

CRIMINAL PROCEDURE

EVIDENCE

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Chapter 5

Evidence¹

For all topics covered by this chapter, practitioners may rely upon *Watt's Manual of Criminal Evidence* (Toronto: Carswell, published annually), and Ewaschuk, *Criminal Pleadings and Practice in Canada* (Aurora: Canada Law Book, looseleaf, continually updated). Recent decisions of the Supreme Court of Canada and the British Columbia Court of Appeal also are summarized in the Criminal Law chapter of the *Annual Review of Law and Practice* (Vancouver: Continuing Legal Education Society of British Columbia, published annually).

[§5.01] Burden of Proof and Standard of Proof

1. General Rule

The Crown has the primary or “legal” burden of proof throughout the trial and must prove all elements of both the *actus reus* and the *mens rea* of the offence(s). The accused is presumed innocent until the Crown proves guilt to the standard of “beyond a reasonable doubt” (*Woolmington v. D.P.P.*, [1935] A.C. 462; *Canadian Charter of Rights and Freedoms*, s. 11(d)). The standard of proof applies to the evidence as a whole, but generally not to individual facts. The test for reasonable doubt, which must be applied in every case, was stated by the Supreme Court of Canada in *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397:

First, if you believe the evidence of the accused, obviously you must acquit.

Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Thirdly, 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.

In *R. v. J.H.S.*, 2008 SCC 30, the Supreme Court re-interpreted the test from *R. v. W.(D.)*, holding that the three steps are not a “magic incantation” requiring specific wording. However, a judge or jury must understand that:

- an accused’s lack of credibility does not prove his or her guilt;
- one may accept some of an accused’s testimony while disbelieving other parts;
- one must consider all of the evidence in deciding whether there is any reasonable doubt; and
- any reasonable doubt must be resolved in favour of the accused.

Following *R. v. Starr*, [2000] 2 S.C.R. 144, often juries are instructed that the standard of proof beyond a reasonable doubt is much closer to certainty than to a balance of probabilities.

At times the accused bears a secondary or “evidentiary” burden of pointing to some evidence that gives an air of reality to a particular defence (such as self-defence or provocation). Such evidence may be found in the testimony of Crown witnesses or in defence evidence. The burden then shifts back to the Crown to disprove that defence (*R. v. Cinous*, [2002] 2 S.C.R. 3; 2002 SCC 29; and *R. v. Fontaine*, [2004] 1 S.C.R. 702; 2004 SCC 27).

2. Statutory Presumptions that Shift the Burden of Proof

The *Criminal Code* includes some statutory presumptions that shift to the accused the secondary or evidentiary burden of proving a particular fact. Unless the accused can adduce or point to some “evidence to the contrary” that raises a reasonable doubt, the fact is deemed proven. Such a presumption is found in s. 258(1)(d.1) of the *Criminal Code*, which provides that blood alcohol readings obtained by police are evidence that at the time of driving, the accused’s blood alcohol level was over 80 milligrams per 100 millilitres of blood, in the absence of evidence to the contrary (evidence that the accused’s blood alcohol level was not “over 80” at the time of driving.) In *R. v. Gibson*, 2008 SCC 16, the Supreme Court strengthened this presumption: the Court decided that it is not sufficient for the accused to provide an expert’s opinion that theoretically the accused’s blood alcohol level, although it may have been “over 80,” may have been different than the police instrument readings.

¹ **Marian K. Brown** of the Ministry of the Attorney General, Criminal Appeals and Special Prosecutions, Vancouver, has kindly revised this chapter annually from 2004 to 2008. Revised annually from 1996 to 2001 by S. David Frankel, QC, Senior General Counsel, Department of Justice. Revised in January 1995 by Geoffrey Barrow, Deputy Regional Crown Counsel, Kamloops. Revised in March 1994 by Geoffrey Barrow and by Bronson Toy, McCarthy Tetrault, and Michael Klein, Bolton & Muldoon, Vancouver.

The *Criminal Code* also includes some mandatory presumptions that shift the primary or legal burden of proof of a particular fact to the accused. The trier of fact is required to make the presumption unless the accused disproves it on a balance of probabilities. An example of this type of presumption is found in s. 258(1)(a) of the *Criminal Code*:

...where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle ...[he] shall be deemed to have had the care or control of the vehicle . . . unless [he] establishes that [he] did not occupy that seat or position for the purpose of setting the vehicle ...in motion ...

Various statutory presumptions, also called “reverse onus provisions”, have been challenged under s. 11(d) of the *Charter*, which enshrines the right to be presumed innocent until proven guilty. *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.) illustrates the general approach, where the Court held the *Charter* requires at a minimum that: (1) an individual be proven guilty beyond a reasonable doubt; (2) the State must bear the burden of proof; and (3) criminal prosecutions must be carried out in accordance with lawful procedures and fairness. A provision which requires an accused to disprove, on a balance of probabilities, the existence of a fact which is an important element of an offence, may violate the presumption of innocence in s. 11(d).

In some cases reverse onus provisions were found to infringe s. 11(d), but were upheld as being demonstrably justified under s. 1 of the *Charter*. In *R. v. Chaulk* (1990), 62 C.C.C. (3d) 193, the Supreme Court of Canada upheld the requirement that an accused prove insanity (now, “not criminally responsible by reason of mental disorder”) on a balance of probabilities. Similar reasoning was applied to the defence of non-mental disorder automatism in *R. v. Stone* (1999), 134 C.C.C. (3d) 353 (S.C.C.).

3. Inferences from Evidence

A judge or jury may make logical inferences from evidence, especially in cases of circumstantial evidence. An example is inferring the possession of drugs found in a household, from all the circumstances of the accused and the household (*R. v. Fisher*, 2005 BCCA 444).

The Crown may rely upon certain commonly made inferences, including the following.

- (a) The common sense inference that a person intends the natural consequences of his or her actions. Any evidence that creates a reasonable doubt about the accused’s intent may displace this inference.
- (b) The “doctrine of recent possession”. On a charge of possession of stolen property, the Crown frequently has no direct evidence that the accused who was found with the property, knew that it was stolen. The Supreme Court of Canada in *R. v. Kowlyk* (1988), 43 C.C.C. (3d) 1, set out the following principles regarding this doctrine:
 - (i) the unexplained possession of recently-stolen goods permits an inference that the accused knew that the goods were stolen, but this inference is not mandatory;
 - (ii) if the accused gives an explanation which could reasonably be true, even if the judge does not believe the explanation, guilt cannot be inferred on the basis of possession alone.

The accused’s testimony, or the accused’s *res gestae* statements to other witnesses, may provide an explanation that will displace the inference (*R. v. Crossley* (1997), 117 C.C.C. (3d) 533 (B.C.C.A.)).

[§5.02] Identification of the Accused

Highly-publicized wrongful convictions have resulted in close scrutiny of all identification evidence and judges now carefully caution themselves, or the jury, regarding evidence identifying the accused (*R. v. Sophonow* (No. 2) (1986), 25 C.C.C. (3d) 415 (Man. C.A.), leave to appeal refused (1986), 54 C.R. (3d) xxvii (S.C.C.)).

A prudent Crown will warn witnesses to be fair and cautious with respect to identification of the accused. However, in most cases identification of the accused does not depend solely upon eyewitnesses, but rather depends upon a combination of circumstantial evidence, eyewitness evidence, and sometimes forensic evidence. Normally, there are discrepancies among eyewitness descriptions, and often there are irregularities in police procedure, requiring the judge or jury to consider carefully all of the evidence together (for a recent example, see *R. v. Whitford*, 2006 BCCA 32).

1. Descriptions of the Accused

Although attention focuses upon witnesses who testify that they recognize an accused in court, to have evidentiary weight such recognition should be supported by testimony describing what the witness remembers about details of the accused's appearance when first seen. Each witness's ability to observe detail is dependent upon distance, angle, lighting, duration, and other factors which should be explored in examination and cross-examination. A witness's memory may be challenged if the witness has given different descriptions at different times. It is permissible for a police officer to testify about descriptions that witnesses previously gave to the officer, for the limited purpose of enabling assessment of the reliability and credibility of the witnesses' identification (*R. v. Tat* (1997), 117 C.C.C. (3d) 481 (Ont.C.A.); *R. v. Campbell*, 2006 BCCA 109 *per* Ryan J.A.).

2. Police "Line-ups" and Photo Packs

Physical "line-ups" of suspects are rare now, but a suspect is entitled to consult a lawyer before being presented for viewing by a witness (*R. v. Leclair and Ross* (1989), 46 C.C.C. (3d) 129 (S.C.C.)). Refusal to participate in a line-up must not be regarded as evidence of guilt (*R. v. Shortreed* (1990), 54 C.C.C. (3d) 292 (Ont.C.A.)). An unfair line-up where the suspect is presented alone or with dissimilar persons, will greatly weaken the identification.

More commonly, witnesses are shown a photo pack or series of photographs, which counsel should scrutinize with regard to fairness in the choice of photographs and the manner in which police presented them to a witness. Although the report on the Sophonow Inquiry recommended certain specific procedures for police officers who show photo packs to witnesses, those recommendations do not have the force of law, and photo identification is not excluded if those procedures were not followed. Instead, the weight of photo identification depends upon the fairness of the procedure used in the particular case (*R. v. Doyle*, 2007 BCCA 587.).

Normally a witness who has seen the accused both in a photograph and subsequently in court, will be cross-examined as to whether he or she recognizes the accused from the photograph, rather than from the scene of the crime (or other location). If the witness has seen images of the accused in media, that too may be alleged to "taint" courtroom recognition (*R. v. Hibbert* (2002), 163 C.C.C. (3d) 129 (B.C.C.A.)). However, a police officer or other person who actually took a photograph of the accused, may look at the photograph before

testifying to compare whether the person that the witness photographed, is the accused in court.

Even if a witness at trial no longer recognizes the accused, the Crown can lead evidence that the witness previously identified the accused's photograph, providing that the witness confirms in court that he or she previously identified the photograph (*R. v. Tat, supra*).

3. In-Court Identification

When identification of the accused is in issue, defence counsel may apply to the judge to permit the accused to sit in the public area of the courtroom, so that the witness will not make any assumption based upon where the accused is sitting (*R. v. Levogiannis* (1993), 85 C.C.C. (3d) 327 (S.C.C.)). Without prior identification by description or photograph, a witness's recognition of the accused in court usually has little evidentiary weight. However, the law distinguishes between a witness who is asked whether he can identify a stranger who the witness saw once briefly, and a witness who is asked whether he recognizes someone with whom he spent time. The latter type of evidence is not subject to such strict safeguards (*R. v. Aburto*, 2008 BCCA 78; *R. v. Bardales* (1995), 101 C.C.C. (3d) 289 (B.C.C.A.), *aff'd* [1996] 2 S.C.R. 461).

4. Video Evidence of an Offence

Photographs and video recordings may be tendered as exhibits upon testimony by a witness (not necessarily the photographer) who can say that the images "accurately depict what they purport to show" (*R. v. Bannister* (1936), 66 C.C.C. 38 (N.B.S.C.App.Div.)). In some cases, a witness who knows the accused well may be called upon to identify the accused in a video recording of the offence, usually a security video from a store or bank. The judge or jury also may recognize the accused in a video recording of the offence, if the recording is of sufficient clarity and duration (*R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 (S.C.C.)). However, the judge must permit counsel to tender any other evidence about the identification or the video recording, and to make submissions on any limitations of the video images (*R. v. T.A.K.*, 2006 BCCA 105).

[§5.03] Voir Dire

A *voir dire* is a procedure in which the trial proper is suspended, and the court embarks upon a trial within a trial to determine the admissibility of a certain item of evidence. Any type of evidence that requires a ruling as to admissibility may be the subject of a *voir dire*. Some examples are the admissibility of statements of the accused; the admissibility of hearsay; and the admissibility of evidence obtained in a search that is alleged to violate the *Charter*.

Counsel should advise the court at the pre-trial conference, or at the beginning of the trial, if he or she anticipates any *voir dire*.

In a trial without a jury, the judge declares a *voir dire*, hears the evidence at issue, and rules on its admissibility. If the evidence is ruled admissible, Crown and defence counsel can agree that the evidence in the *voir dire* (or part of it) then becomes evidence in the trial, to avoid repeating the evidence.

During a jury trial, counsel should advise the court whenever admissibility of evidence is at issue (without saying what the evidence is) so that the jury can be excused and the *voir dire* commenced. The judge hears the evidence and arguments and decides whether or not the evidence is admissible. If the judge rules that the evidence is admissible, the evidence is called again before the jury.

Evidence on a *voir dire* may consist of the examination and cross-examination of witnesses, including the accused. If the accused testifies on a *voir dire*, his or her evidence is not part of the trial, and the accused need not testify later during the trial. In some circumstances it may not be necessary to call oral evidence on a *voir dire*. For example, if the issue is whether the evidence of a particular expert is admissible, counsel seeking to tender the evidence can outline it and make submissions; opposing counsel can make submissions; and then the judge can make a ruling. Exhibits such as an expert's report or the recorded statements of the accused are entered as exhibits on the *voir dire*, separate from exhibits that are evidence on the trial.

[§5.04] Statements of the Accused

1. General

Only the Crown may tender as evidence, the utterances or statements of an accused; the accused may not tender "self-serving" evidence of what he or she said to police or other persons. Also, an accused's utterances or statements can only be evidence with regard to that accused, and are not

admissible as evidence with regard to any co-accused.

Perhaps the most common reason to hold a *voir dire* is to determine whether statements of the accused, made to a person in authority, are (a) voluntary and (b) obtained without violation of the *Charter* right to silence (s. 7) and right to counsel (s. 10(b)). A single *voir dire* may deal with all these issues, but the onus of proof differs: there is an onus on the Crown to prove voluntariness of the accused's statements beyond a reasonable doubt, and there is an onus on the defence to prove *Charter* violations on a balance of probabilities.

To prove a *Charter* breach, the defence may call the accused or other witnesses on the *voir dire*, or sometimes may prove the breach by cross-examination of Crown witnesses.

To prove voluntariness, the Crown must call as witnesses on the *voir dire* all police officers and other "persons in authority" who dealt with the accused to such an extent that they may have affected the voluntariness of the accused's utterances.

The Crown must prove the accused's statements voluntary if the statements will be tendered in the Crown's case, and also if the accused is expected to testify and the Crown wants to cross-examine the accused on statements that may be inconsistent with the accused's testimony. Voluntariness must be proven whether a statement is inculpatory or exculpatory. If defence counsel fully understands the issues, he or she may admit the voluntariness and lawfulness of the accused's statements, thus waiving any *voir dire* on voluntariness or *Charter* issues (*R. v. Park* (1981), 59 C.C.C. (2d) 385 (S.C.C.)).

An accused's utterance that is part of the offence charged, is admissible without a *voir dire*. Some examples are:

- (a) threatening words, where the offence is uttering threats;
- (b) words of refusing to give a breath sample, where the offence is refusal;
- (c) giving a false name or false information to police, where the offence is obstruction or public mischief;
- (d) words such as "stick 'em up", where the offence is robbery.

2. Persons in Authority

Voluntariness is at issue only when the accused speaks to a “person in authority,” typically a police officer or prison guard. It may be argued that an employer, parent, or other person is “in authority,” if the accused reasonably believed that the person could influence or control the investigation or prosecution. Defence counsel must seek a *voir dire* in such cases, or the judge may declare a *voir dire* of her own motion (*R. v. Hodgson*, [1998] 2 S.C.R. 449, 127 C.C.C. (3d) 449; *R. v. Wells*, [1998] 2 S.C.R. 517, 127 C.C.C. (3d) 500)). However, an undercover police officer is not regarded as a “person in authority,” if the accused did not subjectively believe that he or she was speaking to a police officer and therefore felt no pressure to speak (*R. v. Liew* (1999), 137 C.C.C. (3d) 353 (S.C.C.); *R. v. Grandinetti*, 2005 SCC 5).

3. Voluntariness

The classic expression of the “confessions rule” is found in *R. v. Ibrahim*, [1914] A.C. 599 at 609, where Lord Sumner stated:

. . . no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

In *R. v. Hodgson*, [1998] 2 S.C.R. 449, 127 C.C.C. (3d) 449, Cory J. affirmed that an accused’s statement to a person in authority must not have been coerced or induced, and must have been the product of an “operating mind”. To meet these requirements, the accused must be able to understand what is said, able to understand that his or her utterances could be used against him or her, and able to choose to remain silent (*R. v. Whittle* (1994), 92 C.C.C. (3d) 11 (S.C.C.)). These requirements aim to ensure that only reliable and fairly-obtained statements are admitted into evidence.

The Supreme Court of Canada comprehensively reviewed the law of voluntariness in *R. v. Oickle* (2000), 147 C.C.C. (3d) 321. Threats or inducements by police or other persons in authority, and oppressive conditions of interrogation, may render an accused’s statement unreliable and involuntary. There also may be an issue as to whether police trickery deprived the accused of the ability to choose silence. A statement that is involuntary due to any of these factors will be excluded from evidence. Generally, whenever the police offer something in return for a statement (*quid pro quo*),

the admissibility of the statement will be in question. However, an experienced and confident suspect who bargains with police may be freely deciding whether or not to speak, so that his statements remain voluntary (*R. v. Spencer*, 2007 SCC 11).

4. Charter Sections 7 (Right to Silence) and 10(b) (Right to Counsel)

Violations of the right to silence and the right to counsel normally result in the exclusion of the accused’s statement under s. 24 of the *Charter*. Evidence of such violations often is led in the same *voir dire* that deals with voluntariness of the statement, and the issues often are intertwined. For example, a severely-intoxicated person may lack the operating mind required for voluntariness, and also may be unable to appreciate the consequences of waiving his or her right to counsel (*R. v. Clarkson*, (1986) 25 C.C.C. (3d) 207 (S.C.C.)).

Most commonly, if a detained person says that he or she wants to speak with counsel, any statements elicited by police before the detainee’s consultation with counsel will be excluded from evidence. Many detainees speak only briefly with counsel, and generally there is an expectation that one demonstrate some diligence in exercising this right. However, if a youthful or mentally-limited suspect receives only momentary, incomplete information from counsel regarding a very serious charge, a court may hold that there was no effective access to counsel and the suspect’s subsequent confession may be excluded (*R. v. Osmond*, 2007 BCCA 470).

In Canada a suspect is not entitled to have a lawyer present during police questioning, and generally police are not required to cease questioning simply because a suspect repeatedly states that he doesn’t want to talk. Police are permitted to attempt to persuade the suspect to forgo his right to silence, but depending upon the suspect’s mental and emotional states, there may be an issue as to whether police pressure has overborne the suspect’s free will, or his ability to choose whether or not to talk. Thus, the confessions rule and the right to silence have become “functionally equivalent” (*R. v. Singh*, 2007 SCC 48).

If police breach a suspect’s *Charter* rights in obtaining a statement, and police later attempt to obtain another statement, the initial breach may “taint” and render inadmissible the later statement, if the initial breach and the later statement are part of the same transaction or course of conduct, or if there are temporal or causal connections (*R. v. Wittwer*, 2008 SCC 33; *R. v. I.(L.R.) and T.(E.)*, [1993] 4 S.C.R. 504).

[§5.05] Statements of Witnesses

Like the accused, witnesses may be cross-examined on their prior inconsistent statements. Inconsistent statements are admissible only for the purpose of assessing a witness's credibility, unless the witness adopts the prior inconsistent statement as the truth, in which case it becomes the witness's evidence. In contrast, witnesses' prior *consistent* statements are regarded as self-serving, generally are not admissible in evidence, and never can be corroborative of the truthfulness of a witness's testimony (*R. v. Bevan*, [1993] 2 S.C.R. 599; *R. v. Beland*, [1987] 2 S.C.R. 398; *R. v. Kokotailo*, 2008 BCCA 168).

Exceptionally, a prior consistent statement may be admissible to rebut an allegation or suggestion of "recent fabrication"; that is, if the apparent position of the opposing party is that the witness has made up a false story at some point after the alleged offence (not necessarily recently). However, even when tendered to rebut fabrication, a prior consistent statement is relevant only to credibility and is not independent corroborative evidence (*R. v. Evans*, [1993] 2 S.C.R. 629; *R. v. Stirling*, 2008 SCC 10). A prior consistent statement also may be admissible "as part of the narrative," for the limited purpose of showing the fact and timing of a complaint, which may assist in assessing a complainant's credibility (*R. v. Dinardo*, 2008 SCC 24; *R. v. Ay* (1994), 93 C.C.C. (3d) 456 (B.C.C.A.)). On the other hand, in sexual assault cases, especially cases of abuse within families, the fact that a complainant did not report the offence should never reduce his or her credibility (*R. v. D.(D.)*, [2000] 2 S.C.R. 275).

[§5.06] Hearsay

1. General Rule

A classic statement of the rule against hearsay is set out in the case of *Subramanian v. D.P.P.*, [1956] 1 W.L.R. 965 at 970 (P.C.):

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of

the witness or of some other person in whose presence the statement was made.

The key is the purpose for which the evidence is being tendered. If during a trial you hear evidence that sounds suspiciously like hearsay, stand up and object by asking the purpose for which the statement is being tendered. If evidence is not tendered for the truth of what was said, but for another purpose—such as to show the state of mind of either the speaker or the person who heard the statement—it may not be hearsay and may be admissible (*R. v. Ly* (1997), 119 C.C.C. (3d) 479 (S.C.C.); *R. v. Nguyen and Bui*, 2003 BCCA 556)).

2. Traditional Exceptions

The rule against hearsay always has been subject to various common-law exceptions. Some, such as the exception for dying declarations and the exception for declarations against penal interest, rarely are invoked. The exception for statements of intent by deceased persons sometimes arises in homicide cases, notably *R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.); *R. v. Chahley* (1992), 72 C.C.C. (3d) 193 (B.C.C.A.); and *R. v. Mafi* (1998), 130 C.C.C. (3d) 329 (B.C.C.A.).

Perhaps most commonly invoked is the exception for *res gestae* statements, which are utterances at the time of, or soon after, an allegedly criminal act. The *res gestae* exception arises in cases of possession of a drug, weapon, stolen property, or counterfeit money, and the jurisprudence on this topic was thoroughly reviewed in *R. v. Crossley* (1997), 117 C.C.C. (3d) 533 (B.C.C.A.).

In *Crossley*, the court held admissible an utterance of the accused shortly after he was found in possession of break-and-enter instruments. Such a *res gestae* statement may be elicited in cross-examination of the arresting officer. Factors considered when assessing the trustworthiness of such utterances have included:

- (a) spontaneity, contemporaneity to the criminal act, and whether the speaker had any opportunity to concoct;
- (b) the mental and emotional state of the speaker; and
- (c) any likelihood of the speaker trying to lay blame elsewhere (*R. v. Slugoski* (1985), 17 C.C.C. (3d) 212 (B.C.C.A.)).

3. The “Principled Approach”

The law of hearsay in Canada was substantially changed by a long series of cases from *R. v. Khan*, [1990] 2 S.C.R. 531 to *R. v. Khelawon*, 2006 SCC 57. In *R. v. Smith*, [1992] 2 S.C.R. 915, Lamer C.J.C. wrote for the unanimous court: “Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of that evidence, and its necessity.” However, subsequent decisions clarified that courts should first consider whether a statement is admissible under any traditional exception to the hearsay rule (*R. v. Starr*, 2000 SCC 40; *R. v. Mapara*, 2005 SCC 23). Where admission under a traditional exception is opposed, or where no traditional exception applies, courts should resort to the “principled approach” and should assess necessity and “threshold reliability.”

It is necessary to admit a hearsay statement into evidence if the speaker cannot testify, due for example to death (*R. v. Blackman*, 2008 SCC 37) or testimonial incompetence (*R. v. Hawkins and Morin* (1996), 111 C.C.C. (3d) 129 (S.C.C.)). The principled approach to hearsay arose in response to the dilemma of the fearful and silent child complainant in *R. v. Khan*, *supra*. However, in *R. v. Parrott*, [2001] 1 S.C.R. 178, the Court excluded hearsay of the utterances of a woman who was mentally-disabled who was said to have the intellect of a three- or four-year-old. The Court held that the witness should have been brought to the stand in a *voir dire* regarding her competence to testify.

The parameters of “threshold reliability” were redefined in *R. v. Khelawon*, *supra*. Threshold reliability exists wherever there is a sufficient basis for the trier of fact to assess the truth and accuracy of the hearsay statement. There are two general means of assessing threshold reliability:

- (1) the way in which the statement was made, and the nature of its contents, may lend it such reliability that cross-examination of the declarant would add little to the evaluation of reliability (as in *R. v. Khan*, *supra*, and *R. v. U.(F.J.)*, [1995] 3 S.C.R. 764). Contrary to *R. v. Starr*, *supra*, relevant circumstances now include other evidence in the case which tends to show whether or not the hearsay statement is true;
- (2) even if the circumstances of the statement do not provide a good basis for assessing its truth and accuracy, alternative means of testing the reliability of the statement can compensate for lack of cross-examination at the time the statement was made. The most common alternative means of assessment are viewing the video-taped statement, and cross-examination in court of the declarant

or the recipient of the statement, or both of them (for example, *R. v. Blackman*, *supra*; *R. v. Devine*, 2008 SCC 36).

Admission of hearsay is subject also to the trial judge’s residual discretion to exclude evidence where its probative value is slight and where it would unduly prejudice the accused. Once hearsay is admitted, its truth, accuracy and weight are to be decided by the trier of fact.

4. Application of the “Principled Approach” to Prior Inconsistent Statements

In *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257, the Supreme Court of Canada decided that the prior inconsistent statement of a witness who recants at trial, may be admissible on hearsay principles. The orthodox rule concerning prior inconsistent statements was that such a statement was admissible only to impeach the credibility of the witness, and not as evidence of the truth of the statement. However, in *R. v. B.(K.G.)*, the Supreme Court concluded that recantation made consideration of the prior statement necessary. As to reliability, where the prior statement was made under oath or solemn affirmation following a warning about criminal sanctions, and where the statement was videotaped in its entirety, and where the witness could be cross-examined at trial, there were sufficient “circumstantial guarantees of reliability” to permit admission of the statement. Its weight as evidence would remain to be assessed by the trier of fact.

The Supreme Court left open the possibility that there might be guarantees of threshold reliability other than those defined in *R. v. B.(K.G.)*, and some very interesting fact patterns have founded the admission of the prior inconsistent statements of recanting witnesses. In *R. v. U.(F.J.)*, *supra*, the statement of a young girl who recanted the allegation that her father had repeatedly sexually assaulted her, was admitted on the basis that it was “strikingly similar” to the father’s own voluntary statement about the same offences. In *R. v. Naicker*, 2007 BCCA 608, leave to appeal denied [2008] S.C.C.A. No. 45, a convicted former co-accused refused to testify (and therefore could not be cross-examined), but his statement incriminating the accused was admitted because it had various indicia of reliability (and it had been admitted on his own conviction.) A similar result was reached in *R. v. Adam*, 2006 BCSC 1355, where two of the accuseds’ co-conspirators refused to testify, contrary to their plea agreements; their statements were admitted. A rare example of hearsay tendered by the defence, which was found inadmissible due to lack of threshold reliability, appears in *R. v. Post*, 2007 BCCA 123.

Generally, the admissibility of a “K.G.B”. statement is determined in a *voir dire*, which begins under the terms of s. 9(2) of the *Canada Evidence Act*, and which continues with evidence on the necessity and reliability of the statement. However, there are alternative procedures under s. 9(1) of the *Canada Evidence Act* (*R. v. Uppal*, 2003 BCSC 1922 and 2003 BCSC 1923), or in Crown re-examination of a witness who has recanted on cross-examination (*R. v. Glowatski* (2001), 160 C.C.C. (3d) 525 (B.C.C.A.)).

5. Documents as Hearsay—Statutory Exceptions

Generally, when the maker of documents does not testify, those documents are hearsay, but there are many statutory exceptions to this rule. The *Canada Evidence Act* provides for admission of business records, banking records, and government records (ss. 26-30); the provincial *Motor Vehicle Act* provides for the admission of motor vehicle records (s. 82); the *Criminal Code* provides for the admission of breath analysis certificates (s. 258); and the *Controlled Drugs and Substances Act* provides for the admission of drug analysts’ certificates (s. 51).

These exceptions generally are subject to notice provisions in each statute and counsel always should read the notice provisions carefully. Notice is valid if served on the accused, counsel, an articulated student, or perhaps even office staff. If the statute does not explicitly require written notice, filing the document at the preliminary inquiry is sufficient notice (*R. v. Norris* (1993), 35 B.C.A.C. 133). In general, the remedy for late notice or lack of notice is an adjournment.

Further guidance on the law of documentary evidence may be found in Nightingale’s *The Law of Fraud and Other Related Offences* (Toronto: Carswell, 1996 supplemented text).

Other statutory exceptions to the rule against hearsay appear in ss. 715.1 – 715.2 of the *Criminal Code*, which permit video-recorded statements of disabled witnesses and witnesses under the age of 18 to be evidence at trial, providing the witness adopts the statement in his or her testimony (*R. v. C.C.F.* (1997), 120 C.C.C. (3d) 225 (S.C.C.)). However, recorded statements admitted under this provision are not independent corroboration of the witness’s testimony (*R. v. L.(D.O.)*, [1993] 4 S.C.R. 419, *R. v. S.(K.P.)*, 2007 BCCA 397).

[§5.07] Character Evidence

1. Evidence of Bad Character and Good Character

The Crown must not tender evidence that indicates or suggests that the accused is of bad character or has a propensity to commit offences, unless the evidence is relevant to some other issue in the case, and unless the probative value of the evidence outweighs its prejudicial effect upon the defence (*R. v. B.(F.F.)*, [1993] 1 S.C.R. 697, *R. v. G.(S.G.)*, [1997] 2 S.C.R. 716). Sometimes the accused’s other bad behaviour, before or after the offence, may be relevant to his or her motive or intent to commit the offence. However, both counsel should take great care to determine legal relevance and admissibility before such evidence is heard by a jury.

The defence is free to adduce evidence of the accused’s general good character, but must take care not to “put the accused’s character in issue” with regard to the offence charged (see 2. below). Defence witnesses may testify regarding the accused’s reputation in the community (his or her reputation for particular good traits). However, witnesses are not permitted to describe the accused’s prior good acts, or to give their personal opinions about the accused. Direct examination questions for defence character witnesses are prescribed in *R. v. Clarke* (1998), 129 C.C.C. (3d) 1 (Ont.C.A.). Although some accused want to have “character witnesses,” such evidence no longer has great weight, and has little weight with regard to sexual offences, which occur in private (*R. v. Profit* (1993), 85 C.C.C. (3d) 232 (Ont.C.A.)).

2. “Putting Character in Issue”

The accused may put his or her character in issue with testimony that he or she is not the type of person to commit the offence charged, or testimony about prior specific good acts. The accused’s character also is put in issue if other defence witnesses testify about the accused’s good character, or if defence counsel in cross-examining a Crown witness elicits testimony about the accused’s general good reputation in the community, or if there is defence evidence that someone other than the accused had a propensity to commit the offence. Once the accused has put his or her character in issue, the Crown may cross-examine on the accused’s bad reputation, on details of any previous convictions, and on any prior bad acts that are similar to the offence charged (*R. v. Farrant*, [1983] 1 S.C.R. 124; *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont.C.A.), aff’d sub nom. *R. v. Canadian Dredge and Dock Co.*, [1985] 1 S.C.R. 662; *R. v. Brass* (2007), 226 C.C.C. (3d) 216 (Sask.C.A.); *Alcius v. R.* (2007), 226 C.C.C.

(3d) 544 (Q.C.A.)). Also, the Crown may call rebuttal evidence regarding the accused's general bad reputation in the community, and rebuttal evidence of prior bad acts that are similar to the offence charged.

3. Criminal Records

A witness's criminal record is a particular form of character evidence. An ordinary witness may be examined and cross-examined about prior convictions and the facts of prior offences which resulted in convictions. In contrast, the accused may be examined and cross-examined about prior convictions but not about the facts of prior offences, unless he or she has put character in issue. Many defence counsel avert cross-examination of the accused on his or her criminal record by leading the record in direct examination. Crown counsel may do the same with Crown witnesses. Section 12 of the *Canada Evidence Act* provides a statutory basis for evidence of prior convictions, and proof of prior convictions.

There is an important common law limitation on cross-examination regarding the accused's criminal record. Prior convictions are admissible only to impugn the accused's credibility, and to rebut any defence evidence of the accused's good character. Prior convictions must not be used to infer that the accused has a propensity to commit offences (*R. v. W.(L.K.)* (1999), 138 C.C.C. (3d) 449 (Ont.C.A.)). In practice, before the accused decides whether or not to testify, he or she is entitled to know whether the Crown intends to cross-examine on his or her criminal record. Defence counsel then may apply for an order prohibiting Crown cross-examination on convictions which do not reflect upon credibility or which are too prejudicial to the defence. These issues should be addressed in a *voir dire* at the end of the Crown's case. In the *voir dire*, defence counsel may outline what the accused would say in his or her testimony, in order for the judge to assess the potential effect of cross-examination regarding particular convictions (*Corbett v. R.* (1988), 41 C.C.C. (3d) 385 (S.C.C.); *R. v. Underwood* (1988), 121 C.C.C. (3d) 117 (S.C.C.)).

Cross-examination on convictions involving dishonesty generally is permitted, but in jury trials, cross-examination on prior convictions that are similar to the charge at trial may be prohibited as too prejudicial. British Columbia courts have restricted cross-examination less than courts in other provinces (*R. v. Fengsted*, [1998] B.C.J. No. 2931 (B.C.C.A.)). However, the Court of Appeal ordered a new trial in a case where defence counsel did not use a *voir dire* to outline the accused's testimony, and neither counsel nor the judge proposed appropriate "editing" of the accused's

criminal record (*R. v. Madrusan*, 2005 BCCA 609). The Crown also has discretion to refrain from cross-examining on all or part of the accused's criminal record, and counsel may agree on "editing" the record without a *voir dire* or a "Corbett" application.

4. Impermissible Questions

It is improper for either counsel to ask a witness if another witness could be lying (*R. v. Brown and Murphy* (1982), 1 C.C.C. (3d) 107 (Alta. C.A.)); and it may be fatal for the Crown to ask the accused why witnesses would lie about the accused (*R. v. Ellard*, (2003) 172 C.C.C. (3d) 28 (B.C.C.A.)).

[§5.08] Expert Evidence

1. General

"Expert evidence" is an expression of opinion. An expert is "one who has by dint of training and practice, acquired a good knowledge of the science or art concerning which his opinion is sought, and the practical ability to use his judgment in that science" (*R. v. Bunniss* (1964), 44 C.R. 262 at 265 (B.C.Co.Ct.)). On the other hand, any witness may testify regarding observable facts. For example, in *R. v. Williams* (1995), 98 C.C.C. (3d) 160, the Ontario Court of Appeal held that voice recognition over the telephone is not expert evidence. Most commonly, anyone is permitted to testify about observable symptoms of alcohol intoxication and about the estimated speed of vehicles.

2. Admissibility

In *R. v. Mohan* (1994), 89 C.C.C. (3d) 402, the Supreme Court of Canada held that the following criteria govern the admissibility of expert evidence:

- (a) relevance;
- (b) the necessity of expert evidence to assist the trier of fact;
- (c) the absence of any rule excluding the particular evidence; and
- (d) a properly qualified expert.

The Supreme Court applied the "necessity" criteria rather strictly in *R. v. D.D.* (2000), 148 C.C.C. (3d) 41, holding that expert evidence regarding children's reluctance to report sexual abuse is not necessary because public understanding is sufficient now for the topic to be addressed by "a simple jury instruction." McLachlin C.J.C. dissented, observing that many jurors would still require expert evidence to understand a child's silence about sexual abuse. The British Columbia Court of Appeal has been cautious in applying the *D.D.*

decision, holding instead that “the admission of expert evidence regarding human behaviour or psychological factors relevant to credibility is justified where the evidence goes beyond the ordinary experience of a lay person” (*R. v. Meyn* (2003), 176 C.C.C. (3d) 505 (BCCA)).

The admissibility of novel scientific evidence was examined in *R. v. Dieffenbaugh* (1993), 80 C.C.C. (3d) 97 (B.C.C.A.), and more recently in *R. v. J.(J.-L.)* (2000), 148 C.C.C. (3d) 487 (S.C.C.). Trial judges must determine whether such evidence meets a threshold of scientific reliability, before admission. Regarding D.N.A. evidence, see *R. v. Terceira* (1998), 123 C.C.C. (3d) 1 (Ont.C.A.), affirmed (1999), 142 C.C.C. (3d) 95 (S.C.C.).

3. Factual Basis for Expert Opinion

A party who tenders expert evidence also must establish, through properly admissible evidence, the facts on which the expert’s opinion is based (*R. v. Abbey* (1982), 68 C.C.C. (2d) 394 (S.C.C.)). Expert opinion may be based, in certain circumstances, on hearsay (*R. v. Lavalee* (1990), 55 C.C.C. (3d) 97 (S.C.C.)). However, the expert’s opinions must be specific to the case before the court, and must not be generalizations (*R. v. Li (No. 2)* (1980), 59 C.C.C. (2d) 79 (B.C.S.C.)). The Supreme Court held that where a trial judge rejected as not credible an accused’s testimony about how much beer he drank, there was no evidentiary basis for a defence expert’s evidence that someone who drank that much would not have a blood alcohol level “Over 80” (*R. v. Boucher*, 2005 SCC 72).

4. Procedure

Section 657.3 of the *Criminal Code* requires both the Crown and defence to give notice of an intention to call expert evidence 30 days before the trial. In addition, the Crown must provide written material relating to the evidence of an expert—a copy of the report, or if there isn’t one, a summary of the opinion to be given—within a reasonable time before trial. The defence must provide the report or summary of expert evidence not later than the close of the Crown’s case.

Before an expert may give opinion evidence, he or she must be “qualified.” Counsel tendering the expert evidence should advise the judge that he or she is seeking a ruling that the witness is qualified to give opinion evidence in a specified field, for example, the identification of firearms and toolmarks. A *voir dire* is then held for direct examination and cross-examination of the expert regarding his or her education, training, and experience in the specified field. The limitations of

an opposing expert’s qualifications should be carefully probed. The judge will then rule on whether the witness is qualified to give evidence in that field. In a jury trial, such a “qualification” *voir dire*, unlike other *voir dire*s, is usually conducted in the presence of the jury.

Often, the expert’s qualifications are known and admitted by the opposing party, but it is still wise for the party tendering the witness to briefly elicit his or her qualifications, in order to enhance the weight of the witness’s opinions. Once the expert is “qualified,” opposing counsel should be quick to object if the witness ranges beyond the specified field of expertise.

[§5.09] Rebuttal Evidence

The Crown cannot lead in rebuttal, evidence which it should or could have led as part of the Crown’s case. The accused must know the whole of the Crown’s case when he or she decides whether or not to call a defence. However, if the Crown could have led certain evidence, but the evidence did not become relevant or did not become a “live issue” until during the defence case, then the Crown may lead the evidence in rebuttal (*John v. R.*, [1985] 2 S.C.R. 476; *R. v. Aday*, 2008 BCSC 397).