1

THE ROLE OF EVIDENCE IN THE PROSECUTION OF CRIMINAL OFFENCES

LEARNING OUTCOMES

After completing this chapter, you should be able to:

- Understand what evidence is and the different forms it takes.
- Discuss the general rules that determine what types of evidence are admissible.
- Explain the difference between the concepts of relevance and materiality.
- Describe some of the reasons that evidence is excluded from a criminal trial.
- Define the concept of privilege and why privileged information is not admissible.
- Distinguish between the concepts of admissibility and weight.
- Discuss the essential elements of a criminal offence.
- Understand different types of legal defences to a criminal charge.

INTRODUCTION

In this text, we will consider evidence and its relationship to the investigation and prosecution of crimes. Evidence is the raw material that investigators use to determine whether a crime was committed in a particular situation and, if it was, by whom. Evidence is also used in criminal trials as proof of essential facts on the basis of which accused people are found either guilty or not guilty of the crime with which they have been charged.

In Canada, section 11(d) of the *Canadian Charter of Rights and Freedoms* provides that anyone charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." The presumption of innocence is essential to the protection of life, liberty, and security of the person as provided for under section 7 of the Charter. Given that accused people in Canada are presumed to be innocent, to be found guilty by the court of a criminal offence they must first be charged with the offence and have their guilt proved beyond a reasonable doubt on the basis of evidence admitted at trial. Alternatively, a person may be charged with a criminal offence, choose to plead guilty to that offence, and be found guilty by a court without ever having had a trial. In fact, in Canada it is estimated that approximately 90 percent of criminal cases are resolved through guilty pleas (Verdun-Jones & Tijerino, 2021, p. iii). However, we will look at the use of evidence in both the criminal investigation and the trial processes.

evidence
(1) the information or physical material relied on in legal proceedings is the more *legal* definition; (2) there is also a more *forensic* use of the term to indicate things that can be gathered by investigators, such as memories, blood, and weapons, that can become evidence in the legal sense if they satisfy the rules of evidence and are admitted into evidence in a legal proceeding

trier of fact
the decision-maker(s) charged with determining whether the necessary facts of a case have been proved—for example, the jury in a jury trial or the judge in a trial by judge alone

accused
a suspect who has been charged with a crime

EVIDENCE DEFINED

The term *evidence* can be used in a number of ways. **Evidence** can refer to the things that are left behind at a crime scene that may help investigators understand what happened there, such as DNA, fingerprints, a gun, or a video recording. Or evidence can refer to a witness's memory of the event. Evidence can also refer to those things that, having satisfied specific rules, are admitted into a legal proceeding (such as a criminal trial) as proof of the facts in issue. After something is admitted as evidence, the **trier of fact**—for example, a judge or jury—will consider that thing in determining the facts of the case and, ultimately, as part of determining whether or not the **accused** person is guilty of a crime. Not all evidence—in the sense of things that are left behind at a crime scene or that are in a witness's memory—will necessarily end up being admitted as evidence which a trier of fact may consider during a criminal trial. When used in the last sense, the term *evidence* is a synonym for *proof* and has come to describe the information presented before the court by the prosecution and the defence in their efforts to establish the actions and intentions (or lack thereof) necessary to prove (or defend against) the offences charged.

"THE GOLDEN THREAD"

Our entire criminal justice system is founded on the belief that a person is *innocent until proven guilty*. Implied in this belief is the prosecution's responsibility for proving the accused's guilt. As the House of Lords in the

United Kingdom observed in the often-quoted case of *Woolmington v Director of Public Prosecutions* (1935): "Throughout the web of English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt" (p. 481). The same holds true in Canada. The burden of proof *always* lies with the prosecution. The accused is not even required to testify or present evidence but can sit silently by, hoping that the prosecution will fail to prove its case (*R v JJ*, 2022, para. 337; *R v Lifchus*, 1997, para. 27).

In legal cases, the *facts* are what a court has decided are facts on the basis of the evidence presented. Nothing is a fact until a judge or jury has decided that it is. Because our system is adversarial, with both sides presenting evidence, a court will often hear more than one version of an event or interpretation of information. The judge or jury decides which witnesses to believe and which version or interpretation is preferable.

Lawyers and criminal investigators may define evidence in different ways. A lawyer may define it in the third of the ways we have above—namely, as anything that has been properly introduced into a legal proceeding that helps to either prove or disprove a fact in issue. A criminal investigator, on the other hand, may define evidence as anything that can provide information about a case under investigation. For the purposes of this text, both of these definitions are important. Evidence may refer to anything that provides investigators with information with which they can formulate a tentative idea about what happened (an investigative hypothesis). This idea will help investigators determine what direction their investigation should take; who is likely responsible for the alleged offence; and whether or not the investigators should lay a criminal charge, and, if they should, which one(s). Evidence is also the thing that will determine which issue(s) a Crown attorney will be able to successfully prove in court.

DIFFERENT FORMS OF EVIDENCE

While a number of terms are used to refer to different forms of evidence, there are two basic ways in which evidence can be presented in court: as "oral evidence" or as "real evidence" (Paciocco et al., 2020, p. 519). Several related terms describe how various forms of evidence may be used. Those terms are discussed below and are also defined in the margins.

ORAL EVIDENCE

Oral evidence (also referred to as *viva voce*, or testimonial, evidence) is testimonial information provided by witnesses who convey their observations or opinions about the matters before the court directly to the trier of fact—for example, a judge or jury. It is the most common form of evidence the court receives (Paciocco et al., 2020, p. 519). Witnesses' testimony may be sworn either by them taking an oath to tell the

oral evidence
evidence a witness gives verbally during a legal process, typically while under oath or affirmation and usually in response to questions posed by the Crown or defence; also sometimes referred to as oral testimony or testimony given by word of mouth—that is, *viva voce*

truth or by them affirming that their testimony will be true. Statements that were made out of court and were not sworn or affirmed will also be admitted as evidence if they fall under an exception to the *hearsay rule* (which we will look at in "Excluding Evidence" later in this chapter). When a witness gives oral evidence in court, the court may either accept that witness's statement as **direct evidence** of a fact or as **indirect evidence** (also referred to as *circumstantial evidence*) of other facts that the evidence may infer. For example, if a witness testified that they saw Aaron punch Jayden repeatedly with his right hand, the court may accept that statement as direct evidence of the fact that Aaron assaulted Jayden. The court may also accept that statement as indirect (or circumstantial) evidence on the basis of which they can infer that Aaron would likely have sustained some degree of injury to his right hand as a result of his assault against Jayden (Lederman et al., 2014, p. 42).

direct evidence
evidence that proves an important fact without the need to speculate

indirect evidence
also known as circumstantial evidence; evidence that logically supports a fact but that is at least partly dependent on speculation

REAL EVIDENCE

Broadly defined, **real evidence** (also referred to as *physical* or *demonstrative evidence*) consists of things that the trier of fact can view directly (Paciocco et al., 2020, p. 519) and use their own senses to observe and draw conclusions about. This is in contrast to oral evidence for which the court must rely on the testimony of witnesses. Real evidence can include tangible things such as a gun or illegal drugs seized from a suspect. Real evidence can also include the court observing the appearance of a person or the demeanour of witnesses as they give evidence, view a video recording, or take a *view*. That is, under conditions set out in section 652 of the *Criminal Code*, a judge may direct the jury to view a person, place, or thing (Lederman et al., 2014, p. 46; Paciocco et al., 2020, p. 571). As a general principle, before real evidence (such as a pistol used in a murder) can be admitted as evidence in court, it must be properly authenticated. That is, the identity of the thing to be introduced in evidence must first be established. This can be done through the reception of oral evidence in which, to use the pistol as an example, a witness testifies that the pistol found at the murder scene is the same pistol that a party is seeking to introduce as evidence in court (Paciocco et al., 2020, p. 556). There are also other types of real evidence, such as photographs and video recordings and paper and electronic documents, each of which have their own admissibility standards (Paciocco et al., 2020, p. 558).

real evidence
any evidence, such as physical objects (including documents in some cases), with a direct link to the crime for which the court can use its own senses to make observations of and draw conclusions about

THE LAW OF EVIDENCE

The law of evidence is the body of rules (both written and unwritten) that governs whether or not something (such as an object, a document, or witness testimony) will become part of the official court record. In other words, these are the rules that determine whether or not something will be admitted as evidence that the court may consider in determining whether an accused person is guilty or not guilty of a criminal offence.

The law of evidence in Canada is part of both federal and provincial and territorial legislation. However, in the case of criminal prosecutions, the law of evidence is derived from the ***Canada Evidence Act***, which contains written rules of evidence; from **common law** (also known as case law or precedent) rules of evidence, which are developed by judges through their decisions in past cases; and from the

Canada Evidence Act
an act of the Parliament of Canada regulating the rules of witnesses and evidence that applies to all criminal proceedings and to all civil proceedings and other matters over which Parliament has jurisdiction

common law
judge-created law that has evolved into a scheme of rules based on precedent and that exists in the body of previously decided court cases, in contrast to statutory law, which is created by the enactment of legislation

Canadian Charter of Rights and Freedoms, which constitutionally enshrines certain rules of evidence, such as section 11 of the Charter, which provides that any person charged with an offence has the right not to be forced to be a witness in their own prosecution.

Canadian Charter of Rights and Freedoms
a bill of rights entrenched in the Constitution of Canada and part of the *Constitution Act, 1982*, which guarantees people in Canada certain political and civil rights and freedoms that protect them from acts by the state that may infringe on those rights and freedoms

The rules of evidence control what facts are presented before the court. The primary aim of the rules is to avoid the wrongful conviction of innocent people, which results in an innocent person being penalized while the guilty person goes unpunished. The secondary aim of the rules is to ensure that the trier of fact is provided with the most reliable evidence available on which to base the finding of whether the accused is guilty or not guilty of the offence with which they stand charged. However, the rules also seek to protect the interests of witnesses and complainants. For example, the *Criminal Code* places restrictions on the access to and use of private medical and therapeutic records of witnesses and complainants.

While a comprehensive examination of the law of evidence is beyond the scope of this text, it is important for criminal investigators to have a basic understanding of this area of law. Rules of evidence determine when evidence may be admitted in a criminal trial, including rules around relevance, materiality, probative value, and admissibility versus weight. Rules also determine when evidence should be excluded, including those related to hearsay, character, opinion, privilege, and improperly obtained evidence. The specific rules that govern the admissibility and exclusion of evidence are considered in the next sections.

ADMITTING EVIDENCE

The primary rule of evidence law is that any evidence that is relevant to a material—that is, important—issue should be admitted unless a rule of law or policy requires its exclusion. The admissibility of evidence is governed by the law of evidence and determined by the trial judge. The principle of admissibility can be reduced to the following simple rule:

Evidence that is relevant and material is admissible unless:

- an exclusionary rule makes the evidence inadmissible, or
- the probative value of the evidence is outweighed by the prejudicial effect of the evidence.

The concepts of *relevance*, *materiality*, *probative value*, and *prejudicial effect* are discussed below:

- *Relevance*. The concepts of **relevance** and materiality are closely related. Relevance is the logical relationship that makes a proposition more or less probable. For example, if the Crown is asserting that Mr. Smith assaulted Ms. Khan, then clothing seized from Mr. Smith on his arrest containing blood stains determined to belong to Ms. Khan would make the proposition that Mr. Smith assaulted Ms. Khan more probable by proving that the two had been in contact.

  The truth-seeking function of the trial process is premised on the belief that all relevant evidence is admissible. However, as we shall see later in this section, not all relevant evidence is admissible. Trial judges must balance

relevance
the tendency of a piece of evidence to prove or disprove a proposition

the probative value of evidence against its prejudicial effects if it were to be admitted (*R v Grant*, 2015, paras. 18, 19). Relevance is the most important factor in determining which pieces of evidence will be admitted in court. If something is not logically relevant, there is clearly no point in wasting the court's time by having lawyers argue about it during the trial. By ensuring that only relevant evidence is admitted, the judge streamlines the use of court time and narrows the discussion to only what is needed to prove or disprove the propositions made by the prosecution and defence.

EXCLUSIONARY RULES

As we have seen, the preliminary conditions of relevance and materiality must be met before evidence is considered for admission. However, there is one last admissibility hurdle to clear before a trier of fact may consider the evidence in reaching a verdict in a case. After it is determined that a piece of evidence being tendered by a party is both relevant and material, the trial judge must still ensure that the evidence does not violate any exclusionary rules, such as:

1. common law rules that were created to exclude evidence that experience has shown is likely to be unreliable—for example, second-hand hearsay evidence is generally not permitted;
2. statutory rules that are designed to ensure that only reliable evidence that can be authenticated is admitted at trial—for example, section 30 of the *Canada Evidence Act* contains a procedure to be followed before business records, such as banking records, can be entered as exhibits; and
3. constitutional limitations, such as sections 8 and 24(2) of the Charter, which grant the trial judge the discretion to exclude evidence that was illegally seized by the police.

materiality
the degree to which a piece of evidence is necessary in proving a proposition

information
an accusation sworn by the informant, typically a police officer, that sets out the charges in Form 2, as prescribed by sections 506 and 788 of the *Criminal Code*

indictment
an unsworn accusation prepared by a Crown prosecutor that sets out the charges in Form 4 as prescribed by sections 566, 566.1, and 591 of the *Criminal Code*, which are the formal charges on which the trial will proceed

- *Materiality*. **Materiality** refers to matters that one side must prove to win its point or the case. In many cases, the point is obvious or not in contention. In such circumstances, the other side can agree that there is no need to call witnesses or present evidence to prove the point—it is admitted. Judges appreciate lawyers who narrow the issues that must be proved to the questions that are truly contentious.

  Material issues are largely defined by:

  – how the parties have defined the case,

  – how the offence is defined in the *Criminal Code*, and

  – how the offence is defined in the **information** or in the **indictment**.

  Not all evidence that may be relevant will also be material. For example, consider a homicide case in which the defence concedes that the defendant stabbed the victim. The autopsy photographs would likely not be material

evidence because the defence has already admitted the manner in which the victim was killed. However, it is not always this easy to define materiality. For example, the prosecutor may argue that even if the cause of death is not a material fact in issue, the violent manner in which the victim died is. In that case, the autopsy photos showing 50 stab wounds become *relevant* to establishing the *material* issue of intent by showing anger and a guilty mind, and the photos should therefore be admissible.

- *Probative value*. **Probative value** is a common legal term used to describe evidence that helps prove a fact or an issue. In assessing the probative value of the evidence in question—that is, whether the evidence has no, little, or great probative value—the trier of fact will ask the following two questions:
  - *What is the evidence trying to prove?* For example, if the perpetrator of the crime is known to drive a red motorcycle and the accused is also known to ride a red motorcycle, this fact has some probative value because it is relevant to identifying the perpetrator. However, evidence that would have more probative value for identity would be fingerprints left at the scene of the crime by the perpetrator that matched the accused's fingerprints. This evidence would be more helpful—or have a higher probative value—than the colour of the motorcycle in establishing the link between the perpetrator and the accused.
  - *How reliable is the evidence?* While eyewitness evidence may be probative in establishing the identity of a suspect because it is direct evidence, the fact that this kind of evidence has been repeatedly shown to be unreliable means that triers of fact will be careful about relying on it. Flawed eyewitness identification has been found to be the major cause of wrongful convictions. Other forms of evidence, such as DNA, have proved to be much more reliable in establishing identification and for that reason may be preferred by the court.
- *Prejudicial effect*. In deciding which pieces of evidence should be admitted, the judge must decide whether the benefits of admitting the evidence (probative value) outweigh the costs (**prejudicial effect**). The Supreme Court of Canada (in *R v Seaboyer*, 1991) identified four potential prejudicial effects of evidence:
  1. *The possibility that the admission of the evidence would cause undue emotional reaction in the trier of fact*. For example, in an impaired driving case, evidence that an accused is a drug dealer has little or no probative value. However, should this fact become known to the judge or jury, it may create a hostile and distorted impression about the accused because the judge or jury may assume that if someone is a "bad" person, they are likely to break the law. This is called **propensity evidence** and is considered by the Supreme Court to be impermissible reasoning (*R v Corbett*, 1988). Judging a case based on the character of the accused is discriminatory and unfairly judges the accused for past wrongs instead of properly trying them, in an unbiased manner, on the evidence before the court.

probative value
evidence that logically helps prove a fact or an issue

prejudicial effect
the undesirable side effects of a piece of evidence that may be deemed unfair to the accused

propensity evidence
evidence that demonstrates that the accused is the type of person who tends to act in a particular manner

2. *The possibility that the admission of the evidence would create a side issue that would unduly distract the trier of fact from the main issues*. Again, this is especially true with bad character evidence. A trier may become distracted by concentrating on resolving the question of whether the accused had committed similar bad acts in the past.
3. *The possibility that the admission of the evidence would create a delay or be time-consuming*. This is an important consideration when dealing with expert witness testimony. A trial judge may restrict the length of expert evidence to make efficient use of limited court resources.
4. *The possibility that the admission of the evidence would create an unfair surprise to the opponent*. For example, a new eyewitness emerges during a robbery trial and the Crown wants to call them as a witness. While the defence may be unprepared to deal with this new witness, the practical remedy in such a case would be an adjournment, not an exclusion of the witness's evidence.

After the judge has considered these four factors, if the prejudicial effect outweighs the probative value, the trial judge will exclude the evidence in question. The trial judge's discretion to exclude relevant and material evidence as a result of prejudice is intended to ensure that the accused has a fair trial. In *The Queen v Wray* (1970), the Supreme Court noted:

> [T]he exercise of a discretion by the trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate *unfortunately* for the accused, but not *unfairly*. It is only the allowance of evidence *gravely prejudicial* to the accused … which can be said to operate unfairly. [Emphasis added.] (p. 273)

In *R v G (SG)* (1997), the Court explained further that the purpose of inquiring into prejudice is to ensure that the accused's rights to make full answer and defence are not compromised:

> The fact that the evidence tendered may be powerful evidence for the prosecution does not lead to a conclusion of prejudice. The inquiry into prejudice focuses not on the effect the evidence may have on the outcome of the trial, but on its effect on the accused's right to make full answer and defence. *The question is not whether the evidence may tend to convict the accused, but whether it is likely to convict him unjustly*. The just or fair trial is one which gets at the truth, while respecting the fundamental right of the accused to make full answer and defence. [Emphasis added.] (para. 99)

The Supreme Court reiterated how courts are to balance the probative and prejudicial aspects of evidence in *R v Grant* (2015), where it differentiated between evidence led by the Crown and the defence. In the case of the Crown (consistent with *R v Seaboyer*), evidence will be excluded where its prejudicial effects outweigh its probative value. However, where the defence leads evidence, a different balance must be struck given the presumption of innocence enjoyed by an accused person. With

respect to evidence relevant to a defence allowed by law, the prejudice must substantially outweigh the probative value of the evidence before a judge can exclude it (*R v Grant*, 2015, para. 19).

EXCLUDING EVIDENCE

REASONS FOR EXCLUDING EVIDENCE

Among the reasons the trial judge may have for excluding a piece of evidence are the following:

1. *Irrelevance*. The evidence is irrelevant or immaterial to the issues to be decided—it does not relate to or does not help to prove any fact that needs to be proved.
2. *Unreliability*. The evidence, by its nature, may be unreliable—for example, it may be **hearsay** (second-hand) evidence. The court will admit hearsay evidence only when the judge is convinced that in the circumstances it is necessary and reliable.
3. *Prejudice*. The *prejudicial* quality of the evidence (its tendency to influence decision-makers in a way that is unfair or undeserved) outweighs its *probative value* (its tendency to prove or disprove an important fact).
4. *Unfairness*. The evidence was obtained in a way that was unfair to the accused or violated their rights under the Charter or other legislation (which is why extreme care is required in collecting evidence and handling suspects and witnesses).
5. *Procedural unfairness*. Because of procedural rules or for other reasons, admitting the evidence would be unfair to the defence or would waste time or confuse the issues. For example, if the prosecution holds back some evidence and attempts to call it only after the defence has finished calling its evidence, this is called *splitting the case* and is not permitted.

hearsay
evidence that is indirect because it is given by a witness who has heard it from another source; second-hand evidence

MAJOR RULES OF EXCLUSION

HEARSAY

One of the main exclusionary rules of evidence is hearsay. Hearsay is an out-of-court statement that is admitted for the truth of its contents. It involves a witness repeating at trial something they heard someone else say who is not a witness in court. It thus involves a witness relaying indirect or second-hand information to the trier of fact—for example, where Person A testifies to what they were told by Person B, where Person B is unavailable or unwilling to testify in court (*R v Evans*, 1993, p. 643). Without Person B in court, it may be impossible to test that person's perception, memory, narration, or sincerity. The statement itself may not be accurately recorded. Further, mistakes, exaggerations, or deliberate lies may go undetected and lead to unjust verdicts (*R v Khelawon*, 2006). It is because hearsay can threaten the integrity and fairness of the trial's truth-seeking process that it is presumptively inadmissible (*R v Bradshaw*, 2017, para. 1).

However, there are exceptions to the general rule under which hearsay evidence is admissible. The exceptions to the hearsay rule are governed by the same principles that govern the rule itself. The hearsay rule attempts to exclude statements that cannot be tested in court and may therefore be unreliable, thus aiding the court's search for truth. Exceptions to the rule also seek to promote the search for truth by admitting hearsay statements into evidence where they were made reliably and/or where they can be satisfactorily tested (Paciocco et al., 2020, p. 151).

Spontaneous statements (also referred to as *res gestae* statements) are statements made in immediate reaction to a particular event—usually a shocking one—at the time the person is experiencing the event or condition. Because such statements are spontaneous and contemporaneous—that is, made at the time of the event—it is unlikely that the person who uttered them was concocting a falsehood, and they are therefore considered reliable. One example of a type of spontaneous statement (there are a number of different types) is an *excited utterance*. For instance, if Samantha exclaimed, "That guy in the Porsche must have been doing at least 200 kilometres an hour!" and Vladimir overheard this statement, Vladimir would be permitted to testify about what Samantha said. Other types of spontaneous statements include *statements of present mental state* and *statements of present physical condition*.

admissions
acts or words of an accused offered as evidence against the accused

Statements made by the accused (or **admissions**) are acts or words of the accused offered as evidence against the accused. If the statements or admissions (a confession is a type of admission) of the accused were made to a person in authority, then separate rules apply in considering the admissibility of a confession (known as the "confessions rule"). Admissions have long been considered an exception to the hearsay rule because the accused is present at their own trial and able to challenge the reliability of the alleged admission. Only the Crown is permitted to tender an out-of-court statement of an accused. Once in evidence, however, the statement may be used for or against the accused.

Admissions by the accused may also include admissions by silence and the adoption of statements by others. An example of an admission by silence may be the testimony of a friend of the accused who states, "I asked him if he killed her, and he just looked at me and said nothing." It would be expected that someone in the accused's position on hearing the question would immediately deny the accusation.

An accused can adopt the statement of someone else either expressly or by implication. For example, Sanjay and Erica plan to rob a convenience store, and Sanjay is heard by the store owner to say, "Let's just grab the money and go." This statement may also be admissible against Erica as long as the prosecution can prove that Erica adopted Sanjay's view. Thus, evidence that Erica nodded or grinned after Sanjay spoke may constitute implied adoption.

declarations against interest
statements made by a person that seem to acknowledge, for example, guilt or a debt—that is, the opposite of self-serving statements

declarant
a person who makes a statement in testimony

Declarations against interest are statements made by a **declarant** that are against their best interests. These statements fall into three categories: (1) financial, (2) property, and (3) penal. For example, the statement, "I owe Camara $6,000" is a statement against the declarant's financial (or pecuniary) interest. The statement, "I haven't kept up with my car payments for months now" is a statement against property interest. The statement, "They didn't catch me the last time I embezzled from the company" is a statement against penal interest (meaning that if this statement were pursued, penal—that is, punishable—consequences might follow). These statements

are considered reliable because people generally do not make statements that admit facts contrary to their interests unless those statements are true.

Certain conditions must apply for these statements to be admissible. A statement must involve *the immediate prejudice of the declarant*—that is, as soon as the declarant makes the statement, they must feel the gravity of the consequences of such an admission. The declarant must be unavailable to testify, and the witness adducing the evidence must have first-hand knowledge of the statement. Also, this exception essentially applies only to non-parties to the proceeding—that is, these statements may not apply against the accused's interests.

Testimony given on a previous occasion is evidence given by a witness at an earlier judicial proceeding, such as a **preliminary hearing**, and is an exception to the hearsay rule. However, it is not technically a *true* exception because the testimony was given under oath and subject to cross-examination, and thus the hearsay dangers are minimized.

preliminary hearing
a hearing held before the real trial to determine preliminary issues such as whether there is enough evidence to proceed to trial

The requirements of this hearsay exception are codified in section 715 of the *Criminal Code*, which provides that a witness's previously recorded evidence may be admitted at trial when any of the following tests are met: (1) the evidence was given at a previous trial on the same charge; (2) the evidence was taken during the investigation of the charge against the accused or at a preliminary inquiry into the charge; (3) the witness refuses to be sworn or to give evidence; or (4) facts are proved on oath from which it can be reasonably inferred that the person is dead, has since become and is insane, is so ill that they are unable to travel or testify, or is absent from Canada. Where it is proved that the witness's evidence was taken in the presence of the accused, it may be read as evidence in the proceedings without further proof unless the accused proves that they did not have a full opportunity to cross-examine the witness. In most cases, evidence admitted under this exception is presented by means of **affidavit** sworn by an **affiant** before a witness.

affidavit
a written and witnessed statement of evidence that the maker swears and signs as proof of its truth

affiant
a person who makes and swears an affidavit

Prior inconsistent statements are statements made before the trial that are inconsistent with the testimony of the witness at trial. For example, if shortly after a crime is committed, a witness makes a statement at a police station implicating the accused but then changes their mind and tells the court a completely different story at trial, the original statement made to the police may be admitted for the truth of its contents as long as certain criteria are met. At the very least, it may be admitted to show that the witness is untrustworthy.

This type of statement may be admissible only if it satisfies the tests of necessity and reliability. A statement is made more reliable if it is taken by the police in very particular circumstances:

- if the declarant is under oath (or has affirmed) or is warned of the possible consequences of **perjury**,
- if the statement is videotaped, or
- if there is an opportunity at trial to cross-examine the person who made the statement (*R v B (KG)*, 1993).

perjury
lying while under oath or affirmation

Dying declarations are statements made by someone who has a hopeless expectation of almost immediate death and are admissible for use by the prosecution or the

defence. For example, if Deshan is stabbed by his gardener, found by his neighbour, and identifies the killer to the neighbour just as he is about to die, Deshan's neighbour could relate his words in court. The requirements for dying declarations to be admissible are:

- that they be about the circumstances of the death (meaning they would have been admissible had the deceased been able to testify); and
- that the offence in question be the murder, manslaughter, or criminal negligence causing the death of the deceased.

Clearly, in these situations such a hearsay exception is necessary. Imagine how nonsensical it would be if the last words of a murder victim were inadmissible. The justice system's belief in the reliability of these statements is based on the idea that a person who knows that they are about to die will normally be truthful.

Historical facts and materials relied on by experts represent another category of exception to the general rule excluding hearsay. It would clearly be impossible to expect experts to account for all of the information, theories, and so forth that they rely on in coming to their conclusions, although technically it is all second-hand information. Consider the example of an expert accountant who relies on mathematical theories to reach their conclusions and who is called on to testify in a trial. To avoid the hearsay prohibition, they would have to fill in the chain of evidence that enabled them to reach their conclusions on the matter before the court, and thus have to call all the mathematicians who originally formulated those theories. The courts have decided that this is impractical, and thus the hearsay foundation of expertise is not treated as problematic.

Business records and declarations in the course of duty are documentary hearsay evidence in the sense that the people who actually made the records—employees in various capacities—are not present to testify. The exception also covers the statements made in the records (also known as the *course of duty* exception). Thus, the evidence is second-hand. The person who recorded the information is usually not present in court because they are unknown, and even if known, they would be unlikely to remember having made that exact record and thus could not testify to having done so. Because the person who introduces the business records to the court is not the person who made the documents, business records are second-hand information and are considered hearsay. These records should be admissible simply because they are usually reliable. Businesses such as banks, manufacturers, and retailers rely on their records being truthful and accurate and hence should normally have no reason to exaggerate or hide facts. The assumption is that businesses generally have no motive to fabricate. Naturally, if such a motive is found, the records become inadmissible.

Under section 30 of the *Canada Evidence Act*, business records are to be admitted in evidence as long as they are made in the "usual and ordinary course of business." The courts have developed a similar rule regarding declarations in the course of duty that include both written and oral declarations in a business setting as long as they are made (1) contemporaneously (made at the time of the event), (2) in the ordinary course of duty, (3) by persons having personal knowledge of the matters in question, (4) by persons who are under a duty to make the record or report, and (5) by persons having no motive to misrepresent the matters. Thus, in court, business records and declarations in the course of duty constitute ***prima facie* evidence** of their contents.

***prima facie* evidence**
evidence that is reliable on first impression and that is accepted in the absence of any challenge to its validity

WEIGHT TO BE GIVEN TO HEARSAY

If hearsay evidence is ruled admissible by the judge, it may still be given less weight than first-hand evidence. Its weight will depend both on the quality of the hearsay and on the credibility of the witness who relates the hearsay to the court. The jury will usually be told to look to other evidence in the case for corroboration.

THE PRINCIPLED APPROACH TO HEARSAY

Despite the many exceptions described above, the current approach to hearsay admissibility is the *principled approach*. This involves looking at each piece of hearsay evidence on a case-by-case basis. Hearsay evidence will be admitted if it is (1) necessary, and (2) reliable. That is, if for some legitimate reason the out-of-court speaker is not available to give evidence—and the evidence is necessary—and there are good reasons to accept that the out-of-court speaker's statements are reliable, despite the fact that the evidence is second-hand and cannot be challenged in court, the evidence will be admitted. This avoids some of the more complicated exceptions discussed above.

The principled approach was adopted after the Supreme Court decided the case of *R v Khan* (1990). In that case, a four-year-old girl complained to her mother immediately after leaving the doctor's office that the doctor had put his "birdie" in her mouth. Semen was found on the child's dress, but the child was clearly too young to testify. Despite the fact that this was hearsay evidence and no specific exception applied, the Court allowed the mother to repeat her child's statement as a result of the necessity and reliability of the evidence. The evidence was *necessary* because it was the foundation of the charge, but the child was not available as a witness. It was *reliable* because the circumstances made it trustworthy: the child told her mother about the event immediately after leaving the office and without prompting, the story involved details that children of that age would usually not know, and the semen stain corroborated the story.

In *R v Smith* (1992), the Supreme Court further explained necessity as referring to the necessity of the hearsay evidence to prove a fact in issue. It does not mean "necessary to the prosecution's case." Necessity will be established where relevant direct evidence is, for a variety of reasons, not available from another source.

TRADITIONAL EXCEPTIONS AND THE PRINCIPLED APPROACH

In *R v Mapara* (2005) and again in *R v Baldree* (2013), the Supreme Court reaffirmed the continuing application of the traditional exceptions to the hearsay rule within the following framework:

1. Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain in place.

2. A hearsay exception can be challenged to determine whether it meets the criteria of necessity and reliability required by the principled approach. The exception can be modified as necessary to bring it into compliance.
3. In rare cases, evidence falling within an existing exception may be excluded because the signs of necessity and reliability are lacking in the particular circumstances of the case.
4. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indications of reliability and necessity are established on a *voir dire*.

In terms of reliability, the Supreme Court made it clear in *R v Khelawon* (2006) that the trial judge acts as a gatekeeper in making the preliminary assessment of threshold reliability of a hearsay statement, and the ultimate determination of its worth is left with the fact finder. In determining admissibility, the court uses a functional approach focused on the particular dangers raised by the hearsay evidence sought to be introduced—for example, that there was no opportunity for contemporaneous cross-examination—and on those attributes or circumstances relied on by the party to overcome those dangers—for example, that the statement was made under oath or affirmation.

See Figure 1.1 for a summary of the admissibility of hearsay evidence.

CHARACTER EVIDENCE

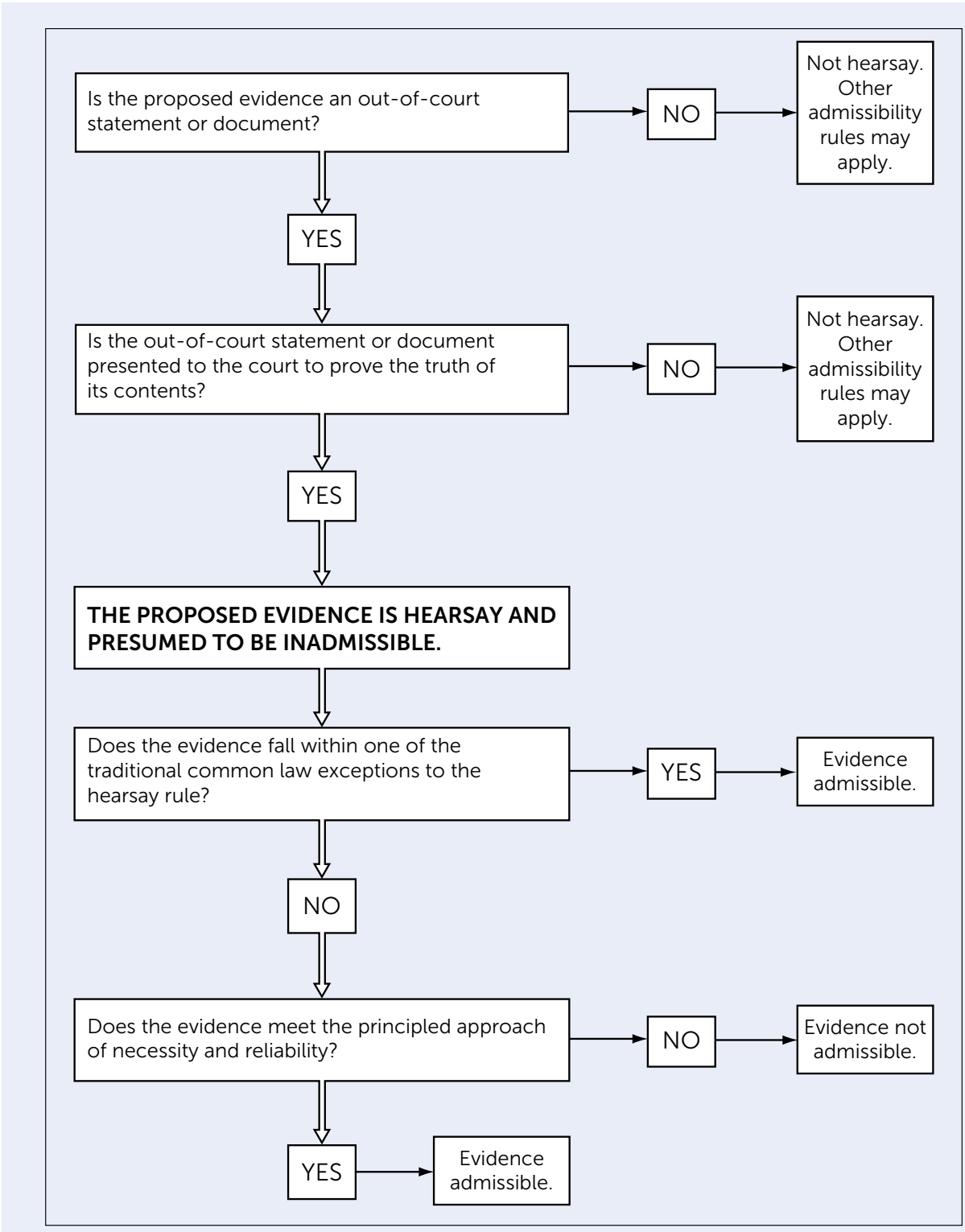
Character is a generalized description of a person's dispositions or of the dispositions to a general trait such as honesty or peacefulness. In this sense, character is concerned with behavioural traits and is broader than habit. Character evidence is any evidence that is presented to establish personality, attitude, general capacity, or the propensity to behave in a certain way.

GENERAL RULES

Accused Allowed to Introduce Good Character Evidence

As a general rule, good character evidence about the accused is generally admissible in criminal trials. This flows from the premise that the accused is innocent until proven guilty and therefore is permitted to rebut the charges brought against them by adducing evidence of their good character. This exception is limited to evidence of reputation, excluding specific acts of goodness. Thus, statements from neighbours, co-workers, and family members that, for example, the accused "is really well liked by all" are permitted. On the other hand, statements such as the accused "donates $5,000 a year to the Cancer Society" are not permitted. If raised by the defence, good character evidence can be rebutted by the prosecution by evidence of "bad" character (see the discussion below).

FIGURE 1.1 Summary: Admissibility of Hearsay Evidence



Crown Not Allowed to Introduce Bad Character Evidence of Accused

In contrast to good character evidence, the Crown may not adduce evidence of the accused's bad character, either by providing evidence of the accused's reputation or by citing specific acts. In *R v Handy* (2002), the Supreme Court said that the Crown cannot ease its burden of proof by characterizing the accused as a bad person. This rule is in place because adducing bad character evidence would be prejudicial to the accused. For example, the jury might convict the accused based only on character evidence that seems to indicate that the accused is the kind of person who would commit the crime in question. Character evidence may also be prejudicial in the sense that it wastes time and can lead to tangential issues. Exceptions to this rule are discussed below.

Character Evidence of Other Individuals

Apart from their own character, an accused may put the character of other people into issue when advancing certain defences. For example:

- *Third-party suspects*. The defence is permitted to call evidence to show that someone else is more likely than the accused to have committed the crime.
- *Claims of self-defence*. To support a defence such as self-defence, evidence of violence or threats on the part of the complainant is admissible.
- *Claims of consent in sexual assault cases*. To support a defence that a complainant consented to the sexual activity with the accused, the defence may seek the trial judge's permission to ask the complainant questions about their past sexual conduct. However, sections 276 and 277 of the *Criminal Code* provide an important limit on evidence about the character of complainants in sexual assault cases by prohibiting evidence about a complainant's sexual history, except in very rare circumstances (*R v Barton*, 2019; *R v Darrach*, 2000; *R v Seaboyer; R v Gayme*, 1991).

Expert Evidence Relating to Character

Expert evidence of character is generally not admissible unless the crime could only have been committed by a member of a group with distinctive psychological characteristics. For example, if a murder was clearly committed by a sexual sadist and the accused does not have any of the characteristics of that paraphilia (sexual disorder), expert evidence of the accused's sexual character may be permitted. Recently, there has been a trend toward not admitting expert evidence of character because scientific opinion on certain issues is still in flux and the evidence may be too heavily weighted without sufficient scientific grounding.

EXCEPTIONS TO THE GENERAL RULE EXCLUDING BAD CHARACTER EVIDENCE OF THE ACCUSED

Although bad character evidence is *not* admissible in general, there are a number of exceptions. The Crown may adduce bad character evidence in a number of exceptional circumstances discussed below (*R v G (SG)*, 1997).

Accused Asserts Good Character

If the accused chooses to put forward evidence of good character or otherwise claims to have a good character, the prosecution is permitted to cross-examine such

testimony and put specific examples of bad character to the witness to weaken the force of the witness's evidence. The prosecution is permitted to do so only when the accused first initiates the discussion of their character.

Evidence that will *not* put the accused's character in issue includes:

- a denial of the crime (this is not the same thing as testifying to good character),
- an explanation that fleshes out the defence, and
- a description of the accused's background such as their education and employment history (as long as the defence does not stray into philanthropic deeds).

Note that if the accused decides to testify, section 12 of the *Canada Evidence Act* allows an accused to be cross-examined on their criminal record (but not concerning the details of the conduct respecting the conviction). This is subject to the trial judge's discretion to prohibit or limit cross-examination of an accused on their criminal record where the potential prejudice of such cross-examination outweighs the potential probative value (*R v Corbett*, 1988). In addition, if the accused puts their character in issue during the examination-in-chief, section 666 of the *Criminal Code* allows for wider cross-examination than under section 12 of the *Canada Evidence Act*. In such cases, the accused may be questioned about the specific conduct and facts relating to the criminal convictions.

Character Evidence Relevant to Issue

Another situation in which the prosecution may raise the question of an accused's character is in a case where character is directly in issue. For example, Julian is charged with murdering a drug trafficker, Ricky. The prosecution may be allowed to lead evidence that Julian was a violent drug dealer and involved in a longstanding turf war with Ricky. The evidence would not be admissible to prove that Julian was the type of bad person more likely to commit the murder; rather, it would be admissible to demonstrate a motive on the part of Julian to commit the murder.

Where Evidence Is Adduced Incidentally to Proper Cross-Examination of Accused

Another exception under which evidence of bad character of the accused can be adduced is where the evidence is adduced incidentally to proper cross-examination of the accused on their credibility.

Similar Fact Evidence

As stated, evidence that does no more than tarnish the character of an accused is inadmissible. However, there may be evidence of an accused's prior misconduct that bears enough similarity to the present charges to suggest that it is not merely a coincidence that the accused is now charged with a similar offence. Similar fact evidence (also referred to as "prior misconduct" or "prior discreditable conduct," *R v LB*, 1997) is a kind of character evidence that relates to earlier conduct by the accused. It is evidence adduced by the Crown of the accused's past discreditable conduct on other occasions. It is used to infer the disposition of the accused—that

is, their inherent qualities of mind and character—from which it may be further inferred that the accused acted in conformity with their disposition about the specific issue in dispute.

An example is the famous "Brides in the Bath" case, which concerned a husband who had a habit of killing his wives. After the murder of wife number three, who was drowned while taking a bath, the prosecution was allowed to bring forward evidence that wives one and two had died in exactly the same fashion.

Similar fact evidence raises the issue of prejudice because in certain cases it may resemble propensity evidence. Recall from our earlier discussion that propensity evidence is evidence that would require a judge or jury to infer that the character of the accused is such that they are the kind of person who would commit the offence. This type of reasoning is generally not permissible. Only a *specific* (as opposed to a general) propensity to engage in a particular behaviour may be admitted to help establish that the accused did or did not do the act in question.

The leading case for the admissibility of similar fact evidence is *R v Handy* (2002). The conditions for the admission of such evidence are narrow, and the legal test begins with the view that past discreditable acts are presumptively inadmissible. The prosecution must convince the judge on a balance of probabilities that, in the context of the particular case, the probative value of the evidence in relation to a particular issue outweighs the prejudice it may cause to the accused.

PROPENSITY OR SIMILAR FACT?

The following two examples illustrate the difference between evidence that would be considered propensity evidence and therefore not admitted, and evidence that would be considered similar fact evidence and therefore would be more likely to be admitted.

Assume that Julie stands accused of brutally and repeatedly stabbing a stranger. The Crown wishes to adduce evidence that Julie has spent time in a mental institution and has schizophrenia, and thus is more likely to have been the perpetrator of this type of frenzied murder. Clearly, the logical inference identifying Julie as the killer is weak. More than anything else, it proposes that Julie is guilty because she has a mental illness and thus is more likely than the average person to have killed someone. This is propensity evidence and would not be admitted.

Now assume that Julie stands charged with murdering a stranger, dragging the body into a churchyard, and sewing a cross into the victim's skin. The Crown wants to adduce evidence that Julie has killed small animals and sewn crosses onto their corpses and, in the last year, has been charged with cruelty to animals. This presents a situation of strikingly similar facts. The Crown is attempting to infer the identity of the murderer from the similar hallmark of crosses stitched into flesh. Because the Crown is not attempting to say that anyone who does something as bizarre as that is more likely to be a murderer, the evidence will most likely be admitted. In effect, the recent pattern of behaviour is a form of identification evidence.

OPINION EVIDENCE

The modern legal rules for the admissibility of **opinion evidence** were set out by the Supreme Court in *R v Mohan* (1994) and later clarified in *White Burgess Langille Inman v Abbott and Haliburton Co* [*White*] (2015). The general rule is that opinion evidence is not admissible:

opinion evidence
evidence of what a witness thinks or believes, generally held to be inadmissible

> Witnesses are to testify as to the facts which they perceived, not as to the inferences—that is, the opinions—that they drew from them. … [I]t is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness": J.B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524. (*White*, 2015, para. 14)

Put simply, the role of witnesses is to recall for the court what they observed or experienced. It is then up to the court to decide what, if any, relevance those observations have to the facts in issue in the particular legal proceedings. There are certain exceptions, however, that allow for the admissibility of opinion evidence from both lay—that is, non-expert—witnesses and expert witnesses.

LAY WITNESSES

Lay witnesses may usually express their opinions in circumstances where the conclusion is one that people of ordinary experience are able to reach. In *Graat v The Queen* (1982), the Supreme Court held that non-expert witnesses may give opinion evidence on certain things including, but not limited to, identification of handwriting, persons, and things; apparent age; estimates of speed and distance; emotional state; and the conditions of things.

lay witnesses
any witnesses testifying about a subject matter in which they are not experts

In addition, because the distinction between opinion and fact is often artificial and because witness testimony is usually based largely on opinions or a mixture of facts and opinions, a lay witness will be able to give an opinion where the opinion is part of the witness's narration. For example, when a witness identifies an accused person in court, they are really stating, for example, "This is the person who assaulted me," which is an opinion, not a fact. Clearly, testimony of this kind would become very difficult to give if all opinions were disallowed. Accordingly, this rule enables a witness to effectively communicate their story, including conclusions, uninterrupted by the rule that forbids opinions. Ultimately, it is up to the judge to decide whether to allow these opinions to be admitted into evidence.

EXPERT WITNESSES

Testimony from **expert witnesses** is also, essentially, opinion evidence and is subject to certain rules of admissibility. These rules are designed to prevent expert evidence from distorting the fact-finding process by causing the trier of fact to simply defer to the expert's opinion rather than carefully evaluating it or by giving it more weight than it deserves. Expert evidence will only be admitted if, on the balance of probabilities, it satisfies a two-stage test. At stage one, the party seeking to have the evidence admitted must demonstrate that the evidence meets the four threshold requirements for admissibility (Paciocco et al., 2020, p. 250), sometimes referred to as the *Mohan* factors (*R v Mohan*, 1994):

expert witnesses
witnesses with specialized knowledge in particular subjects that is beyond that of the average layperson

1. *Relevance*. The expert opinion must be related to a relevant fact in issue, making the expert opinion necessary to arrive at a correct understanding of the material elements of the case.
2. *Necessity in assisting the trier of fact*. Expert testimony is necessary when ordinary people—such as a judge or the members of a jury—would be unlikely to form a correct judgment about the particular subject of an inquiry without the assistance of individuals with special knowledge of that subject.
3. *Absence of any exclusionary rule*. Expert evidence may not be admitted if it violates one of the other exclusionary rules—for example, the evidence of a psychiatrist that is relevant only to the disposition of the accused to commit the crime charged would violate the bad character evidence rule and therefore be inadmissible.
4. *Properly qualified expert*. An expert is properly qualified during a *voir dire* where they must demonstrate having acquired special knowledge and experience in respect of the matters on which they undertake to testify. At this point, the expert must define their precise area of expertise. The expert should not be allowed to offer opinion evidence on matters beyond this established expertise.

The second stage of the test for the admissibility of expert evidence is referred to as the "gatekeeping" stage. Here the trial judge conducts a discretionary cost–benefit balancing analysis to determine "whether the benefits [of] admitting the evidence outweigh any potential harm to the trial process. … Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded" (*R v Bingley*, 2017, para. 16).

Novel Scientific Evidence

The trial judge must be especially careful when considering the admissibility of expert evidence that advances a novel scientific theory or technique, such as cellphone tower data used to determine the location of suspects based on their mobile phone usage, a police dog's signal used to detect accelerants in arson cases, or a drug recognition expert's (DRE) testimony regarding drug impairment of a motorist. In such cases, the reliability of the body of knowledge on which the expert's testimony is based must be strong. Factors that determine reliability include the extent to which the scientific community accepts the expert's theory or technique, the number and kind of errors the theory or technique can produce, and the care with which the theory or technique has been employed (*R v Bingley*, 2017; *R v J-LJ*, 2000; *R v White*, 2015).

EXPERT EVIDENCE: PREJUDICE VERSUS PROBATIVE VALUE

Despite its obvious value in certain situations, because of a number of wrongful convictions in Canada and the United States that have been attributed to faulty expert evidence, expert opinion has come under scrutiny. In

Ontario, for example, a review by the Office of the Chief Coroner found that Dr. Charles Smith had made critical errors in at least 20 child autopsies that led to a number of wrongful convictions (Goudge Inquiry, 2008).

Earlier in this chapter, we discussed that the trial judge has discretion not to admit evidence whose prejudicial effect outweighs its probative value. The judge has the same discretion for opinion evidence. In the case of expert evidence, the risk of prejudice exists because scientific or medical opinion is often impressive and difficult to ignore. There is always a great danger that the judge or jurors will be overwhelmed or overawed by the glitter of an expert's experience and knowledge. They may simply accept the expert's opinion and base their judgment solely on the expert's conclusion. The expert's credentials may thus be given exaggerated importance vis-à-vis other evidence (or the absence of evidence) and may lead to faulty conclusions. Another problem may arise when one party does not have the financial resources to hire an expert as impressive as its opponent's to supply a contrary opinion. Finally, experts often have opposing views, and their evidence may succeed only in confusing the judge or jury and clouding the real issues.

IMPROPERLY OBTAINED EVIDENCE

Charter rights are fundamental individual rights in a democracy and underpin all other principles in the Canadian criminal justice system. The legal rights enshrined in the Charter are summarized in the box "Charter Rights: Review."

CHARTER RIGHTS: REVIEW

The following legal rights are enshrined in the Charter:

- Section 7: The right to life, liberty, and security of the person.
- Section 8: The right to be secure against unreasonable search or seizure.
- Section 9: The right not to be arbitrarily detained or imprisoned.
- Section 10: The right on arrest or detention to be informed promptly of the reasons therefor, to retain and instruct a lawyer without delay, and to be informed of that right.
- Section 11: Rights pertaining to proceedings in criminal and penal matters such as the right to an impartial court.
- Section 12: The right not to be subjected to any cruel and unusual treatment or punishment.
- Section 13: The right against self-incrimination.
- Section 14: The right to an interpreter in a proceeding.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms: (*a*) freedom of conscience and religion; (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (*c*) freedom of peaceful assembly; and (*d*) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein. 4.(1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members. (2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be. 5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

6.(1) Every citizen of Canada has the right to enter, remain in and leave Canada. (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (*a*) to move to and take up residence in any province; and (*b*) to pursue the gaining of a livelihood in any province. (3) The rights specified in subsection (2) are subject to (*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and (*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services. (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. 8. Everyone has the right to be secure against unreasonable search or seizure. 9. Everyone has the right not to be arbitrarily detained or imprisoned. 10. Everyone has the right on arrest or detention (*a*) to be informed promptly of the reasons therefor; (*b*) to retain and instruct counsel without delay and to be informed of that right; and (*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful. 11. Any person charged with an offence has the right (*a*) to be informed without unreasonable delay of the specific offence; (*b*) to be tried within a reasonable time; (*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence; (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; (*e*) not to be denied reasonable bail without just cause; (*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; (*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; (*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and (*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment. 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment. 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence. 14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

16.(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada. (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick. (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French. 16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities. (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed. 17.(1) Everyone has the right to use English or French in any debates and other proceedings of Parliament. (2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick. 18.(1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. (2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative. 19.(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament. (2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick. 20.(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where (*a*) there is a significant demand for communications with and services from that office in such language; or (*b*) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French. (2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French. 21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada. 22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

23.(1) Citizens of Canada (*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province. (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language. (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province (*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and (*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. 26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada. 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. 29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools. 30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be. 31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

32.(1) This Charter applies (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. (2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force. 33.(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

"We must now establish the basic principles, the basic values and beliefs which hold us together as Canadians so that beyond our regional loyalties there is a way of life and a system of values which make us proud of the country that has given us such freedom and such immeasurable joy."

P.E. Trudeau 1981

The *Canadian Charter of Rights and Freedoms*.

In any investigation, it is critical that police obtain evidence according to proper legal procedures. The rights guaranteed by the Charter are like trump cards, and when a Charter right is violated, the violation often becomes the focus of a case.

For example, consider a case where officers make an unauthorized entry into a private dwelling—that is, they break in without a search warrant—and find a large amount of cocaine. That cocaine might be part of a big trafficking operation, but the evidence might not be admitted because a break-in without lawful authority is considered an unreasonable search that infringes on the section 8 right to be secure against unreasonable search or seizure.

Similarly, if police fail to observe the legal rights of persons who are detained or arrested, or if they fail to follow proper procedures during an arrest or a detention—including during an interview—then any information gained in the resulting encounter will likely be ruled inadmissible. Among the procedures that police must follow are cautioning a suspect or an accused on arrest at the beginning of questioning and at any point where the charges against the suspect or accused change, informing the suspect or accused of their right to a lawyer, and informing the suspect or accused of the reason for their detention or arrest. In addition, no statement

made by an accused person to a person in authority—for example, a police officer—will be admissible unless the Crown can show beyond a reasonable doubt that the statement was made voluntarily.

Not every Charter violation, however, will cause evidence to be excluded. According to section 24(2), the violation must be a serious one that brings the administration of justice into disrepute. In determining whether this is the case for a particular violation, the trial judge must consider the seriousness of the police misconduct, the impact of the breach on the Charter-protected interests of the accused, and society's interest in the adjudication of the case on its merits (*R v Grant*, 2009; see also *R v Jones*, 2017; *R v Paterson*, 2017).

PRIVILEGE

Privilege allows certain information to be withheld from the court. For example, with certain exceptions, solicitor–client privilege prevents lawyers from sharing information communicated by their clients.

privilege
a kind of protection (exemption from admissibility) that attaches to evidence produced in special circumstances such as in the course of certain classes of relationships

Privilege is based on the idea that, for individuals in society to benefit from the existence of certain relationships, the confidentiality of such relationships must be respected. Because the normal rules of the court do not apply to information protected by privilege, it may seem that privilege works against the truth-seeking role of evidence. However, the benefits that flow from the confidential nature of such relationships are considered to override the value of disclosing information in certain cases. Privileged communications are protected either by a recognized class privilege or on a case-by-case basis.

CLASS PRIVILEGE

Certain relationships or privacy interests have gained class privilege protection from the courts by virtue of the relationship between the parties. Class privilege communications are automatically presumed to be privileged and inadmissible unless an exception to the privilege can be established. The law recognizes very few "class privileges." It has, for example, rejected the existence of class privilege for communications between a pastor and penitent and has not recognized a class privilege protecting the journalist–confidential source relationship (*R v Gruenke*, 1991; *R v National Post*, 2010; *R v Vice Media Canada Inc*, 2018). In 2017, however, the federal Parliament passed the *Journalistic Sources Protection Act*, amending the *Canada Evidence Act* to protect the confidentiality of journalistic sources. The Act also amended the *Criminal Code* to allow certain judges to issue search warrants to obtain information from journalists if there is no other reasonable way that information can be obtained and if the public's interest in the investigation and prosecution of a criminal offence exceeds the journalist's right to privacy. The class privileges recognized by the courts are discussed below.

Solicitor–Client Privilege

Solicitor–client privilege protects oral and written communications between lawyer and client. This means that these communications, or knowledge the lawyer has gained about the client through these communications, cannot be disclosed either to the opposing party (which is usually the prosecutor) or to the court. To

solicitor–client privilege
an exemption from disclosure requirements for certain communications between a lawyer and client

be considered privileged, and therefore protected, the communications must have been made by a client (1) to a lawyer, (2) confidentially, and (3) for the purpose of obtaining legal advice or preparing for trial.

The privilege is a right of the client (not the lawyer), and where it exists only the client may waive it. The privilege also encompasses any third parties who have had access to the communications while providing legal services to the client—for example, secretaries, clerks, and experts. There is no privilege for communications that:

1. are made for or contribute to the commission of a criminal offence;
2. reveal a clear and imminent threat to public safety;
3. contain information that is necessary for the accused to make full answer and defence;
4. have been overheard by another party (note that this does not include a third party who has access to the communications while providing legal services to the client); and
5. are evidenced in documents that have been lost or stolen—that is, that cannot be produced.

Spousal Privilege

spousal privilege previous to 2015, an exemption from disclosure and compellability for the spouse of an accused, which has since been repealed; a narrower spousal privilege still exists under section 4(3) of the *Canada Evidence Act* that exempts communications between spouses from disclosure and compellability

Spousal privilege was founded on the idea of maintaining marital harmony and protecting the legal construct of marriage. Historically, under sections 4(2) and 4(4) of the *Canada Evidence Act*, spouses were not legally permitted or able to be compelled—that is, competent or compellable—to testify against one another in most circumstances, with some exceptions. This privilege only applied to legally married husbands and wives, not to common law, same-sex, irreconcilably separated, or divorced spouses.

However, in 2015, sections 4(4) and 4(5) of the *Canada Evidence Act* were repealed, and section 4(2) was revised. Section 4(2) now states that "[n]o person is incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused." Thus, spouses are now legally permitted and may be legally compelled by way of subpoena to come to court and testify for the prosecution. However, section 4(3) of the *Canada Evidence Act* still provides for spousal privilege regarding marital communications, saying that "[n]o husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage." The privilege belongs to the spouse who received the communication, not to the spouse who was the source of it, and the receiving spouse may decide either to assert or to waive the privilege.

Informer Privilege

informer privilege a near absolute privilege that attaches to those who give information to police in confidence, which protects them from having their identity revealed in court or in public

The police often rely on confidential informants, such as those who contact them through Crime Stoppers, to give them information about crimes. These individuals are protected by **informer privilege**, which is a common law rule that protects not only the name of the informer from being revealed in court but any information that may implicitly identify them.

The Crown or the police may claim privilege on behalf of the confidential informant, but the privilege cannot be waived without the consent of the informant. This

privilege is subject to only one exception: the *innocence at stake* exception requires that the identity of the informer be disclosed where it is necessary to demonstrate the innocence of the accused (*R v Brassington*, 2018; *R v Leipert*, 1997). For example, if the confidential informant is a **material witness** to the crime, then their identity must be revealed. This exception is rarely resorted to, however, because the accused will have to demonstrate that factual innocence *is* at stake. Mere speculation that the information *might* assist the defence will not be enough to set aside the privilege.

material witness
a witness who has observed material facts or facts that are relevant to proving the elements of the offence with which an accused is charged

The importance of protecting the identity of police informers must be emphasized. Such protection not only ensures the safety of the informant but also encourages others to divulge information about crimes to police. Without police informer privilege, people would be less willing to report friends, acquaintances, and others for fear of reprisals. In *R v Leipert* (1997, para. 16), the Supreme Court emphasized the responsibility of courts not to accidentally deprive informants of the privilege the law provides.

For example, in the case of an anonymous tip to Crime Stoppers, because the identity and circumstances of the informant are unknown, it can be difficult to know what information might allow the accused to identify the informant. A seemingly small detail, such as the time the call was made, could be enough to allow the accused to identify the informant. Courts must not reveal any information that could identify the informant either (1) directly, or (2) indirectly by disclosing information that narrows the pool of people who share certain characteristics with the informant and allows for identification through a process of elimination.

In determining whether informer privilege exists for Crime Stoppers tips, the Supreme Court has held that courts must proceed on the assumption that it does. However, informer privilege does not exist where it can be shown that the informer contacted Crime Stoppers with the intention of furthering criminal activity or interfering with the administration of justice (*R v Durham Regional Crime Stoppers Inc*, 2017).

Public Interest Immunity

"Crown privilege," better described today as **public interest immunity**, is based on the idea that, in certain instances, information and documents regarding governmental activities should not be disclosed (Paciocco et al., 2020, pp. 371–372). For example, documents regarding the location of a police investigative surveillance post whose disclosure would compromise ongoing investigations should remain secret for the protection of the public. Public interest immunity is different from a "privilege" in a number of ways. First, it is not owned by the Crown. If the Crown fails to object to the information being disclosed, others, including the judge, may do so in the public interest. Second, the Crown may not waive the immunity. Third, the primary purpose of immunity is to protect information and not a relationship, as is the case with a privilege. Public interest immunity is accepted under both statute and common law. Under common law, it protects a broad variety of government and public body interests, security activities, police matters, and Cabinet decision-making. Under statute, it protects specific public interests—for example, the location of vehicle identification numbers used to identify stolen vehicles; national security issues—for example, any information of a kind that could injure national security, defence, or international relations, if it were publicly disclosed; and Cabinet and Committee information—for example, discussion papers or communications

public interest immunity
under common law, public interest immunity protects information the disclosure of which would threaten the public interest such as, in some cases, the identity of undercover investigators

between ministers relating to government policy or draft legislation (*Canada Evidence Act*, ss. 37–39; Paciocco et al., 2020, pp. 371–380).

CASE-BY-CASE PRIVILEGE

In addition to the recognized categories of privilege (and immunity) discussed above, the courts will sometimes approve the legal protection of communications made in the course of some other relationships on a case-by-case basis—for example, certain communications between physicians and patients, priests and penitents, and journalists and confidential sources.

***Wigmore* test**
a case-by-case model for establishing privilege

Any communication for which privilege is claimed must satisfy the following criteria, known as the ***Wigmore* test** (*Globe and Mail v Canada (AG)*, 2010; *R v McClure*, 2001; *R v National Post*, 2010):

1. The communication must originate in confidence that the identity of the informant will not be disclosed.
2. The confidence must be essential to the relationship in which the communication arises.
3. The relationship must be one that should be carefully fostered for the public good.
4. The public interest served by protecting the identity of the informant from disclosure outweighs the public interest in the truth.

JOURNALIST CONFIDENTIAL SOURCE PRIVILEGE

In *R v National Post* (2010), the Supreme Court held that while the common law does not recognize a class privilege between journalists and secret sources, a journalist's claim for protection of secret sources can be assessed using the case-by-case model of privilege established by *Wigmore*. In *Denis v Côté* (2019), the Supreme Court recognized the former common law scheme developed in *R v National Post* (2010) and *Globe and Mail v Canada* (*AG*) (2010), in which the burden of proof was on the journalist who objected to the disclosure of information regarding a confidential source to show that the four parts of the *Wigmore* test were met. The Court then explained that a new statutory scheme exists under section 39.1 of the *Canada Evidence Act* that is based on the former scheme but is significantly different from it in a number of ways. These differences include a shift in the burden of proof; new threshold requirements—that is, definitions of journalist and journalistic sources; and the criterion of reasonable necessity—that is, the information or document cannot be produced in evidence by any other reasonable means (s. 39(7)(a)).

weight
the probative value/importance assigned to a piece of evidence, based on an assessment of its reliability

ADMISSIBILITY VERSUS WEIGHT

Evidence that is admissible will be given different **weight** depending on how reliable it is and how effectively it establishes a point. A trustworthy piece of evidence—for example, DNA evidence—will be weighted heavily, meaning that the judge will put

more emphasis on it and instruct the jury to do the same. Conversely, although another piece of evidence may be admitted, it may be given little weight because it is not deemed as reliable—for example, eyewitness testimony. Put simply, the weight (or probative value) of evidence is a function of how believable the evidence is and how strong the trier of fact considers it to be in helping to prove a material fact in the case (Paciocco et al., 2020, p. 40).

This section discusses three important factors that make evidence more persuasive: corroborative evidence, properly obtained evidence, and continuity.

CORROBORATIVE EVIDENCE

Any independently sourced evidence that supports another piece of evidence or a proposition is called **corroborative evidence**. In a case of alleged sexual assault, for example, semen found on the complainant's underwear that matches the accused's DNA may be evidence that corroborates the complaint. (As noted above, however, this fact may not be *relevant* if the accused advances a defence that the complainant consented to the sexual activity because, in that case, one would expect to find the accused's DNA on the complainant's underwear.)

corroborative evidence independently sourced evidence that supports another piece of evidence

Formerly, some kinds of evidence were considered to be particularly unsafe and required corroborative evidence before they could be believed. Judges would warn juries of the dangers of convicting an accused person on the uncorroborated evidence of certain witnesses—namely, children, accomplices to crimes, and complainants alleging a sexual offence (Paciocco et al., 2020, p. 672). A number of the statutory corroboration requirements relating to these types of witnesses have been repealed. For example, section 586 of the *Criminal Code* used to provide that "no person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused." The section was repealed in 1988, and the *Criminal Code* currently has no statutory requirements for corroboration of a child's unsworn evidence. Similarly, the statutory requirement for corroboration in a broad range of sexual offences—for example, *Criminal Code* sections 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 271, 272, 273, 286.2, and 286.3—has since been abolished, and pursuant to section 274 of the *Criminal Code*, where an accused is charged with one of these offences, "no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration."

Nevertheless, commonsense assumptions about who is providing the evidence give some evidence less weight. For example, where a friend of the accused was originally charged with robbery of a convenience store but eventually accepts an offer by the Crown for a lenient sentence in exchange for their testimony that it was the accused who committed the robbery, their testimony may be less believable than that of the store owner, who has no obvious motive to lie. Clearly, in this case any independent evidence confirming the friend's version of events would assist in their being believed, but such evidence is not required by the courts.

However, some statutory corroboration rules still apply. For example, section 133 of the *Criminal Code* provides that no person can be convicted of perjury "on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused." Statutory corroboration

requirements also still exist for treason (s. 47(3)) and procuring a feigned marriage (s. 292(2)).

Corroboration generally helps strengthen the evidence given by a witness. Especially when looking at a case from the prosecution's perspective, the case against an accused must be very strong to convince the judge or jury beyond a reasonable doubt. It is unlikely that a judge or jury will be convinced to such a degree without corroborative facts of some kind.

PROPERLY OBTAINED EVIDENCE

The way in which evidence is collected and preserved is extremely important because improperly obtained and maintained evidence may be excluded in court (see the earlier discussions of opinion evidence, privilege, and improperly obtained evidence). Evidence that is collected and preserved according to proper legal procedures and protocols is referred to as *properly obtained evidence*. The trier of fact is likely to give greater weight to evidence that has been properly obtained and maintained.

The term *properly obtained evidence* applies to both physical and statement evidence. In relation to physical evidence, it describes evidence obtained by police following correct search and seizure procedures—for example, obtaining a search warrant to search a suspect's computer. It also applies to how the evidence is handled and stored to prevent contamination or damage.

In relation to statement evidence, when an individual is detained or arrested, a set of legal requirements with which investigators must comply is triggered. For example, people held in police custody must be informed of the reason for their detention; they must also be informed of their right to a lawyer and be given a meaningful opportunity to exercise this right. Police failure to provide a suspect with this information and opportunity may jeopardize the admissibility of any statements made following the violation of this right. Where a statement is held to be admissible, it may still raise issues of weight. For example, where issues arise as to the accuracy and completeness of the record, a trial judge may instruct the jury that the police's failure to videotape an accused's statement might affect its reliability and weight (*R v Moore-McFarlane*, 2001).

CONTINUITY

continuity
in the context of physical evidence, an ability to account for the whereabouts of the evidence (and the identity of those who have had access to it) from the time of its collection to the time it is entered as an exhibit in the trial record

Another factor that will determine the value of evidence is the Crown's ability to demonstrate its **continuity**, or establish its *provenance* or *history* from the time the evidence was found to the time it is exhibited in court. Continuity is also described as the *chain of continuity* or the *chain of custody*. As the term implies, investigators and the Crown must be able to account for each link in the chain. This includes establishing:

- who initially collected the evidence;
- who subsequently had contact—or the opportunity to have contact—with the evidence; and
- where the evidence was stored, the conditions under which it was stored, and the steps that were taken to ensure that no one was able (either by accident or

on purpose) to alter, contaminate, substitute, degrade, or otherwise affect the nature of the evidence.

For example, a forensic investigator who collects a piece of bloody clothing from a crime scene should document and package the evidence following correct procedures. If the investigator does not submit the evidence to a forensic testing facility immediately—perhaps because forensic protocol requires that the clothing be allowed to dry before it is submitted or because the investigator has more evidence to collect from the same scene and wants to submit all the evidence at once—they will need to make a note of when and where the evidence was stored before it is submitted. (Continuity could be achieved and demonstrated by storing the item in a secure evidence locker to which only the investigator has access.) Once the investigator is ready to submit the clothing to the forensic facility, they will document when it was submitted and to whom. The forensic facility will log the submission into its own evidence management computer system, creating a record of who took custody of the item, when, and from whom, and assign a unique reference number to the item. Following analysis, the investigator will receive a notice of the results and be asked to pick the item up, then will securely store the item in a police facility until it is required for court purposes.

To prove that a particular piece of evidence came from the location in question and that it was not tampered with or contaminated, all the individuals who handled or oversaw the evidence may be required to testify in court. Although proof of continuity goes to the weight that will be given to a piece of evidence as opposed to its admissibility (*R v Andrade*, 1985, quoted in *R v Singh*, 2008, paras. 31–38), if continuity cannot be demonstrated, then the integrity of the evidence may be called into question, and even if the evidence is admitted, it may be given little or no weight by a court.

Ultimately, the burden of showing that the evidence that is being presented in court is the same evidence that was found at the crime scene and that it is in the same state as it was when it was first gathered is on the party who seeks to introduce the evidence—usually the Crown. If the state of the evidence has changed, the party must be able to account for any changes. Many changes occur for innocent and acceptable reasons, such as a change in the colour of a piece of paper that has been chemically treated to make fingerprints visible. On the other hand, some changes occur for unacceptable reasons, such as a loss of all or a portion of the evidence or contamination resulting from improper storage.

LEGAL IMPLICATIONS OF POLICE FAILURE TO MAINTAIN CONTINUITY

The care taken to ensure sufficient continuity can be the difference between a conviction and an acquittal.

In *R v Grunwald* (2008), a large quantity of marijuana was seized from the accused's truck. The officer in charge testified that none of the police

officers involved in the case had placed any identifying labels on the Ziploc bags of marijuana that were seized, nor had the Ziploc bags been placed in other marked exhibit bags. Further, the officer in charge testified that he was not even sure how the drugs were stored at the police station. In acquitting the accused of drug charges, the Court criticized the police:

> Obviously, the police were very sloppy in their handling of the material seized from Mr. Grunwald. If they had initially marked the Ziploc bags with unique identifiers, or had immediately placed the Ziploc bags and contents into exhibit bags on which they placed unique identifiers, they could very easily have traced the movement of the material. (*R v Grunwald*, 2008, para. 45)

PROVING THE OFFENCE

Evidence law is the law of proof. Once the police charge a suspect with a particular offence (or offences), it is up to the prosecution (the Crown) to *prove* the offence and answer any defences so that the judge or jury is persuaded of the accused's guilt. The accused can be convicted and sentenced only if the prosecution can successfully prove the offence in court. The aim of this requirement is to avoid convictions of innocent persons.

ELEMENTS OF THE OFFENCE

If an individual is to be found guilty of committing a crime, the prosecutor must prove two things beyond a reasonable doubt:

1. The individual *committed* the prohibited act.
2. The individual *intended* to commit the act.

essential elements the particular acts and intentions required to prove a specified offence

Together, the act and intent are known as the **essential elements** of an offence. The prosecution must prove *both* act and intent beyond a reasonable doubt, or the accused must be found not guilty (acquitted).

ACTS (ACTUS REUS)

To prove an offence, the prosecution is required to prove certain acts or actions on which the offence is based. Such action or conduct is commonly known by the Latin term *actus reus*. Many of these acts are described in the wording of the statute that creates the offence.

intent also called *mens rea*; the mental element of an offence that must be proved to secure a conviction

INTENT (MENS REA)

In addition to proving action or conduct, all true crimes require the prosecution to prove certain things about the accused's state of mind at the time of the offence. This aspect of the offence is often referred to as **intent** or *mens rea*. For example, in a robbery scenario (such as that set out in s. 343(c) of the *Criminal Code*, which is only one of a number of different ways in which the offence of robbery may be committed),

the Crown must prove both that the accused assaulted a person (act) and that the accused committed the assault with intent to steal from the victim (intent).

STANDARD OF PROOF

The term *standard of proof* refers to the degree to which the judge or jury must be persuaded. In everyday matters, we make decisions on the basis of varying degrees of certainty, depending on how important the question is. For example, how certain do you have to be that it will rain before you decide to take an umbrella with you when you go out? What "evidence" persuades you?

Legal questions are similar. The **standard of proof** is the answer to the question, "How convinced does the law require the trier of fact to be?"

standard of proof
the degree of certainty of the truth of a fact required before that fact can be relied on in support of a particular verdict or legal decision

There are two recognized standards of proof:

1. proof on a balance of probabilities, and
2. proof beyond a reasonable doubt.

BALANCE OF PROBABILITIES

Proof on a balance of probabilities, sometimes called the civil standard of proof, requires that the evidence be sufficient to convince the trier of fact that the fact at issue is *more likely than not* to be true. In other words, if after hearing evidence in support of a fact the jury is 51 percent convinced that the fact is true, the fact has been proved on a balance of probabilities.

proof on a balance of probabilities
proof that leaves the trier of fact convinced that the fact at issue is more likely true than not

In a civil (non-criminal) case, the required standard of proof for the *whole case* is the balance of probabilities. If the plaintiff (the party who started the lawsuit) can prove their side of the story (the claim) on a balance of probabilities, they win the case.

BEYOND A REASONABLE DOUBT

Proof beyond a reasonable doubt is the required standard of proof for criminal offences. For an accused to be convicted, the trier of fact must be convinced of the accused's guilt beyond a reasonable doubt. This is a much more stringent standard than the one required in civil cases. The reason for this is obvious. A criminal conviction can carry serious penalties (such as incarceration), and the justice system recognizes the need to be very certain of an accused's guilt before subjecting them to a deprivation of liberty or other serious sanctions.

proof beyond a reasonable doubt
proof that is convincing and allows a reasonable person to be sure that the accused is guilty

WHAT DOES "BEYOND A REASONABLE DOUBT" MEAN?

In *R v Lifchus* (1997), the Supreme Court suggested that trial judges use the following explanation of "proof beyond a reasonable doubt" when charging a jury:

> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time

as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.

What does the expression "beyond a reasonable doubt" mean?

The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so ingrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt. (para. 39)

BURDEN OF PROOF

burden of proof
also called *onus of proof*; the requirement of proving a particular fact or argument

The term **burden of proof** is used to identify which person or party is responsible for proving a particular fact, issue, or case. If a party is responsible for proving something, they are said to have the burden of proof (or *onus of proof*). In our adversarial system, the side that makes the allegation (or claim or accusation) has to prove it, while the other side always has the right to answer the accusation, in open court, in front of a fair and impartial judge or judge and jury.

RAISING A DEFENCE

Although an accused has the right *not* to present any evidence in their defence, defending the charge may involve asking questions or calling witnesses to raise a reasonable doubt on a material point. Less often, the accused will actually have to prove the defence. For example, when an accused is charged with murder, the prosecution has the burden of proving that the accused caused the death of a human being (act) and that the accused meant to do it (intent). However, the accused can raise a doubt by raising a defence or by calling evidence that will raise a doubt as to any of the elements of the offence. If the defence is that the accused caused the death but that they acted in self-defence, then to be acquitted the accused needs only to raise a reasonable doubt that they acted in self-defence. Once the accused has met this burden, the Crown must disprove the excuse or justification beyond a reasonable doubt.

REVERSE ONUS

While the prosecution must prove the elements of the offence, the *Criminal Code* includes sections that shift the burden to the defence to disprove a presumption (also known as **reverse onus clauses**). For example, with the offence of gaming in stocks or goods, wares, or merchandise (*Criminal Code*, s. 383), once the prosecution proves that the accused had the intent to make gain or profit by the rise or fall in price of the stock of a company or of any goods, wares, or merchandise, and makes, signs, or authorizes a contract with the intention to acquire or sell the shares or goods, wares, or merchandise, the offence is proved—unless the accused can prove that they had the bona fide intention of acquiring or selling the shares or goods, wares, or merchandise ("the burden of proof of a bona fide intention … lies on the accused" (s. 383(2))). In general, it is easier *not* to have the burden of proof (and the responsibility for gathering and presenting evidence).

reverse onus clause sections of the *Criminal Code* that shift the burden from the prosecution to the defence to disprove a presumption—for example, in the case of possession of counterfeit money

STOP AND LOOK AGAIN

A forensic investigator seized a bloody knife from the scene of a stabbing. The investigator had almost completed their 12-hour shift when they located the knife, and because they were not on good terms with their supervisor, they did not want to ask for their permission to work overtime. The investigator knew that they had to properly store the knife before they could submit it to the forensic lab, so they put the bloody knife in a plastic evidence bag to protect it from contamination. But because the blood on the knife was still wet, they did not seal the bag so the blood could dry overnight. They put the bag in their briefcase and locked it in the trunk of their personal car intending to drop it off at the lab first thing in the morning as they would pass the lab on their way to work.

Discuss the different legal and forensic issues and implications that arise in this scenario.

KEY TERMS

accused, 4
admissions, 12
affiant, 13
affidavit, 13
burden of proof, 34
Canada Evidence Act, 6
Canadian Charter of Rights and Freedoms, 7
common law, 6
continuity, 30
corroborative evidence, 29
declarant, 12
declarations against interest, 12
direct evidence, 6
essential elements, 32
evidence, 4
expert witnesses, 21
hearsay, 11
indictment, 8
indirect evidence, 6
information, 8
informer privilege, 26
intent, 32
lay witnesses, 21
material witness, 27
materiality, 8
opinion evidence, 21
oral evidence, 5
perjury, 13
prejudicial effect, 9
preliminary hearing, 13
prima facie evidence, 14
privilege, 25
probative value, 9
proof beyond a reasonable doubt, 33
proof on a balance of probabilities, 33
propensity evidence, 9
public interest immunity, 27
real evidence, 6
relevance, 7
reverse onus clauses, 35
solicitor–client privilege, 25
spousal privilege, 26
standard of proof, 33
trier of fact, 4
weight, 28
Wigmore test, 28

FURTHER READING

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REVIEW QUESTIONS

TRUE/FALSE QUESTIONS

____ **1.** A criminal case can be tried by a judge, a judge and jury, or a jury alone.

____ **2.** Evidence can include witness testimony, physical objects, and documents.

____ **3.** The Crown ultimately decides which evidence is admissible in court.

____ **4.** Direct evidence is stronger than indirect evidence.

____ **5.** It is up to the accused person to prove that they did not commit the offence charged.

____ **6.** Evidence that is irrelevant is not admissible in court.

____ **7.** A criminal offence must be proved beyond a reasonable doubt before a sentence can be imposed.

____ **8.** The *Canada Evidence Act* contains all of the rules of evidence to be followed in a criminal trial.

____ **9.** The standard of proof describes which side is responsible for proving that the offence occurred.

____ **10.** Evidence becomes fact only after a trier of fact makes a finding of fact.

MULTIPLE-CHOICE QUESTIONS

1. Why is an accused said to be innocent until proven guilty?
   - **a.** the prosecution has the burden of proof
   - **b.** the accused cannot be convicted without proof
   - **c.** the standard of proof must be met before a conviction can be entered
   - **d.** all of the above

2. In defending a criminal charge, what must the accused do?
   - **a.** testify on their own behalf
   - **b.** call witnesses
   - **c.** tender documentary evidence
   - **d.** none of the above

3. Which of the following is *not* a reason for excluding evidence?
   - **a.** the evidence is immaterial
   - **b.** the evidence might cause undue prejudice
   - **c.** the evidence is indirect
   - **d.** the evidence was collected in violation of the accused's constitutional rights

4. Why is the criminal standard of proof "beyond a reasonable doubt"?
   - **a.** the justice system must be very certain of guilt before subjecting an accused to criminal sanctions
   - **b.** if there is enough reason to arrest an accused, there can be little doubt of the accused's guilt
   - **c.** before convicting, the trier of fact must be at least 51 percent certain that the accused committed the offence
   - **d.** in a criminal trial, no amount of doubt is unreasonable

5. An accused's right to disclosure does not extend to which of the following?
   - **a.** material in the police possession pertaining to its investigation of the accused
   - **b.** material in the Crown's possession that has potential relevance to the prosecution of the accused
   - **c.** material in the Crown's possession that is clearly irrelevant to the prosecution of the accused
   - **d.** all of the above

6. Which of the following sources governs the rules of evidence at a trial?
   - **a.** the *Criminal Code*
   - **b.** judgments from the Supreme Court of Canada
   - **c.** the *Charter of Rights and Freedoms*
   - **d.** all of the above

SHORT ANSWER QUESTIONS

1. After reading the following section of the *Criminal Code*, list the acts or intentions that the prosecution may have to prove to get a conviction.

   Murder

   229 Culpable homicide is murder

   (a) where the person who causes the death of a human being

   (i) means to cause his death, or

   (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not.

2. List three reasons a judge might have for excluding a piece of evidence sought to be presented in court.
3. Describe the difference between *actus reus* and *mens rea*.
4. Describe a situation in which the burden of proof lies with the defence.
5. Compare the civil *balance of probabilities* and criminal *beyond a reasonable doubt* standards of proof.

IT'S YOUR MOVE, OFFICER!

You are giving evidence in court and are asked by the Crown attorney to explain your handling of a gun seized from the person you arrested. You explain that you originally arrested the person for assault, and when you searched him, you found a gun tucked into the waistband of his pants. You state that you seized that gun and submitted it as part of the evidence in this case. When you are questioned by the defence lawyer, they claim that your search of their client was a violation of their client's section 8 Charter rights and, further, that there was a disturbing lack of police continuity regarding the gun that you claim was seized from their client.

1. How would you respond to the claim that your search violated their client's section 8 Charter rights?
2. Did you have the authority to search their client? What was the source of your authority?
3. How would you demonstrate continuity regarding the initial seizure and subsequent handling of the gun?

SPOT THE ERROR

Police officers received information from the neighbour of a "strange man" who lives on Oak Street. The neighbour told police that the strange man lives alone in the large house and keeps odd hours, coming and going at all times of the night and day. The neighbour is certain that the man is doing something illegal in the house and demands that they investigate. Police attend the man's residence and knock on his front door, but no one answers. An officer tries the door handle and discovers that the door is unlocked, so he opens it and steps inside. The officer yells, "Police—is anyone home?" but there is no response. While inside the house, the officer sees a large quantity of illegal drugs and two handguns sitting on the dining room table. Police seized the drugs and guns and subsequently charged the resident of the house with drug and weapons offences. Further investigation by police revealed that the man was part of a large drug trafficking operation.

Discuss the legal and investigative issues raised in this scenario. What could police have done that they did not do and what impact might this have on their investigation and on the prosecution of the accused?