previous incidents involving the complainant in ***R. v. Quesnelle***, 2014 SCC 46.

In ***R. v. McNeil***, 2009 SCC 3, the Court applied the third-party ***O'Connor*** procedure to the disclosure of police discipline and misconduct records, where such misconduct was not related to the investigation of the accused's case. Misconduct related to the accused's case falls under the first-party disclosure regime of ***Stinchcombe***. The ***O'Connor*** procedure provides a general mechanism for ordering production of any record beyond the possession or control of the prosecuting Crown, and is not limited to cases where third party records attract a reasonable expectation of privacy.

10. Privilege for marital communications

Section 4(3) **CEA** creates a privilege for marital communications, allowing the recipient spouse to refuse to answer questions that would require disclosure. The requirements for the privilege are:

- a valid legal marriage, not terminated by death, divorce or annulment at the time of testimony,
- all communications (but not observations), during the marriage.

The privilege is that of the witness and intercepted communications may be disclosed: ***Rumping v. D.P.P.*** (1962), 46 Cr App R 398 (HL). Where the interception is by way of wiretap, the privilege still operates: ***Lloyd v. R.*** (1962), 64 CCC (2d) 169 (SCC). Communications between the spouses prior to marriage do not appear to be protected by this privilege: ***R. v. Couture***, 2007 SCC 28.

The impact of ***R. v. Salituro***, [1991] 3 S.C.R. 654, upon the privilege is uncertain, if the spouses are irreconcilably separated at the time of testimony. Now that spouses are competent and compellable witnesses for the prosecution under the new s. 4(2) ***CEA***, there may be more claims of marital privilege, including issues about who is a "spouse", e.g., separated spouses, common law partners.

11. Public interest privilege

Statutory provisions:

Federal: ss. 37 (specified public interest), 38 (international relations and national defence and national security), 39 (Cabinet confidences). These ***Canada Evidence Act*** provisions were completely amended in 2001, as part of the government's anti-terrorism legislation. Section 39 was recently interpreted by the Supreme Court to leave little room for judicial review in ***Babcock v. Canada (Attorney General)***, 2002 SCC 53.

Provincial: ***Proceedings Against the Crown Act***, s. 11.

A distinction is drawn between a "***class***" and a "***contents***" claim. In the former case, the public interest privilege (also described as "public interest immunity") is based upon the class or category of the documents, whereas in the latter case, the immunity claimed is based upon the "contents" of a particular document. The responsible minister or designated official files a certificate or affidavit claiming immunity, after which the judge may inspect the documents in issue.

In ***Carey v. Ontario***, [1986] 2 SCR 637, a claim of class privilege for Cabinet documents about a tourism lodge was denied and the documents had to be produced to the court for preliminary judicial inspection to balance the competing interests of government confidentiality and the proper administration of justice.

The Nova Scotia government's claims of public interest privilege over cabinet documents about Bill 148 (freezing and limiting public sector compensation) were rejected, subject to redacting of passages that were irrelevant or contained legal advice: ***N.S.(A.G.) v. N.S. Teachers Union***, 2020 NSCA 17.