CHAPTER 1

INTRODUCTION: BASIC CONCEPTS IN THE LAW OF EVIDENCE

I. WHAT IS THE LAW OF EVIDENCE AND WHAT IS IT FOR?

At its core, a criminal trial is all about answering a single question: has the Crown proven the accused's guilt beyond a reasonable doubt? This almost invariably implies a dispute over the "who," "what," "when," "how," or "why" of whatever is alleged to have taken place.[1] If the central facts are not in dispute, the charge will usually be resolved by a guilty plea or a withdrawal. Where those facts *are* in contention, a trial will usually take place. Evidence is the material put before the court to resolve the factual disputes that have given rise to a trial.[2]

The law of evidence is a set of rules and principles that answer two principal questions:

- What evidence can be considered by the trier of fact?
- Once the evidence is admitted, what can the trier of fact do with it?

One plausible answer to both questions is "anything"—in which case the need for a law of evidence would be reduced or eliminated. Indeed, the existence of a discrete body of law governing the admission and use of evidence is not an inevitability. Bentham famously advocated for the admission of *all* relevant evidence, arguing that the only way to reach the truth is to "see everything that is to be seen; hear everybody who is likely to know anything about the matter: hear everybody, but most attentively of all, and first of all, those who are likely to know most about it—the parties."[3]

If all relevant evidence were admissible, we could dispense with much of what we currently know as the law of evidence. And indeed, much of the rest of the world manages without the complex web of exclusionary rules that our common law has developed. The noted evidence scholar Thayer long ago observed:

> At once, when a man raises his eyes from the common-law system of evidence, and looks at foreign methods, he is struck with the fact that our system is radically peculiar. Here, a great mass of evidential matter, logically important and probative, is shut out from the view of the judicial tribunals by an imperative rule, while the same matter is not thus excluded anywhere else. English-speaking countries have what we call a "Law of Evidence;" but no other country has it; we alone have generated and evolved this large, elaborate, and difficult doctrine.[4]

But, for better or worse, this "large, elaborate, and difficult doctrine" is our own. In recent decades, to be sure, the Supreme Court of Canada has made strides toward

1 The only exception would be where the facts are undisputed and the only contentious issue is whether the undisputed facts disclose the offence charged.

2 If the accused pleads guilty, the need for evidence is almost invariably dispensed with and a finding of guilt is made on the admitted facts. Of course, evidence may subsequently be led at the sentencing hearing. However, the focus of this book is on evidence led at *trial* to resolve the question of guilt or innocence.

3 Jeremy Bentham, "Rationale of Judicial Evidence" in *The Works of Jeremy Bentham*, vol 7 (Edinburgh: William Tait, 1843) at 599.

4 James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, 1898) at 1-2. It is a mistake to think that Continental (European) systems do not possess their own bodies of evidence law, including rules of privilege and rules excluding illegally obtained evidence. The most salient difference is that Continental courts generally do not exclude otherwise probative evidence on the basis of concerns that it may be misused: Mirjan R Damaska, *Evidence Law Adrift* (New Haven, CT: Yale University Press, 1997) at 14-17. Common law courts do this all the time.

mitigating some of the difficulty and intricacy of the doctrine, favouring the formulation of broad and flexible principles over esoteric and technical rules. But, as suggested by the heft of this volume, the Canadian law of evidence remains a dense, voluminous subject. What accounts for it?

Certain characteristic features of the Anglo-American criminal trial are usually assigned prime responsibility for the development of a complex law of evidence in common law jurisdictions. One is the adversary system, in which the parties are responsible for marshalling the facts before a largely passive decision-maker. This can be contrasted with the Continental model, in which fact-gathering is traditionally the primary responsibility of a judicial official. Where facts are gathered and presented by parties with an interest in the outcome, there is naturally a heightened risk that the evidence will be skewed in its substance or presentation. In theory, the law of evidence helps to curb the distortionary effects of party presentation by excluding evidence that would cause unfairness to the other side or whose persuasive effect may outstrip its real value.

The other main systemic feature seen to be responsible for the development of Anglo-American evidence law is the prevalence of jury trials—and the judiciary's historically ambivalent attitude toward them.[5] On the one hand, the jury trial is seen as an invaluable guarantor of individual liberty and bulwark against tyranny.[6] According to Dickson CJ, "The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense."[7] On the other hand, jurors themselves are seen as dangerously prone to malign influence of all kinds if their access to information about the case is not tightly regulated by the judge. Evidence deemed to be too prejudicial for a jury's consideration can run from the sordid[8] to the mundane.[9] Today, only a relatively small proportion of criminal cases that proceed to trial are tried by a jury. Nonetheless, the presumptively dual structure of the court—judge and jury—continues to inform much of our law of evidence. This is so even though, in the majority of cases, most evidentiary disputes revolve around whether the judge should disabuse themself of evidence they have already seen.

In accordance with this dual structure, as a general rule, the judge decides questions of admissibility and the jury (or the judge in their capacity as trier of fact, if sitting alone) decides questions of weight. But this general division of labour is not airtight. Sometimes the judge needs to instruct the jury on matters of evidentiary weight that may otherwise escape its consideration: for example, the minimal weight to be given to in-dock identification evidence[10] and the frailties of eyewitness identification evidence

5 Thayer, *ibid* at 266 dubbed the common law of evidence to be the "child of the jury system."

6 *R v Turpin*, [1989] 1 SCR 1296 at 1309-10, 1989 CanLII 98. Indeed, the jury's power to refuse to apply unjust laws (called jury nullification) has been characterized as "the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law": *R v Morgentaler*, [1988] 1 SCR 30 at 78, 1988 CanLII 90, Dickson CJ, quoting Law Reform Commission of Canada, "The Jury in Criminal Trials" (1980) Working Paper No 27.

7 *R v Corbett*, [1988] 1 SCR 670 at 692, 1988 CanLII 80.

8 See e.g. *R v Handy*, 2002 SCC 56 (evidence of several prior allegations of sexual assault by the accused excluded from the accused's sexual assault trial as offending the similar fact evidence rule).

9 See e.g. *R v Goldfinch*, 2019 SCC 38 (evidence of a consensual "friends with benefits" relationship between the complainant and accused excluded under the *Criminal Code*, RSC 1985, c C-46, s 276 [Code]).

10 *R v Jack*, 2013 ONCA 80 at para 17.

more generally.[11] More rarely, the jury even has a subsidiary role in admitting or excluding evidence—the notoriously confusing co-conspirator's exception to the hearsay rule being the main example of this.[12]

To return briefly to the definitional point with which we began: what is evidence? In basic terms, evidence comes in three main forms:

- *oral evidence*: the testimony of witnesses in court,
- *documentary evidence*: this includes both written and electronic documents, and
- *"real" evidence*: physical objects.[13]

To this list we may add admissions—namely, agreements that certain specified facts have been proved *without* the need to call evidence of them.[14] Collectively, these are the raw materials out of which the facts of the case are determined, or "found," by the judge or jury. Regulating the presentation and use of this material, and thereby enabling valid findings of fact to be made, is what the law of evidence is all about.

To some people, and in some circumstances, the law of evidence can seem arid and technical. There is some truth to this impression: debates over whether a given statement is properly characterized as hearsay, or whether a particular document counts as a business record, are unlikely to get the blood boiling. Although the rules can sometimes seem arcane, in reality they engage fundamental and always-evolving questions about human behaviour that are anything but. For example:

- What may cause people to falsely confess to a crime?[15]
- What factors support or detract from the reliability of an eyewitness identification?[16]
- In what circumstances is an out-of-court statement reliable enough to be relied on in lieu of sworn testimony?[17]
- When is evidence of a prior sexual relationship between the accused and complainant relevant to the accused's claim that an alleged sexual assault was actually a consensual encounter?[18]
- Is immediate flight from the scene of the crime indicative of guilt?[19] What about the failure to immediately deny an allegation of criminal conduct?[20]
- In what circumstances does the fact that a complainant made their allegation shortly after the alleged assault enhance the credibility of their in-court testimony?[21]

11 *R v Hay*, 2013 SCC 61 at para 40.

12 *R v Carter*, [1982] 1 SCR 938, 1982 CanLII 35; *R v Mapara*, 2005 SCC 23.

13 These are not watertight categories. For instance, electronic evidence often blurs the distinction between documentary and "real" evidence. See Chapter 12.

14 Because the trier of fact must accept the facts contained in admissions, they are not "evidence" but may nonetheless contribute to the factual substrate of the case.

15 *R v Oickle*, 2000 SCC 38; *R v Hart*, 2014 SCC 52.

16 *R v Hibbert*, 2002 SCC 39; *Hay*, *supra* note 11.

17 *R v Khan*, [1990] 2 SCR 531, 1990 CanLII 77; *R v B (KG)*, [1993] 1 SCR 740, 1993 CanLII 116; *R v Khelawon*, 2006 SCC 57.

18 *Goldfinch*, *supra* note 9.

19 *R v White*, 2011 SCC 13 [*White 2011*].

20 *R v Levert*, 2001 CanLII 8606 (ONCA); *R v Chafe*, 2019 ONCA 113.

21 *R v Khan*, 2017 ONCA 114; *R v Dinardo*, 2008 SCC 24.

All of these questions, and many more, are the stuff of which the law of evidence is made. The answers are not self-evident. Indeed, they have received disparate answers from lawyers, academics, and judges, right up to our highest court.

It should already be obvious that the law of criminal evidence is not a watertight set of extricable legal precepts, but rather a rich and varied body of rules and principles that are always overlapping and engaging with other sources of legal and extra-legal thought. It is constantly evolving and is necessarily a product of the times. When we look back through Canadian legal history, we see evidentiary rules and presumptions that strike us as outmoded, bizarre, even offensive. At one time, the accused was incompetent to testify in their own defence.[22] Much more recently, the Code required the jury to be instructed that it was unsafe to accept a complainant's evidence in a sexual assault case unless independently corroborated.[23] The ancient rule of spousal incompetency somehow survived until 2015.[24] The natural tendency to see our own position as uniquely enlightened should be resisted: no doubt there are aspects of our contemporary evidence law that will also be seen as wrong-headed or retrograde by future generations.

II. THE SOURCES OF EVIDENCE LAW

Evidence law has three main sources: the common law, statute law, and the Constitution. Of these, the common law has been by far the most influential. For instance, the common law has given us the rule against hearsay, the categorical exceptions to it, and (more recently, with a Charter[25] flavouring) the "principled approach." The common law has also given us the confessions rule, the similar fact evidence rule, and most of the rules regulating the proper scope of opinion evidence.

By contrast, Parliament's contribution to the law of evidence has been more modest. The *Canada Evidence Act*,[26] which applies to all criminal trials, is far from a complete codification of evidence law.[27] Instead, it covers a limited range of topics, and its provisions have themselves been subject to considerable judicial gloss. Notable topics governed by the *Canada Evidence Act* include the following:

- the competence and compellability of witnesses, including spousal privilege (ss 3-4),
- immunity for answers to self-incriminating questions (s 5),
- the process for dealing with adverse witnesses (s 9),
- cross-examination on previous statements (ss 10-11),
- examination on prior convictions (s 12),

22 See *The King v D'Aoust*, 5 CCC 407 at 411, 1902 CanLII 99 (ONCA).

23 See *Warkentin v The Queen*, [1977] 2 SCR 355, 1976 CanLII 190.

24 Spousal incompetency was repealed by SC 2015, c 13, s 52, but spousal privilege remains: *Canada Evidence Act*, RSC 1985, c C-5, s 4(3).

25 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

26 RSC 1985, c C-5.

27 In the 1970s, the Law Reform Commission produced a draft *Evidence Code* and urged Parliament to enact it, but this was never done. See *Report on Evidence* (Ottawa: Law Reform Commission of Canada, 1975). The possibility of comprehensive codification now seems remote.

- judicial notice of laws (ss 17-18),
- admission of certain official government documents (ss 19-26),
- authentication and admission of electronic documents (ss 31.1-31.8),
- public interest privilege (ss 37-37.3),
- national security privilege (ss 38-38.17),
- Cabinet privilege (s 39), and
- journalistic source privilege (s 39.1).

Additionally, the Code contains a patchwork of offence-specific evidentiary provisions. For instance, s 276 governs the admission of the complainant's extraneous sexual conduct in sexual offence prosecutions, and s 278.93 dictates the procedure for the *voir dire* in those cases. In a prosecution for perjury, s 133 provides that the accused cannot be convicted on the evidence of a single witness "unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused." Also, ss 320.31 to 320.35 create a number of evidentiary rules and presumptions applicable to alcohol- and drug-impaired driving prosecutions. Accordingly, while the Code contains little in the way of generally applicable evidence law, it does govern the evidentiary mechanisms by which numerous specific offences can be prosecuted or defended.

Since 1982, the Charter has likewise made incursions into the law of evidence. Most obviously, it introduced new substantive constraints on the ability of the state to gather evidence, and an exclusionary mechanism in s 24(2) for evidence obtained in breach of the Charter. Although the ultimate aim of a Charter s 8 search and seizure claim or a s 10(b) right to counsel argument is usually to exclude evidence thereby obtained, the subject matter belongs principally to criminal procedure and constitutional law rather than the law of evidence. We therefore do not deal with these topics in any detail in this book, except where they overlap and intersect with matters of evidence law—for instance, where the Charter-entrenched right against compelled self-incrimination informs and supplements the common law confessions rule.[28] Readers will want to consult other texts for in-depth treatment of substantive Charter provisions and the s 24 remedial jurisdiction.[29]

Somewhat less directly, the Charter has also informed the development of the common law of evidence. As explained by the Supreme Court in *Salituro*,[30] courts are expected to make incremental changes to the common law of evidence to ensure that it reflects contemporary values, including those embedded in the Charter. In that case, the Court created an exception to the rule of spousal incompetency—the ineligibility of one spouse to testify against the other—for spouses who are irreconcilably separated. More dramatically, the collection of common law and statutory rules concerning self-incrimination has been significantly strengthened and expanded by way of judicial

28 See Chapter 12.

29 See e.g. Don Stuart, *Charter Justice in Canadian Criminal Law*, 7th ed (Toronto: Carswell, 2018); Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada*, 2nd ed (Markham, ON: LexisNexis, 2017); Matthew Asma & Matthew Gourlay, *Charter Remedies in Criminal Cases*, 2nd ed (Toronto: Emond, 2022).

30 *R v Salituro*, [1991] 3 SCR 654, 1991 CanLII 17. Parliament later abolished the rule of spousal incompetency entirely: see *Canada Evidence Act*, s 4(2).

interpretation of the "principles of fundamental justice" in the Charter, s 7.[31] Additionally, the common law confessions rule, once concerned solely with the reliability of confessions, has been refined to embrace Charter values of autonomy and freedom from state oppression.[32]

This book is about the law of *criminal* evidence. We do not discuss rules that arise only in civil cases. However, even for a civil litigator, most of what needs to be known about the law of evidence is contained within the law of criminal evidence. This is because most of the doctrines that comprise this body of law have developed in the context of criminal cases. Some reasons for this are easy to surmise. Jury trials have always been more common in the criminal courts, and with them comes the division between trier of law and trier of fact that lends impetus to many exclusionary rules. Additionally, the kinds of prejudice that motivate many exclusionary doctrines—for instance, the danger of bad character reasoning—have their greatest resonance in the criminal sphere where the presumption of innocence is at stake. In civil cases, some doctrines are applied in virtually the same way as in criminal law—for instance, the rules around expert opinion evidence.[33] But some that concern the accused's vulnerability vis-à-vis the state, like the confessions rule, are simply inapplicable.

III. THE BASIC RULE OF EVIDENCE

The basic rule of evidence in Canada can be stated as follows: *All evidence which is relevant to a material issue at trial is admissible unless excluded by a specific rule of law or the judge's exclusionary discretion.*[34]

This apparently inclusionary formulation can be deceptive. Most of the body of evidence law is encapsulated in the latter part of the sentence: exclusionary rules of law, and principles informing the exclusionary discretion. And most of the rules deal with specific kinds of evidence and contain their own exceptions—for instance, the rule against hearsay, or the rule against prior consistent statements.

The exclusionary discretion can be seen as a residual proviso capturing the underlying logic of most of the more specific rules. As McLachlin J observed in *Seaboyer,*[35] "the exclusionary rules of evidence are based on the justification that the evidence excluded is likely to do more harm than good to the trial process."[36] Accordingly, the trial judge has a discretion to exclude evidence whose prejudicial effect exceeds its probative value even where no specific exclusionary rule applies.[37] Naturally, this cost-benefit

31 See e.g. *R v S (RJ)*, [1995] 1 SCR 451, 1995 CanLII 121; *R v White*, [1999] 2 SCR 417, 1999 CanLII 689.

32 *Oickle, supra* note 15.

33 See e.g. *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23.

34 See e.g. *R v Johnson*, 2010 ONCA 646 at para 81, where Rouleau JA stated: "[A]ll evidence that is logically probative to some material issue at trial is relevant, and therefore admissible unless excluded by some particular rule of law." This is a simplified version of Thayer's formulation, adopted by Lamer J (dissenting) in *Morris v The Queen*, [1983] 2 SCR 190 at 201, 1983 CanLII 28: "(1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it." See also Thayer, *supra* note 4 at 530.

35 *R v Seaboyer*, [1991] 2 SCR 577, 1991 CanLII 76.

36 Thayer, *supra* note 4 at 621.

37 In the case of evidence led by the defence, prejudicial effect must *substantially* outweigh probative value to justify exclusion: *Seaboyer, supra* note 35 at 611.

analysis involves an exercise of judicial discretion, since no rigid rules can possibly predict the myriad ways in which the balancing can play out in any given case.[38]

Give-and-take between rules and discretion is a central theme running through the law of evidence. Beginning in the 1980s, the Supreme Court has made a sporadic but nonetheless pronounced effort to recalibrate numerous areas of criminal evidence law toward broad underlying principles—and therefore, inevitably, discretion—and away from rigid rules and categories. The "principled approach" to hearsay, inaugurated by *Khan* is the most famous but by no means only example.[39] *Handy*'s adoption of an integrated approach to prior discreditable conduct evidence is another.[40] And the cost-benefit analysis increasingly applied to the admissibility of expert evidence is yet another.[41] What all of these developments have in common is an emphasis on discretionary balancing in the individual case based on a prescribed but generally open-ended list of factors. Categorical propositions of admissibility or inadmissibility have, in a range of areas, been replaced by "it depends."

Arguments about the relative desirability of specific rules or general principles have long been pervasive in common law jurisprudence more generally, well beyond the confines of evidence law. The language used to describe one or the other often gives away the writer's preference. To advocates of principle-based discretion, strict rules amount to "pigeon-holes" and their application is "mechanical." Proponents of rules regard open-ended discretionary tests as arbitrary "palm-tree justice." One view favours fair notice and predictability in the system at large; the other favours the attainment of better justice in the individual case.[42] Of course, neither actually exists in pure form: even the most clear-cut rules can be distinguished away in their application by a motivated lawyer or judge, and the broadest statements of underlying principle will naturally accrue "categories" and "pigeon-holes" through the development of the case law. Nonetheless, it seems accurate to posit that over the last several decades the Canadian law of evidence has tended to de-emphasize categorical rules and supercharge the trial judge's role as gatekeeper through the principled exercise of discretion.

The Supreme Court usefully foregrounded the distinction between rules and discretion in *Schneider*, perhaps the Court's most significant recent restatement of the nuts and bolts of evidence law. There, Rowe J formulated the following "three-part test for admission of all evidence":

> Judges must consider: (a) whether the evidence is relevant; (b) whether it is subject to an exclusionary rule; and (c) whether to exercise their discretion to exclude the evidence.[43]

As can be seen, this test replaces the classic inclusionary formula ("all relevant evidence is admissible … ") with three sequential exclusionary barriers that all evidence has to clear in order to gain admission. The significance of this shift, if any, remains to be seen.

38 Precisely what we mean when we talk about "discretion" in admissibility determinations is thoughtfully explored in Peter Sankoff, "The Search for a Better Understanding of Discretionary Power in Evidence Law" (2007) 42:32 Queens LJ 487.

39 *Khan*, *supra* note 17.

40 *Handy*, *supra* note 8.

41 *White Burgess Langille Inman*, *supra* note 33; *R v Abbey*, 2009 ONCA 624.

42 For influential modern expressions of either tendency, see Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56:1 U Chicago L Rev 11758; Cass R Sunstein, "Problems with Rules" (1995) 83 Cal L Rev 953.

43 *R v Schneider*, 2022 SCC 34 at para 36.

The exclusionary rules and the concerns that inform the residual exclusionary discretion find their origins in many sources. As already alluded to, many of them can be traced to the dynamics of the jury trial and the adversary system of party presentation. But what specific policy concerns motivate courts to exclude evidence altogether or limit its permissible use?

IV. THE OBJECTIVES OF EVIDENCE LAW

Most obviously, the law of evidence is meant to promote the accuracy of factual determinations made at trial.[44] A law of evidence that did not tend to facilitate the accurate determination of the disputed facts would fail in its most basic purpose. The modern trend—ostensibly furthered by the recourse to principles over rigid categories—has been to "remove barriers to the truth-seeking process."[45]

Bentham may or may not have been right that the surest way to reach the truth is to allow in all relevant evidence. But truth-seeking, as important as it is, has never been the sole objective of Canadian evidence law. Other objectives, like ensuring fairness to the accused and promoting adjudicative efficiency, have also informed the development of criminal evidence law. And this helps to explain the extent to which our evidence law diverges from the pure Benthamite inclusionary ideal.

Before moving on to other objectives, it is important to be precise about what truth-seeking means in the criminal law context. Most obviously, it entails convicting the guilty and acquitting the innocent. However, a system run by humans can never achieve perfect accuracy in this respect. Accordingly, the criminal law does not place equal weight on those two outcomes: as reflected in Blackstone's famous ratio,[46] avoiding wrongful convictions takes precedence over ensuring that all guilty people are convicted. The burden of proof on the Crown—beyond a reasonable doubt—necessarily means that many *likely* guilty people will be acquitted. This is exactly how the system is supposed to work, and the law of evidence reinforces this bias in a number of ways.

For instance, the accused enjoys a variety of protections against self-incrimination, both at common law and now as a matter of constitutional entitlement. Very often, the accused will be the person best placed to answer the allegation; therefore, a system focused solely on seeking the truth might contemplate requiring the accused to speak to police or testify at their own trial. Nonetheless, the "affront to dignity and privacy"[47] occasioned by such a requirement would be too high a price to pay for any truth-seeking benefit that would accrue from it.

Likewise, it would often improve the accuracy of fact-finding to allow the jury access to all manner of relevant information that is ordinarily kept from it. For example, a jury would benefit from knowing that an accused charged with bank robbery had previously served a penitentiary sentence for the same offence. The universe of people who would consider robbing a bank—much less actually do so—is presumably much smaller

44 *Seaboyer*, *supra* note 35 at 609.

45 *R v Levogiannis*, [1993] 4 SCR 475 at 487, 1993 CanLII 47.

46 "[T]he law holds that it is better that ten guilty persons escape than that one innocent suffer": W Blackstone, *Commentaries on the Laws of England*, Book IV (Oxford: Clarendon Press, 1897) ch 27 at 358, quoted by Major J (dissenting) in *R v Lepage*, [1995] 1 SCR 654 at para 45, 1995 CanLII 123.

47 *R v Amway Corp*, [1989] 1 SCR 21 at 40, 1989 CanLII 107.

than the general population. Identifying the accused as one of those people would thus provide the jury with a valuable tool with which to adjudicate the issue of identity. Likewise, consider an accused alleged to have sexually assaulted his girlfriend, who was previously charged (but acquitted) of a sexual assault against a previous partner. Even though the prior allegation was not proved beyond a reasonable doubt, what are the chances that the same person would be falsely accused of the same crime twice by different people? Would the jury not benefit from knowing that the defendant had been accused of this before?

In both instances, the risk of a "wrongful acquittal" would probably be materially reduced by informing the jury of the accused's prior history. But the law precludes this result for reasons of policy. It is seen as unfair to make an accused defend not only the particular allegation before the court, but also their entire life that led up to the charge. Moreover, the risk of a wrongful conviction is heightened where the jury might be distracted by prior misconduct and tempted to punish the accused for other acts.[48] This risk might be quantitively smaller than the risk of a "wrongful acquittal" that flows from excluding the evidence but is *qualitatively* more significant because of the premium the law places on avoiding wrongful convictions.[49]

The rule against hearsay is likewise underpinned by a set of systemic values that are sometimes in tension. Most obviously, it is predicated on a truth-seeking rationale—namely, that hearsay is less reliable than first-hand testimony. But the rule is also grounded in fairness concerns.[50] In general, fairness dictates that an accused should be able to "confront" their accuser in order to directly challenge the veracity of inculpatory evidence.[51] But not always. The Supreme Court has held that where adequate substitutes for contemporaneous cross-examination exist, or where the reliability of the evidence could not realistically be challenged, the interests of justice may favour admission.[52] In other words, the truth-seeking objective prevails over fairness objections if the relevant criteria are satisfied.

The goal of promoting trial efficiency also informs a number of evidentiary rules. These range from the straightforward (e.g., pursuant to s 7 of the *Canada Evidence Act*, neither side can call more than five expert witnesses without leave of the court) to the frequently misunderstood. The collateral facts rule is in the latter category. Although often wrongly invoked to limit cross-examination perceived as tangential, it places limits on the ability of a party to call evidence *contradicting* answers given earlier in cross-examination. The opposing party can call contradictory evidence only if it bears directly on the issues at stake in the litigation; it cannot do so if the matter goes only to

48 *Handy*, *supra* note 8 at para 25.

49 In the first example concerning prior convictions, the general rule of inadmissibility can be displaced if the Crown meets the stringent test for admission of similar fact evidence: *Handy*, *supra* note 8. Admissibility arises at the point at which the benefit to truth-seeking entailed by the evidence is seen to outweigh concerns about trial unfairness and wrongful conviction. With respect to the second example (the prior acquittal), this would never be admissible because of the Charter guarantee against double jeopardy and the doctrine of issue estoppel: *R v Mahalingan*, 2008 SCC 63.

50 *Khelawon*, *supra* note 17 at para 3.

51 Indeed, the "confrontation clause" of the Sixth Amendment has been interpreted by the US Supreme Court to forbid the admission of most hearsay evidence in a criminal trial: *Crawford v Washington*, 541 US 36 (2004). As will be seen in Chapter 6, the Canadian approach is less categorical.

52 *Khelawon*, *supra* note 17 at para 42.

credibility.[53] A system concerned only with truth-seeking might choose to allow such efforts, since they may in fact yield more accurate results. But our law recognizes that reasonable boundaries have to be placed on the ability of either side to chase the resolution of tangential issues down rabbit holes.

V. DEFINING RELEVANCE AND MATERIALITY

As mentioned earlier, relevance is a categorical precondition to admissibility. Although irrelevant evidence sometimes finds its way into a trial through error or oversight, it is never properly admissible.

The relevance of a piece of evidence must be assessed in relation to the fact or facts it seeks to prove or disprove. This is where materiality comes in. No piece of evidence is relevant or irrelevant in the abstract; rather, it must be relevant to a "material fact." A fact is material if it is "*in issue* according to the governing substantive and procedural law and the allegations contained in the indictment."[54] In other words, materiality is determined by what is legally and factually in dispute between the Crown and defence.

Materiality is usually straightforward and for that reason often overlooked in the admissibility analysis. Relevance is where the real work gets done.

Evidence is relevant if it "tends to increase or decrease the probability of a fact at issue"—that is, a material fact.[55] Or, as formulated by Doherty JA in *Watson*:

> Relevance … requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A." If it does then "Fact A" is relevant to "Fact B." As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and *prima facie* admissible.[56]

Sometimes, longer chains of inference are necessary to establish relevance. For example, in *Watson,* the accused was charged with murder. He claimed that he went with two associates to the deceased's place of business. He stayed outside while the associates confronted the deceased. The Crown alleged that the accused was party to a planned and deliberate killing. The contested piece of evidence was testimony that the deceased habitually carried a handgun ("Fact A"). This was relevant to the defence assertion that the deceased was armed when confronted by the accused's associates ("Fact B"). That is, evidence of the deceased's habit of carrying a gun made it more likely that he was carrying one on the occasion in question than if this evidence had not been

53 *R v AC*, 2018 ONCA 333 at para 46; *R v MacIsaac*, 2017 ONCA 172.

54 *R v Candir*, 2009 ONCA 915 at para 49 (emphasis added).

55 *Schneider*, *supra* note 43 at para 39; *R v Arp*, 1998 CanLII 769 at para 38, [1998] 3 SCR 339. Similarly, according to the US *Federal Rules of Evidence*, r 401, evidence is relevant if (a) it has a tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

56 *R v Watson*, 30 OR (3d) 161 at 172, 1996 CanLII 4008 (CA). Another useful formulation is as follows: "The fact sought to be proved is termed the 'principal fact'; the fact which tends to establish it, 'the evidentiary fact.' When the chain consists of more than two parts, the intermediate links are principal facts with respect to those below, and evidentiary facts with respect to those above them": *Jones v Donaghey*, 2011 BCCA 6 at para 17, quoting from *R v White*, 1926 CanLII 471 (BCCA), adopting a passage from SL Phipson, ed, *Best on Evidence*, 12th ed (London: Sweet & Maxwell, 1922).

adduced. This, in turn, made it more likely that the fatal event was the product of a spontaneous altercation with an armed individual ("Fact C"), as opposed to a planned and deliberate killing as alleged by the Crown. Notably, the connection between Fact A and Fact C is indirect; the former gains its relevance through an intermediate proposition.

Relevance is assessed according to "everyday experience and common sense."[57] This sounds simple, but as will be seen, experience and common sense can engage highly contestable questions of value judgment, psychology, even ideology.

Relevance is a binary concept: evidence is either relevant or it is not (notwithstanding that there may be reasonable disagreement about which label applies in any given instance).[58] Accordingly, the threshold for relevance is modest. The existence of Fact A need only make Fact B *slightly* more likely than if Fact A had not been adduced. In *Watson*, evidence that the deceased habitually carried a gun (Fact A) did not definitively establish that he was armed on the occasion in question. Still less did it establish that he was the aggressor or disprove the accused's involvement in a planned and deliberate killing. But it did not need to. Its relevance lay in the recognition that it made it *somewhat* more likely that the deceased was armed, which in turn *somewhat* raised the likelihood of an unanticipated armed confrontation rather than a planned ambush.

There are pragmatic reasons for maintaining a low threshold of relevance clearly distinguished from ultimate probative value. As Charron J pointed out in *Blackman*, relevance can only be finally assessed in relation to all the other evidence at trial—and yet, the trial process would grind to a standstill if admission needed to await such a global assessment.[59] Therefore, the judge will often need to make a determination of relevance based on the submissions of counsel about how other anticipated evidence will inform the relevance of the evidence in question.[60]

In accordance with the low threshold just described, evidence is not irrelevant merely because it may appear equivocal or ambiguous.[61] Neither is it irrelevant because it has the *potential* for misuse.[62] Rather, if the evidence is *capable* of being given non-speculative meaning in a manner that affects the probability of a fact in issue, it is relevant.[63] However, the ambiguous or equivocal nature of the evidence is properly considered by the trial judge, in determining whether the probative value of the evidence exceeds its prejudicial effect.[64]

In *Schneider*, the Supreme Court considered whether the trial judge erred in admitting testimony from the accused's brother that he had overheard the accused make an admission along the lines of "I did it" or "I killed her" while on the phone with someone else. The brother could not recall the precise words used and did not have the benefit of hearing the entire conversation. For the majority in the Court of Appeal, the jury could not properly give meaning to this overheard fragment; it therefore had no relevance and

57 *R v Jackson*, 2015 ONCA 832 at para 120.

58 *Ibid* at para 123. As pointed out by Watt JA, it is strictly incorrect to speak of evidence as "highly" or "minimally" relevant, however ubiquitous such references may be.

59 *R v Blackman*, 2008 SCC 37 at para 30.

60 *Schneider*, *supra* note 43 at para 41.

61 *Ibid* at para 43.

62 *White 2011*, *supra* note 19 at para 45.

63 *Ibid* at para 44; *Schneider*, *supra* note 43 at para 39.

64 *Schneider*, *ibid* at para 63.

should have been excluded.[65] But a majority of the Supreme Court disagreed, finding that the jury could give non-speculative meaning to what the brother said he overheard.[66] All of the evidence needed to be considered in determining whether there was sufficient context to give the statement meaning, not just (as held by the Court of Appeal majority), the circumstances immediately surrounding the statement itself.[67] The trial judge provided a comprehensive jury instruction on the potential frailties of this evidence and made no error in exercising her discretion to admit it.[68]

As evidenced by the dissent in *Schneider*, such determinations can involve fine-grained distinctions between what is and is not capable of being given non-speculative meaning.[69] In other earlier cases, which remain good law, snippets of putative admissions by the accused overheard by police or third parties have been excluded as too ambiguous in their meaning and too prejudicial in their impact.[70] And in the post-*Schneider* case of *Merritt*,[71] Paciocco JA comprehensively reviewed the jurisprudence on this topic and concluded that the trial judge had erred by failing to tell the jury that if they could not determine the meaning of the partial statement at issue, they could not use it as an admission.

Because of the uniquely powerful quality of confessions or admissions by an accused, the need for such direction is likely most acute where the allegedly ambiguous item is evidence of that nature. The underlying principle is of more general application, however.[72] Any evidence that is *irredeemably* equivocal or ambiguous is irrelevant and therefore inadmissible, but where the ambiguity is merely arguable, this should be the jury's call to make with the assistance of proper instruction. Courts routinely admit evidence that is *capable* of misuse, presuming that juries are capable of following directions (and that trial judges are capable of self-instructing) on the relevant dangers.[73]

The concept of relevance just discussed is sometimes referred to as "logical relevance," as distinct from "legal relevance." Logical relevance is solely concerned with whether the evidence in question makes the existence or non-existence of a material fact more likely. It is not concerned with the costs or benefits of admitting the evidence. Legal relevance goes further and asks whether logically relevant evidence is "sufficiently probative to justify its admission despite the prejudice that may flow from its admission."[74] For instance, under the *Mohan* test for admission of expert evidence, the "relevance" criterion is one of legal relevance: not only must the evidence be logically

65 *R v Schneider*, 2021 BCCA 41 at para 176.

66 *Schneider*, *supra* note 43 at para 77.

67 *Ibid* at para 42.

68 *Ibid* at paras 82-84. Rowe J relied for support on the following appellate cases in which fragmentary or incomplete admissions were held to have sufficient context to be capable of being given meaning: *R v Bennight*, 2012 BCCA 190; *R v Buttazzoni*, 2019 ONCA 645; *R v Hummel*, 2002 YKCA 6; *R v Reierson*, 2010 BCCA 381 at para 40.

69 *Schneider*, *ibid* at paras 89-92.

70 *R v Ferris*, 1994 ABCA 20, aff'd [1994] 3 SCR 756, 1994 CanLII 31; *R v Hunter*, 2001 CanLII 5637 (ONCA).

71 *R v Merritt*, 2023 ONCA 3.

72 *Schneider*, *supra* note 43 at paras 42-43.

73 Examples discussed in *White 2011*, *supra* note 19 at paras 54-60 include the evidence of jailhouse informants (*R v Khela*, 2009 SCC 4); eyewitness identification evidence; and *R v Hibbert*, 2002 SCC 39.

74 *Abbey*, *supra* note 41 at para 82.

relevant, but it must also be sufficiently probative to outweigh the burdens its admission will place on the trial process.[75]

Legal relevance is something of a misnomer, because it brings in cost–benefit considerations that, while important, are not really about relevance at all.[76] In other words, they are about policy rather than logic applied to experience. That said, this distinction between logical and legal relevance may be useful because of the frequency with which lawyers and judges invoke the concept of relevance in ways that transcend its purely logical sense.

For instance, it is often said that an accused's prior criminal history is "irrelevant" to the question of guilt or innocence. But no one would deny that in many circumstances, the fact that the accused committed crimes in the past *does* make it somewhat more likely, as a matter of logic and common sense, that they committed the crime in question. Past behaviour is not a perfect guide to future conduct, but we reasonably rely on it all the time in our daily lives. Subject to exceptions,[77] the law excludes this kind of evidence, not because it is logically irrelevant but because its admission will exact too great a cost in terms of the accused's right to be presumed innocent and to be judged on a specific allegation rather than their general character.[78] In other words, its probative value—while often significant—is normally exceeded by its prejudicial effect.

The Supreme Court has held that relevance determinations are questions of law, reviewable on a correctness standard.[79] This certainly makes sense for questions of logical relevance. Since they are binary and essentially logical in nature, they are less likely to engage the trial judge's privileged position to hear the witnesses and perceive the dynamics of trial. For questions of legal relevance, which involve a more fact-specific balancing, a measure of deference is more appropriate. For instance, the Supreme Court has held that where admissibility of other sexual activity evidence under Code, s 276 is concerned, the threshold determination of relevance is a question of law reviewable for correctness, while deference is accorded to the judge's ultimate balancing of probative value and prejudicial effect.[80]

VI. UNDERSTANDING PROBATIVE VALUE AND PREJUDICIAL EFFECT

We have already reviewed the basic principle that all relevant evidence is admissible unless excluded by a specific rule of law or policy. What general principle underpins the exclusion of *relevant* evidence? At a high level of generality, the unifying principle is this:

> Evidence should be excluded if its probative value is exceeded by its prejudicial effect.

75 *R v Mohan*, [1994] 2 SCR 9 at 20-21, 1994 CanLII 80; *ibid* at paras 88-84.

76 Likely for this reason, Rowe J in *Schneider*, *supra* note 43 at para 38 expressly defined "relevance" as "logical relevance."

77 Prior discreditable conduct can be admitted exceptionally under the similar fact evidence rule: *Handy*, *supra* note 8. Further, if the accused testifies, they can usually be cross-examined on their criminal record for the purpose of challenging their credibility: *Corbett*, *supra* note 7. See also Chapter 7.

78 *Handy*, *ibid* at paras 31-40.

79 *Mohan*, *supra* note 75 at 20-21; *Schneider*, *supra* note 43; *R v TWW*, 2024 SCC 19 at para 21.

80 *TWW*, *ibid* at paras 21-22. Note that Code, s 278.97 deems such admissibility determinations to be "questions of law" for appeal purposes.

This principle both underpins most of the established exclusionary rules and creates a free-standing exclusionary jurisdiction that can be exercised where no specific rule is engaged.[81] At one level, it can seem self-evident: evidence should be excluded if it causes more harm than good. How could it be otherwise? In order to give the general principle meaningful content, we must understand what is meant by "probative value" and "prejudicial effect." Both terms contain implicit value judgments and cannot be understood without reference to those values.

A. PROBATIVE VALUE

Probative value[82] represents the extent to which the evidence actually assists in establishing the proposition for which it is tendered. A precondition for this assessment is a determination that the evidence is directed toward a material fact; if it is not, the analysis need go no further. For instance, the bad character of the accused is never a material fact, so evidence directed only toward establishing this proposition is simply irrelevant.[83]

Where the evidence is directed toward a material fact, probative value must be assessed with reference to the rest of the evidence and the positions of the parties. Sometimes the same piece of evidence can take on dramatically different degrees of probative value when these variables change. For instance, consider a scenario where the accused has fled the scene of a violent altercation leading to a charge of aggravated assault. Flight might be powerful evidence of the accused's consciousness of guilt. In other words, the evidence of flight may have substantial probative value on the issue of identity. After all, why would an innocent person flee the scene? Although alternative explanations can be proffered—perhaps the accused had an outstanding arrest warrant for an unrelated incident—the existence of alternative explanations does not rob the evidence of its probative value. Or, to be more precise, the existence of alternative explanations does not nullify the *potential* of the evidence to be accorded probative value depending on the jury's view of the facts.[84]

However, the analysis of probative value will change significantly if the accused takes the stand and admits to assaulting the complainant but denies having caused the most significant injuries. In essence, the accused has acknowledged committing common assault but denied committing aggravated assault. In *Arcangioli*, the Supreme Court held that on these facts, the jury should have been instructed that the accused's flight from the scene had *no* probative value because the action was *equally* explicable by his consciousness of guilt for either of the two offences, one of which he admitted.[85]

Assessments of probative value will depend to a significant extent on the judge or jury's background assumptions about human behaviour. Even on the narrow question of when flight from the scene can support an inference of consciousness of guilt, much judicial ink has been spilled and contradictory results have been reached. In *White 2011*,

81 *R v Collins*, 2001 CanLII 24124 at para 19 (ONCA).

82 There is an unfortunate trend in some recent judicial decisions of using the term "probity" as a synonym for probative value: see e.g. *R v Durham Regional Crime Stoppers Inc*, 2017 SCC 45 at paras 43-47. "Probity" refers to moral uprightness and is not the noun form of the adjective "probative." If a new coinage is required, "probativity" would be preferable.

83 *Handy*, *supra* note 8 at para 71.

84 *R v White*, [1998] 2 SCR 72, 1998 CanLII 789.

85 *R v Arcangioli*, [1994] 1 SCR 129, 1994 CanLII 107.

the Supreme Court split three ways on whether and how the accused's lack of hesitation in fleeing the scene of a shooting could undermine his claim that his gun went off accidentally.[86] Justice Rothstein took it as common sense that a person whose gun discharges accidentally will probably evince surprise, which will, in turn, manifest in hesitation before leaving the scene.[87] According to Binnie J, this assumption "relies too heavily on the witnesses' power of observation and interpretation, and will often involve a series of speculative inferences from a failure to perform as the onlooker thinks 'normal' to a conclusion of guilt of a particular offence."[88] For her part, Charron J came down in the middle, agreeing with many of the concerns expressed by Binnie J about this kind of evidence but with Rothstein J that any error in the jury instructions was of no significance on the facts of the case.

In *TWW*,[89] the critical issue was the admissibility of evidence that the accused and the complainant (his estranged wife) had had consensual sex the night before the alleged sexual assault. To the majority, this evidence was irrelevant—and inadmissible under the s 276 regime—because it relied for its probative value upon the "myth" that the complainant's prior consent to sex made it more likely that she consented on the following day.[90] For the dissent, the evidence was relevant to rebut the complainant's contention that the couple's separation made the accused's account of consensual sex implausible.[91]

The differing views in *White 2011* and *TWW* demonstrate the extent to which assessments of probative value can be highly contestable. One person's common sense may be another person's unwarranted assumption. Distinguishing one from the other—and persuading the court of the validity of the distinction being drawn—is the goal of much of the trial lawyer's work.

Assessing the credibility and reliability of the evidence is generally a matter for the trier of fact, not the trial judge in their gatekeeper role. In other words, determining the probative value of the evidence for admissibility purposes is normally a matter of evaluating the quality of the inferences to which it gives rise if accepted, not whether or not it will actually be believed. That said, there are circumstances in which the strength or frailty of the evidence is inseparable from a proper assessment of its probative value. For instance, where the Crown seeks to tender extraneous evidence of the accused's prior discreditable conduct under the common law similar fact evidence rule, the trial judge determining admissibility must consider whether the evidence of the other alleged acts is reasonably *capable* of belief.[92] Evidence not meeting that threshold could not displace the general presumption of inadmissibility. And there are certain statutory provisions requiring a judicial assessment of probative value as a gateway to admissibility, those concerning a complainant's other sexual activity and private records in sexual assault prosecutions being the most prominent current examples.[93]

86 *White 2011*, *supra* note 19.
87 *Ibid* at paras 73-74.
88 *Ibid* at para 142.
89 *TWW*, *supra* note 79.
90 *Ibid* at para 38.
91 *Ibid* at para 122.
92 *Handy*, *supra* note 8 at para 134.
93 Code, ss 276(2)(d), 278.92(2)(b).

B. PREJUDICIAL EFFECT

"Prejudicial effect" measures the extent to which reception of the evidence will distort the trial by undermining fundamental principles like the presumption of innocence and the right to be tried on one's actions rather than character. Evidence can also be prejudicial to the Crown—for instance, where it compromises the truth-seeking function of the trial by encouraging reliance on pernicious myths or stereotypes as a basis for acquittal.[94]

Evidence is *not* prejudicial simply because it will tend to incriminate the accused. The question is whether the evidence operates unfairly, not merely unfortunately.[95] In the jurisprudence concerning the general exclusion of evidence of the accused's prior discreditable conduct, the law recognizes two forms of prejudice: moral prejudice (the risk that the trier of fact will be inflamed by the accused's bad character)[96] and reasoning prejudice (the risk that the trier of fact will be distracted from their proper focus by the bad character evidence).[97] Although specific to the context of discreditable conduct evidence, this breakdown provides a useful framework for thinking about prejudicial effect more generally. That is, evidence can operate prejudicially by (1) casting the accused in an unfair light, or (2) otherwise distorting the fact-finding process. Distinguishing what counts as "unfair" from what is merely unfortunate is a value-laden exercise that draws on both common law and Charter principles.

Likewise, the weighing of probative value and prejudicial effect is a subjective, normative exercise that does not lend itself to mathematical precision. As Binnie J noted in *Handy*, probative value and prejudicial effect are two variables that "do not operate on the same plane." Probative value "goes to proof of an issue," while prejudicial effect concerns "the fairness of the trial."[98] Weighing these things against each other has something of the character of asking whether a particular bag of garbage smells worse than a particular sunset looks beautiful. That said, a measure of certainty and predictability is provided by the common law method of treating like cases alike. Where precedent offers little guidance, the admissibility decision involves a large measure of discretion that will typically be afforded deference on appeal.[99]

As already indicated, the courts have recognized a residual jurisdiction to exclude evidence whose probative value is exceeded by its prejudicial effect, even where the evidence is relevant and does not offend any particular exclusionary rule.[100] Although this discretion was originally limited to circumstances where the probative value of the evidence was "trifling,"[101] it has broadened in scope since the enactment of the Charter to provide more robust protection of the fundamental right to a fair trial.[102]

Even where a statutory provision expressly authorizes the admission of evidence, courts have imputed a residual discretion to exclude it in circumstances where admission

94 *R v Darrach*, 2000 SCC 46 at para 24.
95 *Handy*, *supra* note 8 at para 139; *R v Shearing*, 2002 SCC 58 at para 65.
96 *Handy*, *ibid* at paras 31, 100, 139; *Shearing*, *ibid* at para 64.
97 *Handy*, *ibid* at paras 100, 144-46; *Shearing*, *ibid* at para 65.
98 *Handy*, *ibid* at para 148.
99 *Hart*, *supra* note 15 at para 110.
100 *Seaboyer*, *supra* note 35; *Morris*, *supra* note 34.
101 *The Queen v Wray*, [1971] SCR 272 at 293, 1970 CanLII 2.
102 *R v Harrer*, [1995] 3 SCR 562 at paras 13, 41, 1995 CanLII 70.

would create unfairness to the accused. For instance, in *Corbett*,[103] the Supreme Court affirmed the constitutionality of the section of the *Canada Evidence Act* allowing the accused to be cross-examined on his prior criminal record. However, the Court read in a discretion to edit or exclude the record in circumstances where admission would impair the fairness of the trial.[104] A similar discretion was recognized in *Potvin*,[105] where the Court upheld the Code provision permitting the admission of a witness's preliminary inquiry testimony where the witness is unavailable at the time of trial.

For evidence led by the defence, the threshold for exclusion is higher: in order to exclude relevant defence evidence, its prejudicial effect must *substantially* outweigh its probative value.[106] Interestingly, this formula—which has since been codified in the statutory test for admission of other sexual activity and private records in sexual offence prosecutions—explicitly contemplates the admission of defence evidence whose prejudicial effect exceeds its probative value but not "substantially" so.[107] The higher threshold reflects the presumption of innocence and the premium the system places on preventing wrongful conviction.[108] Excluding relevant—and therefore potentially exculpatory—defence evidence from the jury's consideration is a dangerous proposition if it is not undertaken with judicious restraint. This is what caused the Court in *Seaboyer* to strike down the original version of the "rape shield" law, which barred evidence of the complainant's prior sexual history: in addition to barring improper reliance on myths and stereotypes, it prohibited legitimate uses of prior sexual conduct that did not engage any improper reasoning.[109]

Put differently, courts have a "residual discretion to relax in favour of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aims to safeguard does not exist."[110] The limits to this discretion will be reached at the point identified by *Seaboyer*: that is, where the prejudicial effects of the evidence substantially outweigh its probative value. The residual discretion does not open the floodgates to otherwise inadmissible evidence at the behest of the defence. For instance, unreliable hearsay tendered by the defence must still be excluded because unreliability is the very "danger" the exclusionary rule aims to guard against.[111]

VII. BURDENS AND STANDARDS OF PROOF

Evidence is about proof, or lack thereof. The specific rules that make up the law of evidence, therefore, cannot be understood in isolation from these questions: Who has to prove what? And to what degree of certainty?

103 *Corbett*, *supra* note 7.

104 *Ibid*.

105 *R v Potvin*, [1989] 1 SCR 525, 1989 CanLII 130.

106 *Seaboyer*, *supra* note 35 at 611.

107 Code, ss 276(2)(d), 278.92(2)(b). Not surprisingly, one searches in vain for judicial decisions admitting evidence whose probative value is exceeded modestly but not substantially by its prejudicial effect.

108 *R v Grant*, 2015 SCC 9 at para 19.

109 *Seaboyer*, *supra* note 35.

110 *R v Williams*, 18 CCC (3d) 356 at 378, 1985 CanLII 113 (ONCA), Martin JA, quoted with approval by Cory J in *R v Finta*, [1994] 1 SCR 701 at 854, 1994 CanLII 129. See also *R v Folland*, 132 CCC (3d) 14 at para 48, 1999 CanLII 3684 (ONCA), Rosenberg JA; *R v Post*, 2007 BCCA 123 at paras 85-87.

111 *R v Kimberley*, 2001 CanLII 24120 at paras 80-81 (ONCA).

The "burden of proof" refers to the identity of the party that bears the onus of proving the proposition to the relevant standard. The "standard of proof" is the degree to which a proposition must be proven in order to satisfy the relevant legal test.

Burdens of proof are either *persuasive* or *evidential*. A persuasive burden requires the proponent to actually prove the proposition at issue to the requisite standard. The Crown's burden of proving the elements of an offence beyond a reasonable doubt is a persuasive burden. The burden on the defence to prove the "not criminally responsible" defence on a balance of probabilities is also a persuasive burden. By contrast, the burden on the accused to put a defence "in play" by pointing to some evidence in the record that could reasonably support it is an evidential burden.

A. THE BURDEN OF PROOF ON THE CROWN

The ultimate burden of proof, always on the Crown, is to prove the accused's guilt to the standard of beyond a reasonable doubt. This means that *each essential element* of the offence must be proved beyond a reasonable doubt for a finding of guilt to be made. Where an affirmative defence is raised—and determined by the judge to have an air of reality—the Crown must *dis*prove it beyond a reasonable doubt.

What is "proof beyond a reasonable doubt"? Despite the vast amounts of judicial and academic ink that has been spilled in search of an answer, a consensus definition has remained elusive. Instead, Canadian courts have mainly settled for defining it by what it is *not*.[112] Reasonable doubt is not an "ordinary" or "everyday" concept.[113] Beyond the single adjective "reasonable," it should not be further qualified as a "haunting" or "serious" or "substantial" doubt.[114] Proof beyond a reasonable doubt is most certainly not the same as proof on a balance of probabilities. Nor is it proof to an absolute or mathematical certainty—something that is all but impossible in human affairs. However, the standard of proof beyond a reasonable doubt lies much closer to absolute certainty than to a balance of probabilities.[115]

The equation of proof beyond a reasonable doubt with "moral certainty" is arguably one of the more promising formulations. It helpfully conveys that proof of guilt must be sufficiently certain to justify the morally significant act of condemning a person as a criminal and potentially depriving them of liberty. But it, too, has been disapproved by the Supreme Court as unhelpful and potentially misleading.[116] Neither should the judge give the jury examples of what might constitute proof beyond a reasonable doubt in everyday life.[117] Jurors should not be told that a reasonable doubt is doubt for which

112 The judicial aversion to definition may stem in part from the uncomfortable recognition that although wrongful convictions are to be avoided at (almost) all costs, total certainty is impossible. It would therefore appear inevitable that wrongful convictions will happen. No one has any hesitation in affirming that proof on a balance of probabilities means 50 percent plus one, but few jurists would wish to quantify proof beyond a reasonable doubt. Should it be calibrated at 90 percent certainty, 95 percent, 99 percent? Ultimately, perhaps this is the wrong question, because proof beyond a reasonable doubt speaks to the subjective attitude of the trier of fact (being "sure") rather than an objective assessment of probabilities.

113 *R v Lifchus*, [1997] 3 SCR 320 at para 23, 1997 CanLII 319.

114 *Ibid* at para 26.

115 *R v Starr*, 2000 SCC 40 at para 242.

116 *Lifchus*, *supra* note 113 at para 25.

117 *R v Bisson*, [1998] 1 SCR 306, 1998 CanLII 810.

they can give a reason, because this may discourage an inarticulate juror from giving effect to a valid and sincerely held doubt.[118]

In *Lifchus*, the Supreme Court provided authoritative guidance on how reasonable doubt should be explained to juries. In so doing, it abandoned the traditional view that reasonable doubt is self-defining and the less said about it the better.[119] Rather, following *Lifchus*, the trial judge must explain how the standard of proof beyond a reasonable doubt relates to the presumption of innocence. The Court provided the following model charge, which is now, with minor modifications, routinely delivered to criminal juries at the end of trial:

> 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 engrained 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.[120]

This precise formulation is not sacrosanct, so long as the fundamental ideas are conveyed—namely, that the standard of proof is inextricably intertwined with the presumption of innocence;[121] that a reasonable doubt can arise from evidence or lack of evidence;[122] and that if the accused is only "probably" guilty, they must be acquitted.[123] In *Starr,* the Supreme Court encouraged trial judges to situate proof beyond a reasonable doubt between the balance of probabilities on one hand and absolute certainty on the other, while making clear that it lies much closer to the latter than to the former.[124] This clarification, while helpful, is not mandatory.[125]

Ultimately, the simplest formulation is probably the closest to the truth: to be satisfied beyond a reasonable doubt is to be *sure* that the accused is guilty.

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118 *Lifchus*, *supra* note 113 at paras 28-30; *R v Grant*, 2016 ONCA 639 at para 110.

119 *Lifchus*, *supra* note 113. See e.g. *Regina v Campbell*, 38 CCC (2d) 6 at 25, 1977 CanLII 1191 (ONCA).

120 *Lifchus*, *ibid* at para 39.

121 *Ibid* at para 27.

122 *R v Anderson*, 2003 CanLII 31748 (ONCA).

123 *Lifchus*, *supra* note 113 at para 36; *R v Avetysan*, 2000 SCC 56 at para 14.

124 *Starr, supra* note 115 at para 242.

125 *R v Archer*, 2005 CanLII 36444 at paras 36-38 (ONCA).

The Crown need not prove each constitutive fact beyond a reasonable doubt: it must only discharge that burden with respect to the elements of the offence.[126] In a jury trial, individual jurors may take different factual pathways to guilt beyond a reasonable doubt.[127] Accordingly, it is a mistake to relate the standard of proof to individual items of evidence.

By the same token, defence evidence need not be "believed" or "accepted" before it can give rise to a reasonable doubt. Therefore, it is an error to proceed on the basis that the trier of fact should exclude from consideration evidence that has not been accepted, or that the case should be decided only on "proven facts."[128]

Similarly, when the accused testifies, the ultimate question is not whether they are believed or are deemed more credible than witnesses for the Crown. It is whether the Crown's case, as a whole, proves the charge beyond a reasonable doubt. This, of course, is the *W (D)*[129] principle, named after the most-cited decision in Canadian criminal law. In that case, Cory J enunciated the familiar formula relating the assessment of credibility to proof beyond a reasonable doubt:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.[130]

Almost as familiar to criminal lawyers as the *W (D)* formula itself is the customary disclaimer that it is not a "magic incantation."[131] The words themselves are not sacrosanct, but the underlying principle is. A criminal trial is not a credibility contest. The accused's evidence does not have to be affirmatively believed in order to give rise to a reasonable doubt. A state of uncertainty is enough. The three "steps" of *W (D)* are not three sequential stages that a trier of fact must pass through in that order; rather, they describe three possible conclusions a trier of fact could reach on a reasoned consideration of conflicting evidence.[132]

It is now broadly accepted that an equivalent direction should be given in cases where the accused does not testify, but where there is defence evidence requiring credibility findings that could give rise to a reasonable doubt on an essential element of the offence.[133] However, where acceptance of the defence evidence would not necessarily lead to an acquittal, the standard *W (D)* instruction will be inappropriate. This can arise where either an element of the offence itself or an applicable defence has an objective component. In such cases, acceptance of the accused's evidence can be entirely consistent with a finding of guilt if, for example, the accused acted unreasonably in a

126 *R v Morin*, [1988] 2 SCR 345, 1988 CanLII 8. This includes disproving a defence that has been put in play.
127 *R v Thatcher*, [1987] 1 SCR 652, 1987 CanLII 53.
128 *R v Miller*, 1991 CanLII 2704 (ONCA); *R v Bui*, 2014 ONCA 614 at paras 24-28.
129 *R v W (D)*, [1991] 1 SCR 742, 1991 CanLII 93.
130 *Ibid* at 758.
131 *R v S (WD)*, [1994] 3 SCR 521 at 533, 1994 CanLII 76; *R v JHS*, 2008 SCC 30.
132 *R v JE*, 2012 ONSC 3373 at paras 17-20.
133 *R v BD*, 2011 ONCA 51 at para 114; *R v Cuthill*, 2018 ABCA 321 at para 94.

relevant way.[134] There are also scenarios in which an accused's own version of events (including in any police statements tendered in evidence) has both inculpatory and exculpatory elements. In such circumstances, the standard *W (D)* charge may not be necessary or desirable.[135]

However, where the accused's evidence is arguably inculpatory on some of the charged offences but exculpatory on others, it is usually preferable to deliver a "standard" *W (D)* charge and leave the necessary modifications to the offence-specific directions.[136]

B. BURDENS OF PROOF ON THE DEFENCE

The accused never has to prove anything beyond a reasonable doubt. Normally, the accused needs only to raise a reasonable doubt on an element of the offence in order to be entitled to an acquittal. Exceptionally, however, the accused is required to establish a defence on a balance of probabilities in order to secure an acquittal: not criminally responsible by reason of mental disorder is the prime example,[137] and the defence of non-mental disorder automatism is another.[138]

More commonly, as seen above, the accused bears an evidential burden to put a defence in play, thereby activating the Crown's burden to disprove it beyond a reasonable doubt. An evidential burden is not a burden of proof, in that it does not require the accused to prove anything.[139] It merely requires the accused to adduce or point to some evidence that raises an "air of reality" to the defence in question.[140] The evidence in question can come from the Crown's case or from the defence. In determining whether the evidentiary burden has been met, the trial judge does not decide whether the defence will or should succeed, only whether it is *capable* of succeeding—which normally means raising a reasonable doubt.[141] If there is direct evidence on every element of a defence, it must be put to the jury, since it is up to the jury to accept or reject such evidence.[142] If the evidence is circumstantial—or where there is an objective element that involves normative evaluation rather than factual proof—the trial judge engages in a "limited weighing" to determine whether the evidence is reasonably capable of supporting the necessary inferences.[143]

It can sometimes be challenging to distinguish between what counts as an element of the offence that the Crown must always prove, and what counts as an element of a defence that the Crown must only disprove when the accused meets their evidential

134 *R v Baptiste*, 1998 CanLII 14999 at para 29 (BCCA); *R v Nieto*, 2007 MBCA 82 at para 47; *R v Sadiqi*, 2013 ONCA 250 at para 21.

135 *R v McClenaghan*, 2010 ABCA 222 at paras 25-35; *R v Thiara*, 2010 BCCA 415 at paras 23-25; *R v Ibrahim*, 2019 ONCA 631 at para 37.

136 *R v Ruthowsky*, 2024 ONCA 432 at para 74.

137 Code, s 16(2), upheld as a reasonable limit on the presumption of innocence in *R v Chaulk*, [1990] 3 SCR 1303, 1990 CanLII 34.

138 *R v Stone*, [1999] 2 SCR 290, 1999 CanLII 688.

139 *R v Fontaine*, 2004 SCC 27.

140 *R v Cinous*, 2002 SCC 29 at para 52; *R v Schwartz*, [1988] 2 SCR 443 at 466, 1988 CanLII 11.

141 *Cinous*, *ibid* at para 54; *R v Mayuran*, 2012 SCC 31 at para 21.

142 *Cinous*, *ibid* at para 88; *R v Gauthier*, 2013 SCC 32 at para 25.

143 *Cinous*, *ibid* at paras 89-90; *R v Cairney*, 2013 SCC 55 at para 21.

burden. Nowhere was this more evident than in *Morrison*,[144] where the Court entertained a Charter challenge to the "reasonable steps" requirement applicable to the Internet child luring offence in Code, s 172.1. The Court upheld the provision against a Charter challenge on the basis that—all appearances to the contrary—it does *not* allow for a conviction solely on the basis that the accused failed to take reasonable steps to ascertain the interlocutor's age. Rather, it only limits the circumstances in which the accused can discharge their evidential burden to put their honest belief in play. The Crown always bears the ultimate burden of proving that the accused *subjectively believed* the interlocutor was underage.[145] The distinction is a fine one, to say the least.[146]

Fortunately, most offences involve fewer statutory gymnastics, and the interplay of the burdens is more straightforward. If the accused discharges their evidential burden to put the defence in play, the ultimate burden reverts to the Crown. Usually, this means that the Crown must prove all the elements of the offence beyond a reasonable doubt *and* must also disprove at least one element of a live defence to the same standard. For example, if the accused is charged with murder and has raised self-defence, the Crown must prove (1) that the accused caused the death of the deceased and did so with one of the required states of mind; *and* (2) (a) that the accused did not believe on reasonable grounds that force was being used against them, *or* (b) that the accused's use of force was not done for the purpose of self-defence, *or* (c) that the force employed was not reasonable in the circumstances.[147] At the level of principle, a killing carried out in self-defence (or pursuant to any other lawful justification or excuse) is not murder. It therefore makes sense that, if self-defence (or another defence) is in play, the Crown must disprove it beyond a reasonable doubt.

VIII. BOUNDARIES OF EVIDENCE LAW

As noted at various points above, the law of criminal evidence has porous boundaries. It is informed by constitutional values and sometimes even explicitly shaped by Charter requirements. For instance, the evidentiary law of confessions is in regular dialogue with the Charter doctrine of self-incrimination. The statutory rules governing admission of private records in sexual offence prosecutions and admission of scientific evidence in alcohol-driving prosecutions are virtually inseparable from the substantive law governing liability for those offences. Other examples abound.

A less prominent but nonetheless important source of overlap is the trial management power. It is now well established that trial judges possess a power to "control the process of their court and ensure that trials proceed in an effective and orderly fashion."[148] Evidence law, of course, has its own mechanisms for ensuring the efficient conduct of trials through the orderly marshalling of facts—from the basic requirement of relevance all the way through a multitude of cost-benefits analyses in different

144 *R v Morrison*, 2019 SCC 15.

145 *Ibid* at paras 74-91.

146 See also *R v Carbone*, 2020 ONCA 394, applying the *Morrison* approach to the "reasonable steps" requirement for the mistake-of-age defence on a charge of invitation to sexual touching.

147 Code, s 34(1); *R v Hebert*, [1996] 2 SCR 272 at para 23, 1996 CanLII 202.

148 *R v Samaniego*, 2022 SCC 9 at para 20. Prior to *Samaniego*, the leading articulation of the trial management power was that of Rosenberg JA in *R v Felderhof*, 2003 CanLII 37346 (ONCA).

contexts.[149] Where the trial judge intervenes to curtail a cross-examination of significant prolixity but tenuous relevance, are they exercising the trial management power or making an evidentiary ruling? The answer is not merely a matter of terminology since it may affect both the test applied and the intensity of review on appeal.

In *Samaniego*,[150] the Court confirmed the existence of the trial management power and clarified its contours. At issue was a series of mid-trial rulings curtailing four lines of questioning during a particularly repetitious and unfocused cross-examination of a key Crown witness. The majority, speaking through Moldaver J, held that the trial management power and the rules of evidence are generally distinct and that exercise of the former is not a shortcut around the proper application of the latter.[151] However, it recognized that they will sometimes overlap: for instance, where the trial judge needs to enforce compliance (via trial management) with a previous evidentiary ruling.[152] Another example may be where the trial judge decides to cut off a repetitious cross-examination: in one sense, this is managing the trial in the name of efficiency; in another, it is an evidentiary determination that by virtue of repetition, the questions have lost any probative value.[153] And yet another example may be the trial judge's discretion to apply the "rule" in *Browne v Dunn*[154] to ensure adjudicative fairness.[155]

On the facts, Moldaver J held that most of the impugned limitations on cross-examination were exercises of the trial management power. One of the impugned rulings—a curtailment of cross-examination on the witness' preliminary inquiry testimony—was an erroneous evidentiary ruling, but it caused no substantial harm in the majority's view.

Dissenting in *Samaniego*, Côté and Rowe JJ advocated for a stricter separation between evidence law and trial management, emphasizing that many doctrines of evidence law are themselves at least partly rooted in efficiency concerns.[156] The collateral facts rule is one example. The residual discretion to exclude overly prejudicial evidence is another.[157] On this view, efficiency objectives are properly protected by a conscientious application of established evidentiary rules, and nothing can be gained by shielding such rulings under the deferential blanket of trial management authority. In the result, the dissent found the same evidentiary error as the majority but characterized it in much more serious and consequential terms.

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149 Additionally, rules of court provide requirements that need to be complied with for certain evidentiary issues to be adjudicated in the first place. Nonetheless, courts are understandably loath to exclude otherwise admissible evidence on purely procedural grounds. See e.g. *R v Papasotiriou-Lanteigne*, 2017 ONSC 6251, aff'd 2023 ONCA 358 for a case in which egregious non-compliance was sufficient to dismiss an application to call alternate suspect evidence. Relatedly, an application to adduce evidence can be summarily dismissed if it is "manifestly frivolous": *R v Haevischer*, 2023 SCC 11. Although much more often encountered in the context of applications for Charter relief, the summary dismissal power can also potentially be exercised to put a quick end to frivolous evidentiary applications.

150 *Samaniego*, *supra* note 148.

151 *Ibid* at para 24.

152 *Ibid*. See also the discussion in *R v JA*, 2023 SKCA 119 at paras 22-31, upholding the trial judge's decision to deny the Crown permission to re-examine the complainant.

153 See e.g. *R v Polanco*, 2018 ONCA 444 at paras 22-23.

154 (1893) 6 R 67 (HL).

155 See *R v Quansah*, 2015 ONCA 237 at paras 75-86.

156 *Samaniego*, *supra* note 148 at para 133.

157 *Ibid* at paras 134-36.

In any event, there seems to be broad agreement between the majority and dissent that admissibility rulings are, at least in the first instance, almost always a matter of evidence law—while subsequent steps to *enforce* such rulings will engage the trial management power. Nothing in *Samaniego* purports to modify the Court's earlier decision in *Lyttle*, where the Court held that improper restriction of cross-examination constitutes legal error.[158] A proper cross-examination question, under *Lyttle*, is one for which the questioner has a "good faith basis"—subject, of course, to the evidence elicited being otherwise admissible.[159] Undue interference with cross-examination will ordinarily be a serious error, especially in a credibility case—though not one necessarily beyond the reach of the curative proviso.[160]

What divided the Court in *Samaniego*, it seems, was less about the division between evidence law and trial management and more about the relative weight to be given to fact-sensitive *discretion* on the one hand, and clear-cut admissibility *rules* on the other. As already seen, this tension is a constant theme of evidence law and its development more generally. The majority was inclined to give greater deference to the trial judge's discretionary sense of fairness; the dissent was more insistent on defining the rules and applying them correctly. A similar tension between open-ended judgements of fairness and adherence to clear rules will recur in many different contexts in the chapters that follow.

158 *R v Lyttle*, 2004 SCC 5.

159 *Ibid* at para 47. *Lyttle* overruled prior suggestions that it was improper to put a proposition to the witness that the cross-examiner was not in a position to independently prove.

160 *Samaniego*, *supra* note 148 at para 71. See also *R v RV*, 2019 SCC 41.