THE LAW OF EVIDENCE

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GENERAL PRINCIPLES OF EVIDENCE

It is fundamental that findings of fact made at trial must be grounded on evidence properly admissible in those proceeding: *R v KS*, 2017 ONCA 307 at para 20

As a matter of general principle, a proponent who seeks to introduce relevant and material evidence may rely on alternative bases to establish its admissibility. It is enough for the proponent to satisfy the requirements of one alternative, even if the requirements of the other alternative cannot be satisfied. For example, the testimony of a witness at a preliminary inquiry may not satisfy the statutory requirements of s. 715 of thef *Criminal Code*, but may nevertheless be substantively admissible at an ensuing trial under the principled exception to the hearsay rule. Such evidence would be admitted: *R v Mohamad,* 2018 ONCA 966, at para 114

Trial judges do have residual discretion to exclude any technically admissible evidence presented by the Crown where its probative value is outweighed by the potential prejudicial effect: *R v Walker,* 2025 ONCA 19, at para 23

In connection with defence evidence, a trial judge has a residual discretion to relax the strictness of admissibility rules where it is necessary to do so to prevent a miscarriage of justice and where the danger against which the rule aims to safeguard does not exist.

Defence evidence may only be excluded on this basis where the prejudicial effect of the evidence *substantially* outweighs its probative value: *R v Johnson,* 2019 ONCA 145, at paras 58-59

A trial judge's determination that the probative value of evidence outweighs its prejudicial effect is discretionary and should be reviewed with deference. This is because of the trial judge's proximity to the evidence and awareness of the dynamics at trial: *R v Dirie,* 2022 ONCA 767, at para 50

Evidence is prejudicial in the relevant sense if it threatens the fairness of the trial. Evidence may be prejudicial if it cannot be adequately tested and challenged through cross-examination and the other means available in the adversarial process. Evidence may also be prejudicial if there is a real risk that the jury will misuse the evidence (*e.g*. propensity evidence), or be unable to properly assess

the evidence regardless of the trial judge's instructions. This latter form of prejudice must, however, overcome the strong presumption that jurors can and do follow the trial judge's instructions: *R v Frimpong,* 2013 ONCA 243, at para 18

The types of prejudice that may arise in a jury trial are often attenuated in a trial by judge alone: *R v MacCormack*, 2009 ONCA 72, at para 56

ACCUSED'S STATEMENTS

A. CONFESSIONS RULE

i. General Principles

The confessions rule prohibits the admission at trial of statements made by suspects to police or to other persons in authority, unless the Crown proves beyond a reasonable doubt that such statements were voluntary.

The voluntariness requirement extends to all statements made by an accused to a person in authority, even if the statement appears to be “obviously voluntary” or “volunteered”. Whether or not the statement is actually voluntary is a substantive issue to be determined in the *voir dire* itself, not on the threshold issue of whether a *voir dire* is required: *R v Sabir,* 2018 ONCA 912, at para 27.

The voluntariness requirement also extends to statements by conduct. For example, in *Johnston*, the Court found that the accused packing his belongings in response to a request by a Correctional Officer was not proven voluntary beyond a reasonable doubt. The Crown had intended to use the conduct to prove that the accused was admitting ownership of the items in question: 2015 ONSC 3486

The accused’s age and the overall context of the interview are relevant considerations to this inquiry: *R v Othman,* 2018 ONCA 1073, at para 21, 22

Where there is a reasonable basis to consider the accused a suspect at the time of questioning, the absence of a caution raises *prima facie* evidence that the accused's statements are involuntary: *R v Tessier,* 2022 SCC 35

The operating mind consideration requires proof that the accused was capable of making a meaningful choice to speak to the police and that the choice was not improperly influenced by state action. The language of meaningful, free or active choice emphasizes the overall voluntariness of the statement, rather than a minimum level of actual subjective knowledge that the accused did not have to say anything to the police and that anything said could be taken down in evidence: *R v Tessier,* 2022 SCC 35

The presence of a mental illness does not in and of itself mean legal advice was not understood or that a statement must be involuntary. Rather, the question is whether the accused was so devoid of rationality and understanding, or so replete with psychotic delusions, that his uttered words could not fairly be said to be his statements at all. This means that a detainee can have an operating mind even when experiencing psychosis at the time a statement is given: *R v Kostuk,* 2025 ONCA 195, at paras 28-29

To establish a *Charter* breach, the burden is on the accused to prove, on a balance of probabilities, that he did not have an operating mind at the time he gave his statement: *R v Kostuk,* 2025 ONCA 195, at paras 27-30

To render a statement involuntary, threats and inducements need not be the sole contributing factor. In *Othman,* for example, the Court of Appeal found the statement to be involuntary despite an acknowledgment that the immediate trigger for the accused's inculpatory statement may have been his despair at seeing his girlfriend's incriminating video statement: *Othman* at para 24

Where what is said to negate voluntariness is an inducement offered by a person in authority, a trial judge should examine the evidence for a quid pro quo offer by investigators. This offer raises the possibility that an accused is confessing, not because of any inherent desire to do so, but because of an appetite for the benefit offered. The mere offer of an inducement is not improper, however. An inducement only becomes improper when, on its own or in combination with other factors, the inducement is strong enough to raise a reasonable doubt about whether the accused's will has been overborne.

Where the hope is self-generated, the essential quid pro quo falls away, even if something said or done by a person in authority amounts to an inducement. For there, there is no nexus: *R v Richards,* 2017 ONCA 424 at paras 76-77

An inducement or threat need not be explicit. In *Wabason,* for example, the Court of Appeal held that the officer's veiled inducements of decreased jeopardy for speaking, and threats of increased jeopardy for silence, gave rise to an implicit *quid pro quo*: 2018 ONCA 187 at paras 12-20

Advising an accused that they might not be charged if they give a statement is not a promise, but an explanation of circumstances: *R v Osborne,* 2024 ONCA 467, at para 27

Even if there has been an inducement, this alone is not a basis for exclusion. An inducement will require exclusion only if "standing alone or in combination with other factors" it is "strong enough to raise a reasonable doubt about whether the will of the subject has been overborne. All the circumstances are considered, including: the accused's subjective characteristics, whether the accused had been provided with rights to counsel and cautioned, whether the accused spoke with counsel prior to being interviewed, whether the accused was subjected to any violence, threats, or received any promises, whether the police conduct was particularly aggressive, and whether the accused had consumed any drugs or alcohol. In short, that is pivotal is the strength of the inducement or threat, considered in the overall context. *R v Osborne,* 2024 ONCA 467, at paras 30-32

In proving a statement voluntary beyond a reasonable doubt, the Crown must furnish a sufficient evidentiary record of the circumstances surrounding the receipt of the statement to persons in authority. The failure to do so may render the statement inadmissible by depriving the court of the requisite information to assess all of the factors relevant to voluntariness: *R v Gauthier,* 2024 ONCA 621, at paras 76-85

In *Othman,* the Court of Appeal held that the accused's statement was involuntary. The interviewing officer's statements to the accused undermined the legal advice he received to remain silent, asserted that he may never get an opportunity to tell his side of the story, suggested that he would not be believed if he did not tell his side of the story to the police, and further pointed out that a trial court would see him, on video, refusing to comment.

The Court held that police assertions to the effect that an accused's credibility is at its highest during a police interview and that a trial court will see and take a negative view of a refusal to speak are legally incorrect and undermine the accused's right to silence. Such comments constitute both a threat and an inducement as they suggested negative legal consequences if the appellant failed to speak and positive consequences if he spoke. Further, the combined suggestion that, despite legal advice, the accused should make his own decision about whether to speak and that he would not be believed if he did not speak during the police interview, improperly undermined the advice the accused received from his lawyer: *R v Othman,* 2018 ONCA 1073, at paras 14, 16, 18

In *R. v. DeClercq*, [1968] SCR 902, the Supreme Court of Canada held that the truth or falsity of a statement to a person in authority is not irrelevant to an inquiry into the voluntariness of the statement. In giving evidence on the voir dire on voluntariness, an accused may be asked whether the statement is true: *Richards,* at para 82

The confessions rule is linked to the law's concern that involuntary statements are unreliable. However, the rule is also said to rest on fundamental notions of trial fairness and the idea that a person in the power of the state's criminal process has the right to freely choose whether or not to make a statement to the police, coupled with a concern [for] the repute and integrity of the judicial process. Those same concerns underlay the privilege against self-incrimination a detainee's right to silence, which is as a principle of fundamental justice under section 7 of the Charter: *R v Paterson,* 2017 SCC 17 at paras 14-15

Voluntariness is concerned with the circumstances in which a statement is made. The content of the statement does not affect or change the circumstances in which the statement was made: *R v Stevens,* 2016 ONCA 292 at para 12

The absence of a caution is a factor that goes to the voluntariness of the statement. However, the absence of a caution is not determinative: *R v Pearson,* 2017 ONCA 389 at paras 16-22

The confessions rule does not apply to statements tendered in the context of a *Charter voir dire: R v Paterson,* 2017 SCC 17 at para 18

It is fundamental that, in nearly all cases, a statement made to a person in authority by one accused is not admissible in relation to another co-accused in a joint trial, even if the statement refers to something said or done by the other accused.

The co-conspirators' exception to hearsay is an exception to this general rule. It follows that, at least as a general rule, a co-accused has no direct interest in a voir dire held to determine the admissibility of another co-accused's statement, thus no unqualified right to participate in a voir dire to determine the admissibility of that statement: *Richards,* 2017 ONCA 424, at para 80

The absence of a verbatim record of a statement does not necessarily render a statement inadmissible: *R v Pauls,* 2020 ONCA 220, at para 90

ii. Absence of a Caution

The absence of a caution may unfairly deprive someone of being able to make a free and meaningful choice to speak to police when they are at risk of legal jeopardy. However, the caution does not resolve all of the concerns addressed by the confessions rule. The absence of a caution is an important but not a decisive factor in the voluntariness inquiry. Even where a caution is not given, the circumstances may nevertheless indicate that a person has freely chosen to speak. Note that the fairness considerations underlying the importance of a caution arise primarily when the individual is a suspect at the time of speaking to the police: *R v Tessier,* 2022 SCC 35

When an accused brings a voluntariness claim with respect to police questioning that did not include a caution, the first step is to determine whether or not the accused was a suspect. The test is whether there were objectively discernable facts known to the interviewing officer at the time of the interview which would lead a reasonably competent investigator to conclude that the interviewee was implicated in the criminal offence being investigated. If the accused was a suspect, the absence of a caution is *prima facie* evidence of an unfair denial of choice but not dispositive of the matter.

However, the absence of a caution is not conclusive and the Crown may still discharge its burden if the totality of the circumstances allow. The Crown need not prove that the accused subjectively understood the right to silence and the consequences of speaking, but where it can, this will generally prove to be persuasive evidence of voluntariness: *R v Tessier,* 2022 SCC 35

iii. Absence of a Recording

If the police failure to make a proper recording of an alleged inculpatory statement is in issue at trial, I think a trial judge should tell the jury that the failure to make a proper recording is an important factor for the jury to consider in deciding whether to rely on the police version of the alleged statement: *R v Verma,* 2025 ONCA 122, at paras 14-15

iv. Standard of Review

The determination of whether a confession is voluntary is a question of fact or of mixed law and fact. If the application judge properly considers all the relevant circumstances, then a finding regarding voluntariness is essentially a factual one, and should only be overturned for palpable and overriding error: *R v Wabason,* 2018 ONCA 187 at para 8: *R v Othman,* 2018 ONCA 1073, at para 11; *R v Hayes,* 2020 ONCA 284, at paras 41-42

Where a trial judge applies the correct test and considers all relevant circumstances, deference is owed to the trial judge's ultimate determination on voluntariness: *R v Al-Enzi,* 2021 ONCA 81, at para 80

v. The Derived Confessions Rule

The derived confessions rule where an initial involuntary statement taints a subsequent, voluntary statement. An involuntary statement may render a later statement involuntary where, "the tainting features which disqualified the first confession continued to be present or if the fact that the first statement was made was a substantial factor contributing to the making of the second statement": *R v Foster,* 2017 ONCA 751 at paras 9-10

vi. Waiver of the Right to a Voluntariness Voir Dire

There is no particular wording or formula required to communicate an informed waiver. However, the waiver must be express. The question is: Does the accused

indeed waive the requirement of a *voir dire* and admit that the statement is voluntary and admissible in evidence?

A trial judge has a duty to ensure that a statement is voluntary notwithstanding counsel's failure to raise the issue. A trial judge does not commit reversible error, however, unless clear evidence existed in the record which objectively should have alerted him to the need for a *voir dire* notwithstanding counsel's silence: *R v Stevens,* 2016 ONCA 292, at para 11

Note, however, that in *Quinton,* the Court of Appeal said that a trial judge is obliged to conduct a *voir dire* into the admissibility of a confession, even in the absence of objection, unless the right to a *voir dire* has been expressly waived: *R v Quinton,* 2021 ONCA 44, at para 41; see also para 47

In the context of a waiver made by defence counsel, the trial judge must be satisfied that counsel understands the matter and has made an informed decision to waive the *voir dire*. The onus on a trial judge with respect to voluntariness is high, even where an accused is represented by counsel. The trial judge has a duty to conduct the trial judicially quite apart from lapses of counsel. This includes the duty to hold a *voir dire* whenever the prosecution seeks to adduce a statement of the accused made to a person in authority: *R v Sabir,* 2018 ONCA 912, at paras 24

Once a waiver has been offered the trial judge has discretion to accept the waiver, to hold a *voir dire*, or to make inquiries of counsel as to factual admissions underlying the waiver. Although a trial judge is not required to make inquiries before accepting the waiver, the trial judge must be "satisfied that counsel understands the matter and has made an informed decision to waive the *voir dire*": *R v Quinton,* 2021 ONCA 44, at para 46

A mistaken concession by defence counsel that a voir dire was not required on the law does not constitute a valid waiver: *Quinton* at para 48

When there is no *voir dire* at trial, appellate courts will not intervene if it is clear that the statement would have met the admissibility threshold if a *voir dire* had been held: *Quinton* at para 72

In *R. v. Dimmock*, the British Columbia Court of Appeal dealt with the question of whether a self-represented accused gave an informed waiver of a voluntariness voir dire. The Court ordered a new trial because the trial judge did not intervene to hold a *voir dire* on the admissibility of certain statements made by the accused to

police, or obtain the accused's informed waiver. The court concluded that despite the trial judge explicitly asking the accused whether the statements were voluntary and free of any inducement or threat, it could not be established based on these exchanges that the accused understood the issues and provided informed consent: *R v Dimmock,* (1996), 47 CR (4th) 120 (BCCA);

In *Sabir,* the Court of Appeal held that, in the absence of an express waiver, the trial judge erred by not holding a *voir dire* into the admissibility of the accused's statements when he indicated his intention to adduce them. The trial judge was required to inform the appellant of the purpose of a voluntariness *voir dire*, that he had a right to waive a *voir dire*, and the consequences of so doing. The appellant's response to this information may have required a more detailed explanation of the *voir dire* process, including evidence to be adduced by each party and the burden of proof. The court concluded that the failure to conduct a *voir dire* vitiated the conviction: *R v Sabir,* 2018 ONCA 912, at paras 26-29.

vii. Mr. Big Confessions

In *Hart*, Moldaver J. foresaw that police might make superficial changes to their operations to avoid *Hart*. As a result, he defined a Mr. Big investigation broadly, at paras. 10, 85: "where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him…any confession is presumptively inadmissible" (emphasis added).

The relevant question to determine whether *Hart* applies to an operation is whether the operation poses the potential for the three dangers identified in *Hart*: unreliable confessions, the prejudicial effect of the evidence of the appellant's participation in the scheme, and the potential for police misconduct: *R v Quinton,* 2021 ONCA 44, at paras 40-41

In *Quinton,* the Court suggested that the confession in issue was problematic and may not have survived the scrutiny of a Mr. Big *voir dire*. At paragraph 91, the Court stated:

> In summary, the appellant was extremely vulnerable and came to depend on Det. Hopiavuori: he had very little money and lacked a social network; he had documented mental health issues, including addition to alcohol; by the time of his confession, he had significant physical health issues; and he was off his medication for three days in the lead-up to his confession. The appellant's

> vulnerabilities were exploited, consciously or not, by the operation: the police officers provided him with money; they made him feel valued; they provided him food and alcohol; they were invaluable to the appellant while he was recovering from his stroke; and they actively prevented the appellant from obtaining medication right before the confession.

The abuse of process prong of the test is intended to guard against state conduct that society finds unacceptable, and which threatens the integrity of the justice system. The operation cannot be permitted to overcome the will of the accused and coerce a confession. Operations that prey on an accused's vulnerabilities – like mental health problems, substance addictions, or youthfulness – are also highly problematic. Taking advantage of these vulnerabilities threatens trial fairness and the integrity of the justice system.

In addition to mental health problems and substance addiction, courts have explored whether the accused possessed traits such as intelligence and "street smarts" and have also explored the degree to which the accused was emotionally bonded to the undercover operatives, dependant on the fictional criminal organization, socially isolated, and destitute: *R v Quinton,* 2021 ONCA 44, at paras 78-79

In *Quinton*, the Court of Appeal stated that "The promise of a "reinvigorated" abuse of process doctrine must not be an empty one." And "the courts…must seriously consider the applicability of the abuse of process doctrine in cases of this nature:" see paras 93-94

B. DISBELIEVED VERSUS FABRICATED STATEMENTS

i. General Principles

The law draws a distinction between statements or testimony by an accused which are disbelieved, and therefore, rejected, and statements or testimony which are found to be fabricated in an effort to avoid culpability. A disbelieved statement or evidence has no evidentiary value. A statement or evidence found to be fabricated in an effort to avoid liability may be considered as circumstantial evidence of guilt: *R v UK,* 2023 ONCA 587, at para 71; *R v Iqbal,* 2021 ONCA 416

It is not the disbelief of an accused's evidence that may provide circumstantial evidence of guilt. Rather, it is the attempt to deceive that supports an inference of fabrication with an intent to avoid liability: *R v UK,* 2023 ONCA 587, at para 74

An alibi or other exculpatory statement that is merely disbelieved is not evidence that strengthens the Crown's case. By contrast, "where the Crown adduces evidence from which the trier of fact can infer that the exculpatory statement was fabricated, that evidence is capable of supporting an inference of guilt"

The reason for distinguishing mere disbelief from a finding of fabrication relates to the fundamental principle that the onus of proof remains on the Crown throughout a criminal trial
To establish fabrication, the trier of fact must rely on evidence that is independent of the evidence that contradicts or discredits the exculpatory explanation

While evidence that points to an accused person's guilt may lead a trier of fact to reject an accused person's statement as untrue, standing alone, direct evidence of guilt cannot be equated with fabrication.

Evidence of fabrication may emerge from the circumstances in which the disbelieved out-of-court statement was made… For example:

1. the circumstances in which a false statement was made may show an intent to mislead the police or others or an intent to deflect suspicion from the maker of the statement or towards others:
2. The timing of the statement, for example that the accused provided the statement at a time when the police did not suspect or have any reason to suspect the involvement of the accused;
3. The scope of the exculpation provided by the statement; and
4. The degree of detail provided in the statement

R v Clause, 2016 ONCA 859, at paras 52 - 56, 61-62; *R v MacIsaac,* 2017 ONCA 172, at paras 47-48; *R v Vassel,* 2018 ONCA 721, at para 169; *R v Al-Enzi,* 2021 ONCA 81, at paras 38-39

Independent, in this sense, means that the evidence of concoction is separate from the evidence of guilt, not necessarily separate from the statements themselves. For example, where an accused has made contradictory exculpatory statements, the self-contradiction of an accused may constitute independent evidence of fabrication. This requirement ensures that the Crown is made to prove

an accused's guilt beyond a reasonable doubt, and that mere disbelief of an accused does not automatically lead to a guilty verdict.

Where the exculpatory statement is made out of court, independent evidence of fabrication may emerge from the evidence of the circumstances in which the statement was made. Such evidence will necessarily be case and fact specific. Some examples of such evidence are pre-arrest exculpatory statements that are specific and detailed or post-arrest statements that are inherently implausible: *R v Al-Enzi,* 2021 ONCA 81, at paras 39-40

Independent evidence of fabrication may be found in the circumstances in which the statement was made, including the timing, as well as its logical implausibility, level of detail, or internal inconsistencies in the statement: *R v UK,* 2023 ONCA 587, at para 77

For example, in *UK,* the Court of Appeal found sufficient independent evidence of fabrication in a case where two accused claimed that the complainant in a sexual assault case was chugging Hennessy after the sexual contact. The independent evidence consisted of the fact that:

- Each accused had a very similar account in their police statement (i..e, there was an improbability of coincidence that each would be mistaken about the same exculpatory detail)
- This portion of the statement was relatively detailed and specific for both accused;
- The accused had the opportunity to discuss the events at issue prior to providing their statements and one accused said they did discuss them;
- Each accused quickly gave up this detail as mistaken when pushed on it by the officer conducting the interview: 2023 ONCA 587, at para 87

Evidence that merely puts the accused at the crime scene, contrary to an alibi, cannot ground an inference of fabrication. Without more, such evidence is equally consistent with the accused having been honestly mistaken about their whereabouts at the time.

In contrast, the nature, timing, and content of an alibi – in other words, the circumstances surrounding an alibi – can, in some cases, furnish evidence of fabrication. For example, the fact that an accused pre-emptively volunteered a false alibi before they became a suspect can furnish circumstantial evidence that

the alibi was prepared by the accused and then planted to mislead the police, particularly where that false alibi was detailed in nature.

Another circumstance capable of serving as independent evidence of fabrication arises where significant parts of an alibi narrative are found to be deliberately and demonstrably false, rather than mere errors. For example, depending on their nature, contradictions between two or more versions of an alibi statement may circumstantially suggest that at least one of those versions must have been concocted. Likewise, dubious explanations for an admitted lie may invite an inference of fabrication.

Even the timing and subject matter of false information may, in certain cases, support an inference that an accused fabricated that false information. This could include changes made by an accused to their alibi story over time, as new information comes to light.

Moreover, evidence of dishonest efforts by an accused to deflect suspicion from themselves can also serve as independent evidence that may assist in showing the false alibi offered was fabricated.

Ultimately, in order for independent evidence relating to a false alibi to be incriminating, it must be possible to reasonably infer from the totality of the evidence that: (1) the accused knowingly offered a false alibi, and (2) the accused deliberately did so because they had a culpable state of mind: *R v Cole,* 2021 ONCA 759, at paras 115-120

A trial judge has a duty to consider the effect of the Crown's allegation of fabrication on the admissibility of an accused's statement. This duty persists even where the *voir dire* focuses on other issues relating to the statement, such as voluntariness or *Charter* compliance

ii. Instruction to the Jury

First, the trier of fact must determine whether they believe or have a reasonable doubt about the truthfulness of the statement.

Next, if the judge concludes that there is sufficient independent evidence of fabrication of an exculpatory out-of-court statement, "the judge should instruct the jurors that it is open to them to find that the accused fabricated the exculpatory

version of events because he or she was conscious of having done what is alleged and that they may use that finding, together with other evidence, in deciding whether the Crown has proven the case beyond a reasonable doubt"

If, on the other hand, there is insufficient independent evidence of fabrication, the jury should be instructed to disregard any disbelieved exculpatory statement and decide the case on the balance of the evidence

It is essential for the trial judge to set out clearly the difference between evidence leading only to disbelief and independent evidence of fabrication. Where the fabrication instruction is given, the trial judge must "carefully outline what evidence is capable of constituting independent evidence: *R v Clause,* 2016 ONCA 859

Where independent evidence of fabrication exists, the following should be communicated to the jury :

A. the trier of fact may, but does not have to, disbelieve the accused's exculpatory statement;
B. if they disbelieve the statement, is there other, independent evidence upon which they may, but do not have to, find that the accused fabricated the exculpatory statement;
C. if, on the basis of the independent evidence, they do not find that the accused fabricated the statement, they must ignore the statement and treat it as if it had never been given;
D. by contrast, if they do find that the accused fabricated the statement, they may consider the reason why the accused fabricated the statement, including whether it was to conceal their involvement in the offence(s) charged. This determination must be made in light of all the evidence.

Where an instruction regarding fabrication is provided, a trial judge should carefully outline what evidence is capable of constituting independent evidence of fabrication.

However, the failure of a trial judge to provide such an instruction will not always constitute a reversible error. Rather, the question for an appellate court is not whether an *O'Connor* instruction would have been appropriate, but whether the instruction given prejudiced the appellant's right to a fair trial.

The risk of prejudice arising from a trier of fact's confusion of mere disbelief with affirmative evidence of guilt underscores the law in this area. However, this risk is lessened where the statement to be adduced is an out-of-court statement of the accused, as compared to the accused's in-court testimony: *R v Al-Enzi,* 2021 ONCA 81, at paras 41-46; *see also R v UK,* 2023 ONCA 587, at para 96

C. DESBELIEVED VERSUS FABRICATED TESTIMONY

The risk that a jury will inadvertently shift the burden of proof is qualitatively different where the jury is instructed to consider whether an accused's trial evidence was deliberately fabricated to avoid liability, and that they may use such a finding as circumstantial evidence of guilt. Such an instruction risks undermining the burden of proof on the Crown because, if too readily given, a jury may use mere disbelief of an accused's evidence as positive evidence on the scale to prove guilt. This would undermine the third branch of the *W.(D.)* analysis. For this reason, what may constitute independent evidence of fabrication is different where the allegation of fabrication relates to out-of-court statements rather than to trial evidence.

Unlike for out-of-court statements, where there is an allegation of fabrication of trial evidence, the circumstances surrounding the testimony, such as logical implausibility or internal inconsistencies, *cannot* constitute independent evidence of fabrication. Before an adverse inference may be drawn, there must be evidence capable of showing fabrication apart from both the evidence contradicting the accused's testimony and the fact that the accused is found to have testified falsely at trial. An example of the type of independent evidence that can provide a basis to instruct a jury on fabrication of trial evidence is evidence from another witness that the accused attempted to persuade them to lie about the accused's whereabouts at the time of the offence, Whether the evidence in a given case amounts to independent evidence of fabrication is necessarily a fact-specific exercise.

In cases where there is independent evidence of fabrication of either a statement or trial evidence, a trial judge must properly instruct the jury: *R v UK,* 2023 ONCA 587, at para

Instructions to a jury regarding an allegation that trial evidence is fabricated should include at least the following:

- An explanation of the distinction between a disbelieved statement or evidence and a fabricated statement or evidence, and that mere disbelief has no evidentiary value;
- An explanation that in order to find that a statement or evidence is fabricated, the jury must find that there is evidence of fabrication independent of the evidence which discredits or contradicts the accused's version of events;
- An explanation of what is capable of constituting independent evidence of fabrication (and some review of the relevant evidence);
- That if the jury concludes that the statement or evidence is false, the jury must consider other explanations for the false statement or evidence before concluding that the statement or evidence was intentionally fabricated for the purpose of avoiding liability. The trial judge should review the relevant evidence of other explanations: *R v UK,* 2023 ONCA 587, at para 96

It is not necessarily the case that the absence of one of these elements will render an instruction insufficient. An appellate court must take a functional approach to reviewing a jury charge, and review the impugned instructions in the context of the charge as a whole: *R v UK,* 2023 ONCA 587, at para 97

D. ARTISTIC EXPRESSION

Various forms of artistic expression, such as poems and songs, are not necessarily probative of the truth of what is expressed. The motives underlying the expression may be many. Yet these forms of expression may be capable of significant prejudice.

Evidence of some forms of artistic expression may be received as part of the narrative, a link in the chain of inferences tending to establish guilt. The strength of the link is for the jury to decide. These forms of artistic expression should not be considered in isolation as direct proof of any conduct to which they may refer and require careful jury instructions to ensure no improper use: *R v Boucher,* 2022 ONCA 40, at paras 128-129

i. Rap Lyrics

In the absence of any specific rule of admissibility governing the reception of evidence of rap lyrics in a criminal trial, as well as any argument inviting the creation of such a bright-line rule, its reception at trial depends upon its relevance, materiality and compliance with any applicable rule of admissibility: *R v Skeete,* 2017 ONCA 926, at para 144; see also *R v Campbell,* 2015 ONSC 6199

ii. Dreams

Nothing said or left unsaid in jury instructions about dreams should leave the impression with the jury that they could be treated as an admission of guilt: *R v Boucher,* 2022 ONCA 40, at para 130

E. EDITING AN ACCUSED'S STATEMENT

A statement or record of interview of an accused tendered in evidence by the Crown and found to be voluntary may be edited to excise parts that are irrelevant to the issues in play at trial or unfairly prejudicial to the accused.

A trial judge who admits a statement or record of interview that requires editing must ensure not only that irrelevant or unnecessarily prejudicial contents are excised, but also make certain that what remains retains its proper meaning when considered in relation to the whole of the statement: *R v Boucher*, 2022 ONCA 40, at paras 125-126

F. CO-ACCUSED'S STATEMENT

A co-accused statement is inadmissible against an accused. When the Crown leads evidence of a statement made by one accused, the jury must be told that the statement is admissible only against the maker of the statement and cannot be

considered in determining the co-accused's culpability: *R v John,* 2016 ONCA 615 at para 35; *R v Drooly,* 2009 ONCA 910 at para 133

In considering the reliability of the exculpatory portions of statements given by each of the co-accused, the trier of fact can, however, consider the inconsistencies found in the various statements: *R v Drooly*, 2009 ONCA 910

The co-conspirators' exception to hearsay is an exception to this general rule: *Richards,* 2017 ONCA 424, at para 80

In some circumstances, an accused in a joint trial other than the maker of a statement tendered in evidence at trial by the Crown may be able to rely on the statement. In order to do this, the accused who seeks to rely on the co-accused's out-of-court statement must establish its admissibility for this purpose under the principled exception to the hearsay rule: *R v Srun,* 2019 ONCA 453, at para 122

ADMISSIONS

A. WHAT IS AN ADMISSION?

An admission is a statement of an opposing party offered in evidence against that party. A statement can include an express oral or written assertion or implied from nonverbal conduct intended by the party as an assertion: *R v Lo,* 2020 ONCA 622, at para 64

B. ADOPTIVE ADMISSIONS

An accused person can adopt a statement f they "expressly adopt the statement or where, by their words, action, conduct or demeanour they may be taken to have inferentially adopted it as true. If an accused person "adopts" as true a statement made by a co-accused person, that statement may be used as evidence against them as well, since they have adopted that statement as their own: *R v Millard,* 2023 ONCA 426, at para 91

When the Crown seeks to treat a statement made by one accused person as an adopted admission by their co-accused, the trial judge must perform a gate-keeping function. If the trial judge determines that a finding of adoption by the accused is not available on the evidence, the trial judge must direct the jury not to use it as evidence against the accused. But if a finding of adoption is available on the evidence, it is up to the jury to apply the legal principles as instructed by the trial judge to determine whether the inference of adoption should in fact be drawn: *R v Millard,* 2023 ONCA 426, at para 92

C. DECLARATIONS AGAINST INTEREST

Admissions are often against their maker's interest, but they need not be. By contrast, declarations against interest must be against the maker's interest. Another requirement is that the declarant must be unavailable: *R v Lo,* 2020 ONCA 622, at paras 65-66

D. ADOPTIVE ADMISSIONS

If an accused person adopts as true a statement made by a co-accused person, that statement may be used as evidence against them as well, since they have adopted that statement as their own. An accused person can adopt a statement made by their co-accused if they expressly adopt the statement or where, by their words, action, conduct or demeanour they may be taken to have inferentially adopted it as true.

This line of reasoning tends to operate where the alleged adoptive conduct is silence in the face of an allegation

When the Crown seeks to treat a statement made by one accused person as an adopted admission by their co-accused, the trial judge must perform a gate-keeping function. If the trial judge determines that a finding of adoption by the accused is not available on the evidence, the trial judge must direct the jury not to use it as evidence against the accused. But if a finding of adoption is available on the evidence, it is up to the jury to apply the legal principles as instructed by the trial judge to determine whether the inference [of adoption] should in fact be drawn: *R v Millard,* 2023 ONCA 426, at paras 91, 92, 103

Where the alleged adoptive conduct is silence in the face of an allegation, the underlying theory is typically the assumption that the natural reaction of one falsely accused is promptly to deny the allegation. The fact that the statement does not contain an accusation against the accused can therefore weaken or even defeat the adopted admission theory.

In *Millard,* the Crown took a different theory to an adoptive admission. In particular, the Crown relied on actions engaged in by Mr. Millard to capture and preserve the ashy stone rap lyrics alluding to the deceased's murder, most significantly, by filming their performance by the co-accused and by backing that film up on his computer. In effect, the inference was that Millard adopted the ashy stone rap lyrics by keeping them in order to memorialize the deceased's murder: *R v Millard,* 2023 ONCA 426, at para 103

E. WHO CAN MAKE ADMISSIONS?

For the most part, admissions are made by the party against whom they are offered in evidence. But they may also be made by an agent within the scope of their authority. Counsel acting for an accused may also make admissions on behalf of the accused: Section 655 of the CRIMINAL CODE expressly authorizes counsel to "admit any fact alleged…for the purpose of dispensing with proof thereof": *R v Lo,* 2020 ONCA 622, at para 67

F. FORMAL ADMISSIONS

Admissions may be formal or informal. In criminal proceedings, the Criminal Code recognizes two formal admissions:

- a plea of guilty; and
- an admission of fact under s. 655.

A plea of guilty is a formal in-court admission by an accused that they committed the offence to which the plea has been entered.

In the proceedings in which they are entered, formal admissions are conclusive of the facts admitted. They are not subject to contradictory proof. On the other hand, informal admissions are not conclusive: *R v Lo,* 2020 ONCA 622, at paras 68-9.

Rather, they may be contradicted or explained by evidence adduced at trial: *R v Stennett,* 2021 ONCA 258, at paras 56-58

Where a formal admission has been made it has the effect of withdrawing that fact from issue and dispensing with the need for proof of that fact: 2023 ONCA 864, at para 45

Formal admissions may relate to admissions as to objective facts. Informal admissions may relate to the anticipated evidence of a witness. In this regard, it iss important to bear in mind that an agreement about what a witness could say or would have said is not an agreement that what they say is true: *R v Scott,* 2021 ONCA 625, at para 67

Formal admissions need not be formalized in any technical sense. They can be made by a statement of counsel during the course of litigation. It is enough if it is evident, as a matter of substance, that the party against whom that fact operates intended to communicate that the fact is true: *R v Rudder,* 2023 ONCA 864, at paras 45-48

When a formal admission has been made, however, a trial judge is free to interpret what the admission of fact means: *R v Rudder,* 2023 ONCA 864, at para 49

G. ADMISSIONS MADE IN OTHER PROCEEDINGS

Sometimes, formal admissions made in prior proceedings may be tendered and received in evidence in later proceedings. For example, a plea of guilty in a prosecution for a provincial or criminal offence may be received in evidence in subsequent civil or criminal proceedings.

A plea of “no contest" is not available to an accused in criminal proceedings. As s. 606(1) of the *Criminal Code* makes clear, an accused called upon to plead in criminal proceedings may plead guilty, not guilty, or the special pleas authorized by Part XX and no others.

However, accused persons may follow a procedure with some affinity to what ensues after a no-contest plea. Its purpose is to preserve a right of appeal from a decision on a contested pre-trial motion that would be lost if a plea of guilty were entered. The procedure involves:

i. a plea of not guilty;
ii. an Agreed Statement of Facts establishing the essential elements of the offence(s) charged;
iii. no submissions on proof of guilt by the accused; and
iv. entry of a conviction: *R v Lo,* 2020 ONCA 622, at paras 70-75

H. THE USE, ACCEPTANCE, AND RESCINDING OF, ADMISSIONS

Admissions are received as exceptions to the hearsay rule. Unless made to persons in authority, an accused's admissions are presumptively admissible: *R v Lo,* 2020 ONCA 622, at para 81

When formal admissions of fact have been made, as matter of law, a trial judge is obliged to accept those facts: *R v Rudder,* 2023 ONCA 864, at para 44

Once an agreement to make admissions for trial is made, pursuant to s.655, counsel must obtain permission of the trial judge to rescind the agreement. The trial judge has a discretion to refuse permission. The trial judge may consider whether the agreement was made in haste, or whether there was a mistake or misunderstanding which lead to the agreement. *R v Lapps,* 2019 ONCA 1001; *R v Stennett*, 2021 ONCA 256, at para 56

I. THE EFFECT OF ADMISSIONS ON THE ADMISSIBILITY OF EVIDENCE

While a trial judge cannot require the Crown to accept certain admissions, the Crown should not be allowed to gain entry for prejudicial evidence by refusing to accept the admissions an accused is prepared to make: *R v Oppong,* 2021 ONCA 352, at para 81

ALIBI

A true alibi places an accused elsewhere and does not implicate the accused in any way in the crime with which he or she is charged. Where the accused's explanation of his whereabouts did not place him elsewhere, but in fact placed him in the vicinity of the offence at the relevant time, albeit for an allegedly innocent reason, this does not constitute alibi evidence: *R v Iqbal,* 2021 ONCA 416, at para 86

Neither is it alibi evidence where an accused acknowledges in his testimony that he was present at the scene of the alleged crime, but explains his actions and movements while at the scene of the alleged crime in a manner that differed from the account provided by the complainant: *R v Haidary,* 2023 ONCA 786, at para 12

ADMISSIBILITY: PROCEDURE AND REVIEW

The admissibility of evidence tendered for reception in a criminal trial is for the trial judge to determine. In a jury trial, the presiding judge has the duty to ensure that only relevant, material and admissible evidence gets before the jury: *R v JH,* 2020 ONCA 165, at para 56

The obligation of the trial judge is to ensure that only relevant, material, and admissible evidence is received. It is also incumbent upon counsel conducting a case, whether prosecuting or defending, examining in-chief, cross-examining or re-examining, to adduce evidence that is relevant, material and admissible.

At trial, the presiding judge has a duty to intervene to ensure compliance, at least in cases in which the contravention may result in the introduction of evidence prejudicial to the accused. Failure of defence counsel to object does not bar a successful appeal on this ground. Nor does appellate success inevitably follow. On appellate review, the question is whether, in the context of the entire trial, the

evidence or other conduct (including any response or lack of response by the trial judge) caused a substantial wrong or miscarriage of justice: *R v JH,* 2020 ONCA 165, at paras 98-101

In trials in the Superior Court of Justice, any party who seeks admission of evidence that a common law or other rule renders presumptively inadmissible must apply to the trial judge for an order permitting its reception, pursuant to. rr. 30.01 and 30.02(1) of the *Criminal Proceedings Rules for the Superior Court of Justice: R v JH,* 2020 ONCA 165, at para 57

Neither the common law nor the *Charter* require that any specific procedure be followed in determining the admissibility of evidence. The procedure followed may vary and may be adapted to protect any competing interests that may come into conflict when evidence is proffered at trial: *R v Polanco,* 2018 ONCA 444 at para 29 citing *R. v. Darrach* (1998), 38 O.R. (3d) 1, at pp. 21-22

The form the admissibility inquiry will take is for the judge to decide: *R v JH,* 2020 ONCA 165, at para 58

There is no rule regarding how a *voir dire* on the admissibility of evidence is to be conducted nor is there any requirement that *viva voce* evidence be heard. However, before rendering a proper legal ruling, the trial judge must have the necessary factual foundation, in some form, on which to make an informed decision on whether (1) the evidence is relevant; and (2) the probative value of the evidence outweighs its prejudicial effect. The failure to engage in the second stage of the analysis is an error of law: *R v McKenna,* 2018 ONCA 1054, at paras 21-23

The trial judge's discretion to determine the form that an admissibility voir dire will take will be based on the issues involved and the nature of the case being tried.. In many cases it is not only common, but preferable in the interests of efficiency, to conduct admissibility voir dires based on information that would not be admissible during the trial proper. This is not to say there are never cases where admissible evidence will be required to establish contested facts in an admissibility voir dire. There are passages, for example, supporting the proposition that oral evidence must be presented in contested voluntariness voir dires and in contested Charter admissibility voir dires.

Nonetheless, in exercising discretion relating to the manner in which any admissibility voir dire is conducted, trial judges should take a functional approach to ensure that the record before them enables factual determinations required to

determine admissibility to be fairly made, and they should disregard contested information that has been received that cannot fairly be assessed where it is important to do so: *R v Aragon,* 2022 ONCA 244, at paras 37-39; see *R v Dirie,* 2022 ONCA 767, at para 59

It may not be necessary in all cases to conduct an admissibility inquiry in accordance with the procedure prescribed by the *Criminal Proceedings Rules*. An express waiver by counsel of the necessity for an inquiry, and an admission that the proposed evidence is admissible, may obviate the necessity for an inquiry: *R v JH,* 2020 ONCA 165, at para 59

The failure to conduct an admissibility inquiry may amount to procedural error capable of vitiating a conviction. But whether such a consequence will ensue from the failure will depend on the circumstances of each case. In some instances, the failure may be rendered harmless by the application of a curative proviso: *R v JH,* 2020 ONCA 165, at para 60

A trial judge's decision on the admissibility of evidence is entitled to deference on appeal, provided that it is compliant with the correct legal applicable principles and does not disclose a material misapprehension of the evidence central to the assessment: *R v Al-Enzi,* 2021 ONCA 81, at para 117

AUTHENTICATION

What "authentication" requires for the purposes of admissibility "depends upon the claim(s) which the tendering party is making about the evidence": *R v AS,* 2020 ONCA 229, at para 27

Authentication is intertwined with relevance: in the absence of authentication, the thing lacks relevance unless it is tendered as bogus. At common law, authentication requires the introduction of *some* evidence that the item is what it purports to be. The requirement is not onerous and may be established by either or both direct and circumstantial evidence.

For electronic documents, s. 31.1 of the *CEA* assigns a party who seeks to admit an electronic document as evidence the burden of proving its authenticity. To meet

this burden, the party must adduce evidence *capable* of supporting a finding that the electronic document is what it purports to be. Section 31.8 provides an expansive definition of "electronic document", a term which encompasses devices by or in which data is recorded or stored. Under s. 31.1, as at common law, the threshold to be met is low. When that threshold is satisfied, the electronic document is admissible, and thus available for use by the trier of fact.

To satisfy this modest threshold for authentication, whether at common law or under s. 31.1 of the *CEA*, the proponent may adduce and rely upon direct and circumstantial evidence. Section 31.1 does *not* limit how or by what means the threshold may be met. Its only requirement is that the evidence be *capable* of supporting a finding that the electronic document "is that which it is purported to be." That circumstantial evidence may be relied upon is well established.

At common law, correspondence could be authenticated by the "reply letter" doctrine: to authenticate correspondence as having been sent by one individual to another, evidence is adduced to show it is a reply to a letter sent to that person. As a matter of logic, the same should hold true for text messages and emails. Evidence that A sent a text or email to B whom A believed was linked to a specific address, and evidence of a response purportedly from B affords some evidence of authenticity.

In a similar way, text messages may be linked to particular phones by examining the recorded number of the sender and receiving evidence linking that number to a specific individual, as for example, by admission.

As a matter of principle, it seems reasonable to infer that the sender has authored a message sent from his or her phone number. This inference is available and should be drawn in the absence of evidence that gives an air of reality to a claim that this may not be so. Rank speculation is not sufficient. And even if there were an air of reality to such a claim, the low threshold for authentication, whether at common law or under s. 31.1 of the *CEA*, would seem to assign such a prospect to an assessment of weight: *R v CB,* 2019 ONCA 380, at paras 65-72. On authenticating electronic documents, such as website screenshots, see also *R v Farouk,* 2019 ONCA 662, at para 60

The threshold for admissibility of an electronic record under s. 31.1 of the *CEA* is low. Where there are various strands of evidence capable of supporting a finding that the text messages were what they purported to be" a trial judge errs by insisting on direct evidence from the sender or on expert

forensic evidence to establish admissibility: *R v NG,* 2024 ONCA 20, at para 39

To authenticate an electronic document for the purposes of admission, s. 31.1 of the *Canada Evidence Act* requires only that there be evidence capable of supporting a finding that the electronic document is that which it is purported to be. It does not require this evidence to be provided by an independent witness: *R v SP,* 2025 ONCA 60, at para 10; see also *R v SM,* 2025 ONCA 18

AUTOPSY EVIDENCE

Autopsy photographs are often vetted, cropped or pixelated to remove prejudicial evidence from the jury. These photographs are not automatically shown to a jury simply because they were taken, or because they happen to accurately depict the true state of a deceased's remains. They must be relevant to a material issue at trial. The nature of the photographs, and the manner in which they are presented, must not unfairly divert the jury from its solemn task of deciding the case without sympathy or prejudice: *R v Cook,* 2020 ONCA 731, at para 54

CHARACTER EVIDENCE

A. GOOD CHARACTER EVIDENCE

Evidence of an accused's good character is relevant not only to support the accused's credibility as a witness, but also to support an inference that the accused is unlikely to have committed the offence charged: *R v Luckese,* 2016 ONCA

359 at para 16. It is an error of law for the trial judge to fail to instruct a jury on this point: *R v Potts,* 2018 ONCA 294 at paras 60-61

In *R v Dwyer,* 2017 ONCA 238, the Court of Appeal left open the question of whether a client who testifies that s/he has no criminal record necessarily puts his/her character in issue.

B. BAD CHARACTER EVIDENCE

i. General Principles

Discreditable conduct evidence is evidence that:

> (a) tends to show that the accused has committed an offence that is not the subject matter of the charge or charges before the court; or
>
> (b) tends to show behaviour on the part of the accused, either through prior or subsequent acts, records, statements or possessions,
>
> (c) and which, in the opinion of the court, would be viewed with disapproval by a reasonable person; *R v JW,* 2022 ONCA 306, at para 15; *R v Bos,* 2016 ONCA 443 at para 72; see also *R v MRS,* 2020 ONCA 667, at para 62

Such evidence is presumptively inadmissible because its potential for prejudice, distraction and time consumption is very great and these disadvantages will almost always outweigh its probative value: *Bos* at para 73

While a trial judge has discretion to determine the form of an admissibility voir dire, it is typical that contested evidence of other discreditable conduct is introduced through the testimony of those who suffered it (if alive), observed it, or, as admissible hearsay, by those to whom the victim reported it. The formal presentation of admissible evidence is optimal where material facts relating to admissibility are contested because the strength of the evidence establishing that the alleged discreditable conduct even occurred is an important consideration in

evaluating the probative value of the proposed extrinsic discreditable conduct evidence:

If, on a threshold examination, the evidence alleging the extrinsic discreditable conduct is of questionable credibility or reliability, the probative value of the proposed discreditable conduct evidence will be diminished. Indeed unless the proposed discreditable conduct evidence is reasonably capable of belief, it may be too prejudicial to admit: *R v Aragon,* 2022 ONCA 244, at para 40

The trial judge should not take an "all or nothing" approach with discreditable conduct, and should consider the cumulative effect of the evidence. Further, even when evidence has a permissible use, if it also incidentally exposes the general bad character of an accused, a trial judge must balance the probative value of the evidence against its prejudicial effect: *R v Bush,* 2024 ONCA 469, at paras, 23, 27

A prosecutor's desire to create fodder for cross-examination is not a legitimate path to admission. Admission of highly prejudicial evidence on this basis may actually have the effect of discouraging an accused person from testifying. Conversely, it may induce an accused person to testify just to explain irrelevant evidence that portrays him or her in an unfavourable light. Either way, it has real potential for unfairness: *R v Pilgrim,* 2017 ONCA 309 at para 59

The fact that prior conduct evidence is not discreditable is not a legally appropriate basis for exclusion. If prior conduct evidence is not discreditable, the *Handy* rule will not have to be considered, and the prior conduct evidence, if relevant, will be *prima facie* admissible: *R v Houle,* 2022 ONCA 325, at para 15

The trial judge may restrict the scope of bad character evidence to be admitted on the basis that permitting all of it to be admitted might overwhelm the jury and cast the accused in such a bad light as to make it impossible for them to evaluate the ultimate question objectively: *R v Thomas,* 2018 ONCA 694, at para 28

The failure to balance the probative value and the prejudicial effect of bad character evidence is an error that displaces the deference ordinarily owed to trial judges: *R v Rose,* 2020 ONCA 306, at para 43

The assessment of the probative value of the evidence requires the trial judge to consider: (a) the strength of the evidence that the extrinsic acts in question occurred; (b) the connection between the accused and the similar acts, and the extent to which the proposed evidence supports the inferences the Crown seeks

to make (sometimes referred to as the "connectedness" between the similar act evidence and the "questions in issue"); and (c) the materiality of the evidence – that is, the extent to which the matters the evidence tends to prove are live issues in the proceeding.

The second and third factors must not be glossed over. The Crown must be prepared to establish exactly what inferences it will be asking the jury to draw from the evidence, and the extent to which the evidence tends to permit those inferences. Defence counsel should also be prepared to identify, to the extent possible, the issues that will actually be in play at trial. This may serve to eliminate the Crown's need to adduce the evidence, or to limit the evidence required: *R v ZWC,* 2021 ONCA 116, at paras 98-100

The admissibility inquiry is important because it focuses the parties and the trial judge on the probative value of the evidence and the risk of prejudice arising from it, and it informs the instructions to the jury on the permissible and prohibited uses of any discreditable conduct evidence that is admitted: *R v Lako,* 2025 ONCA 284, at para 122

There is less risk of moral and reasoning prejudice in a judge-alone trial than in a jury trial: R v JH, 2018 ONCA 245 at paras 23-24; *R v Norris,* 2021 ONCA 847, at para 24; *R v Jevane Fuller,* 2021 ONCA 888, at para 51

A trier is entitled to rely on bad character evidence in its assessment of the overall credibility of an accused person: *R v GMC,* 2022 ONCA 2, at para 77; *R v Calnen,* 2019 SCC 6, at para 64

The risk of general bad character inferences is apt to be far greater where the Crown leads evidence of the accused's behaviour on other occasions than it is where such evidence unfolds as part of the story itself. Jurors are more likely to struggle to understand why extrinsic misconduct evidence is being presented and to thereby engage in prohibited lines of reasoning where the link between the evidence and the charged conduct is less clear: *R v BB,* 2025 ONCA 766, at para 30

Even where discreditable conduct is admitted, trial judges must exercise their gate-keeping function to ensure that highly prejudicial information that goes beyond the scope of the admissibility ruling is not admitted: *R v Aragon,* 2022 ONCA 244, at para 70

ii. Prior Record of an Accused

For a review of the case law seeking to exclude an accused's prior record, see chapter on General Principles of Law: Corbett Applications

Pursuant to s. 12 of the Canada Evidence Act, a witness may be questioned as to whether he or she has been convicted of a criminal offence. Typically, the relevance of such evidence is in respect of the witness's credibility, and the evidence cannot be used as bad character evidence or for propensity reasoning: *R v McManus,* 2017 ONCA 188 at paras 81

Given the dangers associated with propensity reasoning, questioning an accused regarding a criminal record is limited to three areas: (1) the fact of conviction; (2) the date and place of conviction; and (3) the punishment imposed. The Crown is not permitted to ask questions about the conduct underlying the convictions or whether the accused testified at the trials leading to those convictions: *R v AJK,* 2022 ONCA 487, at para 50

The proper manner in which the witness is to be questioned involves being asked about the offence, the place and date of the conviction and the punishment imposed. These details assist the trial judge in assigning the weight, if any, to the convictions when assessing the witness' testimonial trustworthiness. It is an error of law to reject an accused's evidence based upon his prior record where no evidence has been adduced as to the dates, place, and punishment imposed: *R v MC,* 2019 ONCA 502, at paras 83-86

In *Rose,* the Court of Appeal held that the admission of the reasons for conviction was a legal error, as the trial judge had failed to balance the probative value against the prejudicial effect, which should have lead to exclusion: *R v Rose,* 2020 ONCA 306, at paras 42-50

iii. Prior Statements of an Accused

Trial judges may be required to edit statements of an accused person in order to prevent the jury from seeing or hearing evidence that reflects irrelevant

discreditable conduct. Some courts have held that trial judges have a "heavy duty" to edit statements to minimize prejudice: *R v Cook,* 2020 ONCA 731, at para 53

An accused's communications with, and actions towards, a deceased person can be relevant to identity, animus, motive and intention. Even if this evidence tends to portray the accused in a negative way, no limiting caution is necessary about propensity reasoning: *R v Hamade*, 2015 ONCA 802

iv. Motive

Evidence of prior discreditable conduct can be admissible to prove *animus* and motive. Importantly, the *animus* need not necessarily be directed toward the victim, as long as it is relevant to the motive with respect to the victim: *R v Kostuk,* 2025 ONCA 195, at paras 39-40

Where evidence is admissible to establish motive, a discreditable conduct instruction on that same evidence will sometimes be unnecessary. An inference of motive may be more direct and powerful than the possibility of propensity reasoning, and a discreditable conduct instruction would only confuse the jury: *R v Staples,* 2022 ONCA 266, at para 94

It is improper to argue that the accused had a motive to commit a sexual assault because he was not involved in romantic relationships at the time. Such an argument engages improper propensity reasoning: *R v SK,* 2025 ONCA 149, at para 11

Discreditable conduct evidence that is adduced to advance a speculative theory of motive ought to be excluded. However, evidence that provides the trier of fact with real insight into the background and relationship between the accused and the victim, and which genuinely helps to establish a bona fide theory of motive is highly probative, and thus more likely to outweigh its inherent prejudicial effect: *Bos* at para 74

Prior discreditable conduct such as threats to a complainant may be relevant to the issue of animus or motive and thus admissible in evidence against the accused: *R v Thomas,* 2018 ONCA 694, at para 35

A propensity caution is not always required when the evidence is relevant to motive: *R v Kostuk,* 2025 ONCA 195, at paras 46-48

v. Multi-Count Indictments

For a review of the limitations on the use of bad character evidence, properly admitted on one count, on other counts, see Jury Law: Jury Charge: Limiting Instructions: Prejudicial Reasoning

vi. Use of Discreditable Conduct by Co-Accused's Counsel

An accused is entitled to rely on discreditable conduct by a co-accused in his/her defence. When this occurs, the trial judge must instruct the jury against moral and propensity reasoning with respect to that co-accused: *R v Zvolensky,* 2017 ONCA 273 at paras 100-101; *R v Pan,* 2023 ONCA 362, at para 131

Such evidence is admissible provided its prejudicial effect does not substantially outweigh its probative value: *R v Chambers,* 2023 ONCA 444, at para 26

This discreditable conduct includes the propensity of a co-accused to commit the offence charged. When seeking to elicit such evidence, the accused advances a *Pollock* application. The application requires that there be some evidentiary foundation to support the assertion of relevance. Even then, there is discretion to exclude this relevant defence evidence where its prejudicial effect substantially outweighs its probative value. This can arise where the evidence invokes moral or reasoning prejudice: *R v Davani,* 2023 ONCA 169, at paras 19-22

The circumstances where a co-accused may elicit evidence of a co-accused's discreditable conduct or bad character are not limited to situations of a cutthroat defence by the co-accused: *R v Davani,* 2023 ONCA 169, at para 38

An accused who testifies *against* a co-accused must accept that his credibility can be fully attacked by the latter.

An accused can lead evidence of the co-accused's silence upon arrest. In such circumstances, the trial judge is required to instruct the jury that the evidence is relevant only to the accused's credibility, which responded to testimony from the co-accused implicating the accused, and is not evidence of the co-accused's guilt: *R v Davani,* 2023 ONCA 169, at para 24

vii. Use of Discreditable Conduct in a Domestic Situation

In domestic cases, similar fact evidence or prior discreditable conduct evidence (whether uncharged or across counts) may be admissible to (1) to explain the dynamics of the relationship between accused and the complainant; (2) demonstrate the accused's animus toward the complainant; (3) explain why the complainant delayed in making a complaint; (4) and to rebut the accused's suggestion that the complainant fabricated her story: *R v CW,* 2019 ONCA 976, at para 11; *R v Nolan,* 2019 ONCA 976, at paras 42-43; *R v MRS,* 2020 ONCA 667, at paras 81-85; *R v ZWC,* 2021 ONCA 116, at paras 106-108

In many cases, much benign or mundane background evidence about the nature of a relationship between an accused person and a complainant, such as their marital status or biographical information, will be narrated during a trial. This kind of narrative evidence permits the relevant story to be told in a natural manner and is readily admissible across counts. Since it is not discreditable, it is not caught by the rules now under consideration.

However, where the evidence about the nature of the relationship raises a real risk of prejudice because it discloses bad character, it is subject to the admissibility rules for prior discreditable conduct and the similar fact evidence rule, and it's probative value must exceed its prejudicial effect: *R v MRS,* 2020 ONCA 667, at paras 83-85. When it does not, the evidence should properly be excluded: see, for example, *R v NN,* 2025 ONSC 6333.

If evidence of uncharged prior discreditable conduct has probative value, for one of the reasons described above, and is admitted, the trial judge is required to instruct the jury on its use. That instruction should identify the evidence in question, and explain the permitted and prohibited uses of the evidence.

The trial judge is also required to take additional measures to minimize the prejudicial effect of the evidence and to prevent its misuse. For example, the trial

judge does not have to admit all the evidence tendered by the Crown. The trial judge may thus limit the volume and extent of evidence that the Crown is permitted to adduce. In addition, or alternatively, the trial judge may admit the evidence, but only on the condition that it is edited, or it is adduced in a more restricted form, such as a statement or through excerpts of evidence at the preliminary hearing.

Ultimately, the trial judge's balancing of the probative value and the prejudicial effect of the evidence is entitled to significant deference, absent an error in law or principle, a misapprehension of material evidence, or a decision that is plainly unreasonable: *R v ZWC,* 2021 ONCA 116, at paras 111-113

Evidence of discreditable conduct occurring *after* the date of the alleged offences may still be admissible, for example, to demonstrate relevant context, motive or animus: *R v NH*, 2020 ONCA 694

viii. Use of Discreditable Conduct in a Homicide

Evidence that shows or tends to show the relationship between the parties may help to establish a motive or *animus* on the part of the accused. And evidence of a person's *animus* or motive to unlawfully kill another may assist in proving the identity of the killer and the state of mind of that accompanied the killing. Depending on the circumstances, this type of evidence is admissible in intimate partner homicide cases: *R v Ranhorta,* 2022 ONCA 548, at para 65

ix. Use of Discreditable Conduct in a Criminal Harassment Case

In a criminal harassment prosecution, the history of the relationship between the parties is relevant in terms of providing background and context for a proper consideration of the charges before the court. Evidence of a defendant's prior conduct toward the complainant may be admitted as going to the state of mind of the complainant during the time period covered by the indictment and to whether the complainant's fear for her safety was reasonable in all of the circumstances. It may also be admitted to provide a context within which to assess whether the conduct of the defendant was of such a nature that he knew that the conduct would cause the complainant to be fearful or that he was reckless as to whether or not she was fearful, an essential element of the offence of criminal harassment. Such evidence would also provide the necessary context in which to consider whether

her fear was objectively justifiable. The evidence is not admissible, however, to show merely that the defendant was the kind of person who was likely to have committed the offence.

However, such evidence is not admissible for it's truth. Where a trial judge references this evidence in his/her reasons, but does not avert to it's limited use, the appellate court may find that the trial judge has relied on the evidence for an impermissible use. A jury must similarly be instructed of the limited use to make of such evidence: *R v Linhares,* 2017 ONSC 1975, at paras 17-25

x. Prior Guilty Plea

Where the accused on a guilty plea has said that the facts are "substantially correct," the guilty plea is evidence of the accused having committed the essential elements of the offence, but not necessarily additional misconduct that formed part of the narrative of the guilty plea facts: *R v Thomas,* 2018 ONCA 694, at paras 37-39

xi. Similar Fact Evidence

See section below entitled SIMILAR FACT EVIDENCE

xii. Discreditable Conduct of a Non-Accused Witness

For a review of the principles surrounding cross-examination of a non-accused witness on discreditable conduct, including outstanding charges and facts underlying a conviction, see *R v John,* 2017 ONCA 622 at paras 55-66 and *R v Hussein,* 2017 ONSC 1159; see also *R v Rayner,* 2015 ONSC 2423; *R v Pascal,* 2020 ONCA 287, at paras 109-110

xiii. Gang Association

Evidence of gang membership is bad character evidence. It is presumptively inadmissible unless the Crown can demonstrate that: (a) it is relevant to an issue

in the case; and (b) the probative value outweighs its prejudicial effects. While evidence of gang membership can be highly prejudicial, it may be admissible to provide context or narrative, to establish animus or motive, or to establish the accused's state of mind or intention, among other purposes: *R v Phan,* 2020 ONCA 298, at paras 90-99; *R v Cook,* 2020 ONCA 731, at para 41; *R v Cook,* 2022 ONCA 244, at paras 31-32

In *Cook,* the Court of Appeal held that the introduction of evidence of association with the Hells Angels was highly prejudicial and should not have been admissible. The cumulative introduction of bad character evidence was found to have undermined trial fairness. The Court ordered a new trial.

xiv. STANDARD OF REVIEW

The trial judge's decision to admit bad character evidence is entitled to deference: *R v Thomas,* 2018 ONCA 694, at para 28

Evidence of prior discreditable conduct, which is presumptively inadmissible, can be admitted when its probative value on a material fact in issue outweighs its potential prejudicial effect on the fairness of the trial. Because the trial judge is best positioned to undertake this balancing exercise, the standard for appellate intervention is high. Appellate courts will defer to trial judges' balancing of probative value and prejudicial effect under both tests unless the trial judge errs in law, misapprehends the evidence, or reaches an unreasonable result: *R v Kostuk,* 2025 ONCA 195, at para 38

C. LIMITING INSTRUCTIONS

When prior discreditable conduct is admissible (for narrative or other probative value) it is essential that the trial judge clearly articulate the limited use the trier of fact is permitted to make of this evidence; the trier of fact must restrict his assessment of that evidence to its limited use: *R v Pilgrim,* 2017 ONCA 309 at para 60

Not, however, that in *MP,* the Court of Appeal held that limiting instructions about evidence of extrinsic misconduct are not necessary in every case in which such

evidence has been introduced. Among the factors relevant in determining whether a limiting instruction should be given are:

A. the nature and extent of the evidence of extrinsic misconduct;
B. the relative gravity of the extrinsic misconduct in comparison to the gravity of the misconduct charged;
C. the likelihood that a limiting instruction may reasonably draw attention to the discreditable conduct; and
D. the extent of the risk that without instruction the evidence may be used improperly: *R v MP,* 2018 ONCA 608 at para 100

A warning is not required if the facts of the case negate any realistic possibility that the trier of fact will use bad act evidence improperly. In addition, occasionally, courts have rejected appeals based on the failure of a trial judge to give a propensity direction where such failure did not prejudice the accused, but, instead, spared the accused from the reciprocal need for the judge to recite the damaging permissible uses of the similar fact evidence.

The risk of general bad character inferences is apt to be far greater where the Crown leads evidence of the accused's behaviour on other occasions than it is where such evidence unfolds as part of the story itself … [J]urors are more likely to struggle to understand why extrinsic misconduct evidence is being presented and to thereby engage in prohibited lines of reasoning" where the link between the evidence and the charged conduct is less clear.

The court will also consider whether a bad character evidence instruction would hinder the defence ability to rely on the evidence for a proper purpose: *R v BB,* 2024 ONCA 766, at paras 25-34

In *Brown,* 2018 ONCA 481, the Court of Appeal held that the trial judge erred in failing to give the jury a limiting instruction on propensity after admitting a photograph of a firearm found on the accused's cellphone as circumstantial evidence of his possession of a similar firearm.

CIRCUMSTANTIAL EVIDENCE

A. PROPER EVALUATION OF

There is no legal requirement for a special self-instruction on circumstantial evidence. To convict, a trial judge must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is one of guilt: *R v Smith,* 2016 ONCA 25 at para 80; *R v Villaroman*, 2016 SCC 33 at paras 55-56

It is the cumulative effect of all the evidence that is to be considered and may afford a basis for a finding of guilt – not each individual item which is merely a link in the chain of proof: *R v Smith,* 2016 ONCA 25 at paras 81-82; *R v Sault,* 2018 ONCA 970, at para 13

While the evidence cannot be considered in a piece-meal fashion, it is often necessary to consider the significance of individual pieces of evidence before their cumulative effect can be considered: *R v Chu,* 2023 ONCA 183, at para 11

A trier of fact cannot consider individual items of circumstantial evidence against the standard of proof required of the evidence as a whole – proof beyond a reasonable doubt: *R v McIntyre,* 2016 ONCA 843 at para 13. The standard of proof beyond a reasonable doubt applies only to the final evaluation of innocence or guilt by the trier of fact: *R v Qiang Wu,* 2017 ONCA 620at para 15

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. There can be no inference without objective facts from which to infer the facts that a party seeks to establish. If there are no positive proven facts from which an inference may be drawn, there can be no inference, only impermissible speculation and conjecture: *R v Wilson*, 2016 ONCA 235 at para 30 [citation committed]

Sometimes the absence of evidence may raise a reasonable doubt about the guilt of an accused: *R v Hassanzada,* 2016 ONCA 284 at para 68; *R v Bruzesse*, 2023 ONCA 300, at para 22

The charge must leave the jury with an understanding of how the evidence or lack of evidence relates to the issues that are left to the jury for their decision: *R v Bruzesse*, 2023 ONCA 300, at para 25

The absence of evidence may be of especial importance to the defence where no defence evidence is called. It follows that it is open to defence counsel to demonstrate inadequacies or failures in an investigation through cross-examination of the witnesses for the Crown and, in counsel's closing address, to link those failures to the Crown's obligation to prove its case beyond a reasonable doubt.

The importance of an absence of evidence to the adequacy of the Crown's proof is a variable. Trial judges instruct juries that a reasonable doubt may arise from the evidence or an absence of evidence: *Hassanzada* at paras 69, 70, 71, 107

Circumstantial evidence does not have to totally exclude other conceivable inferences: *Villaroman* at para 55. A trial judge need not negative every possible conjecture which might be consistent with innocence: *R v Onyedinefu,* 2018 ONCA 795, at para 12

The line between a "plausible theory" and "speculation" is not always easy to draw, the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty. Put another way, to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative. it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation. The trier of fact's assessment can be set aside only where it is unreasonable: *Villaroman* at paras 38, 41, 71

Merely because a trial judge rejects an alternative theory inconsistent with guilt does not mean that he or she committed a so-called *Villaroman* error. It may simply mean that there was no available inference, other than guilt, that was reasonable, given the evidence and the absence of evidence, and in light of human experience and common sense. Nor does the use of expressions such as "no evidence to the contrary" or "no competing narrative" signal a "*Villaroman* error" or a misplacement of the burden of proof: *R. v. Pun*, 2018 ONCA 240; *R. v. Caporiccio*, 2017 ONCA 742; *R. v. Arnaud*, 2017 ONCA 440, at para. 17; *R v SB1,* 2018 ONCA 807, at para 138

In circumstantial cases, inferences inconsistent with guilt do not have to be based on proven facts but must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation: *see, for example, R v MacAdam,* 2024 ONCA 13, at para 8

An appellate court is justified in interfering only if the trial judge's conclusion that the evidence excluded any reasonable alternative was itself unreasonable: *R v Loor*, 2017 ONCA 696, at para. 22.

When considering the reasonableness of the verdicts, and the inferences drawn by the trial judge, this court is entitled to consider that the appellant did not testify and did not adduce evidence to support any other reasonable inference consistent with his innocence: *R v Qiang Wu,* 2017 ONCA 620 at para 16

Where an accused does not testify, the trial judge is not required to speculate about possible defenses s/he might have offered had s/he chosen to give evidence: *R v Youssef,* 2018 ONCA 16 at para 6

Villaroman applies only in the context of wholly or substantially circumstantial cases. It does not apply to individual pieces of circumstantial evidence proffered in the context of what was otherwise a case of direct evidence: *R v IS,* 2025 ONCA 76, at para 3

For an excellent analysis of the evaluation of circumstantial evidence in a fingerprint case, see the dissenting opinion of Feldman JA in in a fingerprint case, see the dissenting opinion of Feldman JA in *R v Youssef,* 2018 ONCA 16

The accused's failure to appear at his first trial is circumstantial evidence from which an inference of guilt may be drawn. However, the accused's explanation for his failure to attend may bear on the probative value/prejudicial effect analysis, such that a legitimate excuse (e.g., illness) may negate the probative value of the evidence and therefore defeat its admissibility: *R v McKenna,* 2018 ONCA 1054, at paras 23, 59

In *Khan,* the Court of Appeal held that the verdict was unreasonable because the trial judge failed to negative an innocent explanation arising from the evidence: 2019 ONCA 81

B. IMPROPER EVALUATION OF

i. Speculative Reasoning

It is an error of law to draw inferences that do not flow logically and reasonably from established facts, because doing so draws the trial judge into the impermissible realms of conjecture and speculation. *R v MacIsaac*, 2015 ONCA 587 at para 46

Where a trial judge has employed speculative reasoning, unless the Crown can demonstrate that the error caused no substantial wrong or miscarriage of justice, the convictions tainted by that error must be quashed: *R v MacIsaac*, 2015 ONCA 587 at para 47

ii. Circular Reasoning

It is improper to ask the jury to draw an inculpatory inference from circumstantial evidence when to do so involves circular reasoning – i.e., where the accused's guilt must be assumed for the evidence to have probative value. For two examples of this type of reasoning, see *R v Hall,* 2018 ONCA 185 at paras 47-55; see also *R v Portillo* (2003), 176 CCC (3d) 467 (CA)

iii. Examples

In *Asante,* the Court of Appeal upheld the trial judge's decision to admit a photographs of a handgun in a murder case as circumstantial evidence that the accused had access to, and possession of, a handgun similar to the type of gun used in the homicide [the actual murder weapon not being recovered]: *R v Asante,* 2022 ONCA 657, at paras 28-29

C. STANDARD OF REVIEW

It is of the essence of circumstantial evidence that a single item of evidence may support more than one inference. The same may be said of several items of

circumstantial evidence, whether considered individually or assessed cumulatively. That different inferences may be drawn from individual items of evidence, or from the evidence as a whole, does not entitle a reviewing court to re-weigh or recalibrate the evidence by substituting, for a reasonable inference drawn by the trial judge, an equally – or even more – persuasive inference of its own. The task of the reviewing court is to determine whether the inferences drawn by the trial judge are "reasonably supported by the evidence". No more. No less. *R v Tsekouras,* 2017 ONCA 290 at para 231

COLLATERAL FACTS RULE

A. GENERAL PRINCIPLES

Cross-examination is fundamental to a fair trial and counsel on both sides are to be afforded wide latitude to test a witness' credibility, even in relation to collateral matters: *R v AC,* 2018 ONCA 333 at para 48

The rule governs the ability of the cross-examiner to introduce extrinsic evidence in his or her case to contradict answers given by an opposing witness on a collateral issue: *R v Khanna,* 2016 ONCA 39 at para 9; *R v MacIsaac,* 2017 ONCA 172 at para 58

If the questioner asks a question that bears on a collateral issue, he or she is "stuck" with the answer, in the sense of not being permitted to lead extrinsic evidence to contradict it. However, this does not prevent proper questions from being put in the first place: *MacIsaac* at para 58.

Put differently, the collateral facts rule does not prevent parties from asking collateral questions. It prevents parties from disproving collateral answers: *R v Dent,* 2023 ONCA 460, at para 108

Generally speaking, credibility is considered to be collateral, thereby barring the questioner from adducing extrinsic evidence that bears solely on this issue. However, the rule has developed in a manner that admits of a number of

exceptions. For example, medical evidence may be adduced to prove that, by virtue of a mental or physical condition, the witness is incapable of telling or is unlikely to tell the truth: *MacIsaac* at paras 59-60; see *R v SB,* 2016 NLCA 20 at paras 11-21, aff'd on appeal at 2017 ONCA 16

Further, sufficiently important evidence about credibility may not be collateral: *R v Kiss,* 2018 ONCA 184 at para 67

The rule does not regulate *cross-examination* of an opposing witness about prior utterances that contradict his or her testimony on a collateral matter: *Khanna* at para 9

A witness may be cross-examined about circumstances that tend to show bias, interest or corruption. The witness' denials may be contradicted by evidence as an exception to the collateral facts rule: *R v MeGill,* 2021 ONCA 253, at para 109

CORROBORATION

A trial judge's determination that a piece of evidence is confirmatory of or supports a witness' testimony, and the weight to be given to such evidence, is part of the trial judge's credibility assessment and fact-finding, which are accorded deference in the absence of a palpable and overriding error: *R v De Flores Bermudez*, 2024 ONCA 433, at para 21

The weight, in terms of corroboration, that can be given to the condition of an item or thing will be diminished where the link between that item or thing and the event depends on the testimony of the witness for which the item or thing is offered to support. It is not an error, however, for a trial judge to find testimony to be supported by the production of a thing by the witness that is in a condition that is consistent with the testimony the witness provides. This is particularly so where no suggestion has been made that the object has been tampered with.

The condition of a physical object or thing can be readily observed, without the testimony of a witness. An object, or a photo of the object, is therefore additional evidence that exists independently of the witness and can support the testimony of the witness: *R v DA,* 2018 ONCA 612 at paras 19-20

The defence failure to tender corroborative evidence to support an unusual claim, where evidence was readily available and no explanation was offered for not calling the evidence, may give rise to a legitimate adverse inference regarding credibility: *R v Strojny,* 2019 ONCA 329, at paras 44-45

The consideration of evidence which is capable of confirming or supporting certain aspects of a witness's testimony is typically part of the assessment of credibility in making findings of fact. Confirmatory evidence is often merely other circumstantial evidence that tends to support the Crown's case, or to dispose of alternative hypotheses put forward by the defence. Such evidence can be given weight even if it does not directly 'confirm the key allegations of sexual assault' or 'directly implicate the accused: *R v Primmer,* 2021 ONCA 564, at para 39: *R v HP,* 2022 ONCA 419, at para 69

Evidence can be given confirmatory weight "even if it does not directly 'confirm the key allegations of sexual assault' or 'directly implicate the accused'", where it is capable of confirming or supporting certain aspects of a witness's credibility or reliability, in the context of the specific challenges made by defence counsel: *R v HP,* 2022 ONCA 419, at para 69

Put differently, confirmatory evidence need only store the trier's faith in relevant aspects of the witness's account: *R v Neto,* 2024 ONCA 107, at para 43

Put differently, confirmatory evidence need not directly confirm key allegations in order to be considered in assessing credibility. The evidence need only be "more consistent with the complainant's version of events than with another version: *R v R v RK,* 2023 ONCA 653, at para 43

Deciding whether evidence is confirmatory of the allegations made by a complainant is part of the broader assessment of the complainant's credibility and reliability that trial judges must make based on the entirety of the evidence: *R v SR,* 2023 ONCA 671, at para 7; *R v LG,* 2023 ONCA 804, at para 37

Evidence that could be viewed as consistent with differing accounts of an event can still be relevant to a trial judge's reasoning – evidence that is supportive of a witness's testimony can, for example, be used in assessments of credibility in making findings of fact: *R v Brown,* 2022 ONCA 417, at para 22

That being said, it is not necessarily permissible to rely on evidence that equally supports competing accounts as a basis for accepting one of those accounts over

the other, or to use evidence that supports both competing accounts selectively as supporting only the complainant's account: *R v Casarsa,* 2023 ONCA 826, at para 9

In *Neto,* the Court of Appeal held that it was open to the trial judge to find that medical evidence of injuries and bleeding in the vaginal and pelvic was corroborative of the complainant's account of sexual assault: 2024 ONCA 107, at paras 39-40, 43

CREDIBILITY ISSUES

A. MULTIPLE COUNTS

In credibility case, it is incumbent on the trial judge to carefully analyze the evidence on each count and reach individual conclusions on them. An all or nothing approach to credibility assessments is improper. Absent a count-to-count similar act application by the Crown, aa trial judge must engage in an independent analysis of the evidence on each of the counts: *R v Dindyal,* 2021 ONCA 234, at paraa 27

B. Oath Helping

There is a distinction to be made between evidence that goes directly to a witness's credibility (i.e. a witness stating "in my opinion the witness is truthful"), which is inadmissible, and evidence about a feature of the witness's behaviour or testimony, which may be admissible even though it will likely have some bearing on the trier of fact's ultimate determination of the question of credibility: *R v Savage,* 2023 ONCA 240, at para 17

Even if the evidence is properly characterized as oath-helping, that fact, by itself, did not render the evidence inadmissible. As a general proposition, oath-helping evidence is inadmissible if it is led only for the purpose of bolstering a witness' evidence. If there is another purpose to which the evidence relates, the evidence

is not rendered inadmissible simply because it may also include an element of oath-helping: *R v Savage,* 2023 ONCA 240, at para 240

The rule against oath-helping prohibits the reception of evidence solely for the purpose of establishing the truthfulness of a witness.

In *RM,* the Ontario Court of Appeal found that the following witness answer was inadmissible, because the complainant should not be expressing an opinion about the disposition on the case

> Q. Can you tell us why you're here today?
>
> A. I'm here because when it all comes down to it, I honestly believe that the accused should be held accountable for his actions.

The exchange was also found to be impermissible oath helping, tending to bolster the credibility of the complainant by suggesting that she is more likely to be telling the truth because she made the choice to come to court.

Another impermissible exchange in that case took place when the Crown asked the complainant whether she had chosen to testify of her own free will; she responded that she had.

The evidence impermissibly relies on the inference that the complainant is more credible because she exposed herself to the unpleasant rigours of a criminal trial. Using the fact that a complainant pursued a complaint to bolster their credibility is inconsistent with the presumption of innocence: *R v RM,* 2022 ONCA 850, at paras 33, 34, 37-42

In some circumstances, evidence can be elicited to rehabilitate a witness's credibility after impeachment. However, the bolstering evidence must be responsive to the nature of the attack and not exceed permissible limits. The admissibility of rehabilitative evidence should depend on whether what is proposed is logically relevant to rebut the impeaching fact: *R v TO,* 2023 ONCA 222, at paras 39, 42

Another example arose where the Crown impermissibly asked a police officer about the fact he had never been charged with or cited for misconduct, and had been promoted: *R. v. Tash*, 2013 ONCA 380

In *TO,* the Court of Appeal found that the trial judge erroneously relied on the fact that the complainant chose to travel to Ontario to give her evidence as bolstering her credibility and reliability: *R v TO,* 2023 ONCA 222, at para 44

In *R v Santhosh*, 2016 ONCA 731, the Court of Appeal found that the trial judge erred in relying on the conservative manner in which the complainant was dressed in court and the fact she was a religious person to enhance her credibility.

In part because of concerns about the unreliability of polygraph results, the law prevents those results from being used to prove or disprove the truth of statements made during the polygraph examination, or to oath-help. But where it is relevant to the credibility of a witness, the law does not prevent a party from proving the fact that a polygraph was used in securing information from a witness: *R v Gale,* 2019 ONCA 519, at para 10

C. TESTIMONY OF THE ACCUSED

i. W.(D). Analysis

The rule in *W.(D.)* is intended to ensure that reasonable doubt is properly applied where the credibility or reliability of evidence inconsistent with guilt is in issue.

Credibility contests are not properly resolved by choosing one side after carefully giving the other side fair consideration in the context of all of the evidence. They are resolved by ensuring that, even if the evidence inconsistent with guilt is not believed or does not raise a reasonable doubt, no conviction will occur unless the evidence that is accepted proves the guilt of the accused beyond a reasonable doubt. It would be an error to convict because the trial judge deems an accused's evidence to be not as reliable as another witness's evidence. This would be a legal error, indeed the very error made in *W.(D.)* itself: *R v Morillo,* 2018 ONCA 582 at paras 14, 18

It is an error to reason or suggest that, in relation to the *W.(D.)* analysis, the trier can have a reasonable doubt based on the defence evidence only if they accepted all of the defence evidence. The trier is entitled to believe some, none, or all of the evidence of any witness – including defence witnesses. It is open to the trier to be left with a reasonable doubt based on some of the defence evidence, without accepting all of the defence evidence: *R v UK,* 2023 ONCA 587, at para 123

In *UK,* the Court of Appeal provided sample instructions to provide to a jury to convey this principle in the context of defence evidence of multiple accused persons and exculpatory evidence arising in the Crown's case at paragraph 128.

A finding that the complainant is credible and the accused is not does not end the inquiry. Even when the credibility assessment favours the complainant, the *W.(D.)* analysis must go on to assess whether there is a reasonable doubt, based on the accused's evidence or the remaining evidence in the case. A trial judge must also give an explanation for why he finds the accused's version implausible and the complainant's evidence credible: *R v HC,* 2018 ONCA 779 at paras 10-12

It is not an error for a trial judge to contrast competing versions of events when evaluating opposing testimony, so long as they do not accept the inculpatory version because they prefer it to the exculpatory version: *R v CH,* 2023 ONCA 622, at para 20

It is not the task of a trier of fact to determine which of two versions of an event is true. Rather, the trier's task is to determine whether the Crown has met its burden of proving the elements of an offence beyond a reasonable doubt. A finding that a complainant is both reliable and credible is not sufficient to satisfy the burden of proof beyond a reasonable doubt. A reasonable doubt can survive a finding that the complainant is credible: *R v TA,* 2020 ONCA 783, at paras 28-29

An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence: *R v AN,* 2017 ONCA 647 at para 15 [citing *JJRD*]

Rejection of an accused's evidence based on the acceptance of a complainant's conflicting evidence constitutes reversible error if the acceptance, beyond a reasonable doubt, is not considered and reasoned: *R. v. D.H.*, 2016 ONCA 569; *AN* at para 16; *R v Slatter,* 2019 ONCA 807, at para 88, rev'd at 2020 SCC 36, but not on this principle of law. Note that the error falls under insufficient reasons, and is not a stand-alone ground of appeal.

For example, acceptance of the complainants' evidence does not automatically require a trial judge to reject the accused's exculpatory testimony and it is an error to reason in this manner: *R. v. Van Deventer,* 2021 SKCA 163

A trial judge will still commit legal error if s/he engages in a considered and reasoned acceptance beyond a reasonable doubt of the complainant's evidence, but then goes on to reject the appellant's evidence on an unjustified basis: *R v AK,* 2020 ONCA 435, at para 28

There are obvious risks in rejecting exculpatory evidence where that evidence is immune from cogent criticism. One would think that the credibility of inculpatory evidence must be particularly impressive before that evidence can be credited beyond a reasonable doubt in the face of otherwise unassailable exculpatory evidence: *R v CL,* 2020 ONCA 258, at para 40

The failure to advert to such exculpatory evidence, and to address it, means that the acceptance of the complainant's evidence is neither considered nor reasoned: *R v CG,* 2021 ONCA 809, at paras 54, 60

The trial judge does not necessarily have to give a W.(D). instruction with respect to exculpatory portions of the accused's statements to police or others - as long as the charge as a whole makes the burden of proof in relation to reasonable doubt and issues of credibility clear to the jury: *R v Barrett*, 2015 ONCA 012 at paras 15, 19; *R v McCracken*, 2015 ONCA 228 at paras 90-91

The trial judge need not expressly articulate the W.(D.) analysis in his/her reasons, so long as it is clear that s/he engaged in the proper analysis: see *R v Yeung,* 2017 ONCA 190 at para 5

A misstatement of the three principles in W.(D.) does not mean that the trial judge erred in their application of the reasonable doubt standard to the evidence. If on the entirety of the reasons, it is clear that the trial judge not only disbelieved the accused's evidence, but unequivocally rejected that evidence as incapable of leaving the trial judge with a reasonable doubt, the reasons demonstrate a proper application of the burden of proof. The misstatement of one of the steps in W.(D.) does not, in that circumstance, amount to reversible error: see R. v. Rattray, 2007 ONCA 164, at paras. 16-19; *R v Lavergne,* 2022 ONCA 760, at para 42

The fact that the trial judge assessed the complainant's credibility before the accused's does not automatically demonstrate that s/he reversed the burden of proof: *R v Gerard,* 2022 SCC 13

When a trial judge rejects an accused's testimony in a trial by a judge alone, it can generally be concluded that the testimony also failed to raise a reasonable doubt in the trial judge's mind: *R v BW,* 2016 ONCA 96 at paras 11-12

A *W. (D.)* instruction might also be applicable to cases where the accused did not testify: *R v McCracken*, 2016 ONCA 228 at para 90; *R v BD,* 2011 ONCA 51 at paras 105-114

The instruction propounded in *W(D)* applies whenever credibility issues arise between the case for the Crown and evidence for the defence. The defence evidence may be an accused's testimony or out-court-statement, as for example on police interview tendered as part of the case for the Crown. Contradictory evidence may arise from other evidence called by the defence or conflicting evidence favourable to the defence in the case for the Crown. This evidence may require the jury to make factual findings. The decision in *W(D)* applies in these circumstances. It explains how the principle of reasonable doubt relates to the process by which the jury resolves conflicting evidence. The jury must understand that it is *not* essential for them to believe the defence evidence, but rather that it is enough that, considered in the context of all the evidence, the conflicting evidence leaves them with a reasonable doubt about the accused's guilt: *R v MP,* 2018 ONCA 608 at para 60; *R v Bacci,* 2018 ONCA 928, at paras 48-49; *R v Charlton,* 2019 ONCA 400; *R v UK,* 2023 ONCA 587, at para 117

If a witness gives exculpatory evidence, a *W.(D.)* direction will be required even if that same witness also gives an inculpatory version of events: *R v Charlton,* 2019 ONCA 400, at paras 44-49; *R v Hoffman,* 2021 ONCA 781, at para 41

For example, in *Frater,* the Court of Appeal recognized that a *W(D)* analysis applied to text evidence of the accused's denials of the offence adduced in the Crown's case: 2020 ONCA 624, at para 22

However, where a general denial by the accused lacks probative value, the trial judge is not required to link this evidence to his W.(D.) analysis: *R v SR,* 2022 ONCA 192, at para 24

The *W.(D.)* analysis is not restricted to the impact of the evidence of the accused; instead, it must embrace all of the evidence, including evidence tendered by the Crown, even when that evidence may contradict the appellant's own narrative: The trial judge errs in limiting their application of *W.(D.)* by failing to consider whether the complainant's evidence could have raised a reasonable doubt. *R v NP,* 2022 ONCA 597, at paras 28-29; *R v UK,* 2023 ONCA 587, at para 118

Such an error is particularly of concern in a case where there is significant overlap of the evidence and the issues for the two accused, thereby making it essential for the jury to understand that, in its assessment of credibility and the reasonable doubt standard, each accused is entitled to individual consideration of the case against him and the defence evidence as it applies to his case: *R v UK,* 2023 ONCA 587, at para 134

It is a basic principle of criminal liability that in a joint trial, the trier of fact must consider the liability of each accused individually. This principle applies to instructions given to a jury on the principles from *W.(D.)*. It is an error for a trial judge in a joint trial to conflate two (or more) accused for the purposes of a *W.(D.)* instruction: *R v UK,* 2023 ONCA 587, at paras 119, 122

A *W(D)* instruction also applies to a "mixed" statement by an accused. A "mixed" statement is one in which some of the contents are inculpatory and other parts exculpatory. Instructions on the exculpatory parts of the statement must make it clear that these parts of the statement retain their evidentiary value in exculpation as long as the jury does not reject them as untrue: *MP* at para 61.

The jury should be instructed that exclupatory evidence offered by the accused could be the source of a reasonable doubt even if it was not affirmatively believed: *R v Brown,* 2018 ONCA 481

But the failure of a trial judge expressly to instruct the jury in these terms is not necessarily a fatal blow to a conviction provided that the charge, as a whole, makes the burden of proof in relation to reasonable doubt and issues of credibility clear to the jury and does not leave the case for them to decide on an "either/or" basis: *MP* at para 61; see also *R v Ivall,* 2018 ONCA 1026, at paras 115-130

In *Bacci,* however, the Court of Appeal held that the trial judge's failure to instruct the jury on the second and third prong of the *W(D)* analysis on a recharge was non-direction amounting to misdirection, notwithstanding the fact that the trial judge included a full and proper *W(D)* instruction in the original charge. The omission of the second and third branch did not appropriately reflect the burden of proof on the Crown: 2018 ONCA 928, at paras 50-53

Objective fault components present challenges for the classic *W.(D.)* framework. This is because, at the first stage of the analysis, belief of an accused's testimony

does not necessarily entitled him/her to an acquittal. In many such cases, the instruction is dispensed with altogether: *R v Ibrahim,* 2019 ONCA 631, at paras 37-47

ii. Adverse Inferences Against Credibility

The failure of the accused to question a complainant about something pivotal to his defence can, in addition to triggering the Brown and Dunn issue, lead to an adverse inference regarding his credibility. The Crown cannot use the adverse inference as positive evidence to meet its burden of proof, but an adverse inference can be used to undermine the defence evidence to which it relates: *R v Strojny,* 2019 ONCA 329, at para 42

Similarly, the defence failure to tender corroborative evidence to support an unusual claim, where evidence was readily available and no explanation was offered for not calling the evidence, may give rise to a legitimate adverse inference regarding credibility: *R v Strojny,* 2019 ONCA 329, at paras 44-45

In *AK,* the Ontario Court of Appeal found that the trial judge erred in rejecting the appellant's phraseology that numerous incidents, including sexual assaults, "would not have happened." The Court cautioned that the dated, historical nature of the allegations must be borne in mind in assessing the appellant's evidence. "It is not surprising a witness, when asked about events from long ago, would, in attempting to answer honestly, not speak in definitive terms, but rather speak in terms of what "would have" or "would not have" happened:" *R v AK,* 2020 ONCA 435, at para 21

Speculation about the level of detail a witness should provide is particularly dangerous when applied to accused persons because it risks shifting the burden of proof from the Crown to the defence and ignores the principles from *WD.* The court should not draw a negative credibility inference from an accused's level of testimonial detail in the absence of independent, contradictory evidence: *R v BTD,* 2022 ONCA 732, at paras 30-31

It is an error of law for the trial judge to discredit the accused's testimony based on portions of his police statement that were not in evidence: *R v JW*, 2023 ONCA 304

iii. Interest in the Proceedings

The common sense proposition that a witness's interest in the proceedings may have an impact on the witness's credibility applies equally to an accused who testifies in his or her own defence. In many cases, however, an accused's interest in not being convicted is simply an unhelpful factor for the trier of fact to consider in its assessment of the evidence. But not always. Whether it is appropriate for a trier of fact to consider and thus a jury to be instructed that it is entitled to consider that an accused may have a motive to lie because of his or her interest in the trial will depend on the evidence adduced and the issues raised at trial: *R v Vassel,* 2018 ONCA 721, at para 159

In general, in jury instructions, the jury will be told that "Did the witness have any reason to give evidence that is more favourable to one side than to the other?" The jury will also be told that "When a person charged with an offence testifies, you assess his evidence in the same way and in accordance with the same principles that you assess the testimony of any other witness." The juxtaposition of these two instructions, without more, may suggest to the jury that the accused's interest in the outcome in the proceedings is a factor that may weigh against them; in other words, it may lead a jury to assume that, by virtue of their interest in the proceedings, the accused will not tell the truth. To avoid this, the trial judge should tell the jury that: "You must not presume that an accused who testifies will lie out of self-interest in order to avoid conviction": *R v Shabbir,* 2024 ONCA 750, at paras 30-32

However, the failure to provide such an instruction at trial is not fatal. The appellate court will look to whether any party at trial raised the accused's motive to lie, and whether any evidence or issues created a real risk that the jury would fall into the prohibited mode of reasoning, as well as whether any objection was taken to the charge: *Shabbir* at para 35

While there is no absolute prohibition against considering an accused's motive to lie in assessing their credibility, this type of submission is fraught with risk because it can potentially undermine the presumption of innocence. Accordingly, where the issue is raised at trial, juries should be instructed not to presume that an accused will lie to avoid conviction. Such an instruction is consistent with one of jury instructions' central goals: to ensure jurors do not engage in assumptions or forms

of reasoning that do not respect fundamental principles such as the presumption of innocence: *R v DB,* 2024 ONCA 546, at para 40

iv. Commenting on the Credibility of Others

It is improper to call upon an accused to comment on the credibility of his accusers. This includes questions that ask the accused for an explanation for a complainant's allegations.

There are two reasons for this rule. First, such questions may call for the accused to speculate about the state of mind of an accusing witness. Second, and more importantly, questions of this nature suggest that there is some onus on an accused person to provide a motive for the Crown witness' testimony and, as such, they undermine the presumption of innocence. Such questions create a risk that the jury may draw an adverse inference if the accused fails to provide a 'reasoned or persuasive' response: *R v DM,* 2022 ONCA 429, at paras 68-69

D. TESTIMONY OF THE CO-ACCUSED

It is perfectly proper for the jury's assessment of the overall credibility of one co-accused to be influenced by the totality of the evidence they have heard, including evidence relating to another co-accused. Even where a co-accused pleads guilty, the accused's trial is not rendered unfair by the jury considering a co-accused's evidence if they are warned not to draw an adverse inference against the accused: *R v Akthar,* 2022 ONCA 279, at para 54

E. TESTIMONY OF CHILD WITNESSES

i. Evaluation of Credibility

The evidence of children should not be approached from the perspective of rigid stereotypes, but on a common sense basis, taking into account the strengths and

weaknesses which characterize the evidence offered in the particular case: R v Becks, 2016 ONCA 91 at para 22; R v Radcliffe, 2017 ONCA 176 at para 34

Generally, where an adult testifies about events that occurred when she was a child, her credibility should be assessed according to the criteria applicable to adult witnesses. However, the presence of inconsistencies, especially on peripheral matters such as time and location, should be considered in the context of her age at the time the events about which she is testifying occurred: R v CK-D, 2016 ONCA 66 (citing R v AM, 2014 ONCA 769) at paras 17-19

When someone testifies about events that transpired when they were a child – especially on matters such as time and location, or about precise details – their evidence must be assessed differently taking into account their age, level of maturity and the passage of time. The fact it is challenging for a child witness to remember and recount precise details of an event, like the when and where, does not mean they have misconceived what happened to them: *R v JP,* 2023 ONCA 570, at para 37

For evaluation of statements tendered under section 715.1, see Hearsay: Statutory Exceptions: Child Witness statements under 715.1

There is a longstanding recognition in our law that memories formed as a child can be expected to contain gaps in respect of details, including time and place. The standard for assessing the credibility of adult complainants giving evidence about harm they suffered as children accounts for these expected frailties: *R v PJC,* 2025 ONCA 196, at para 41

F. TESTIMONY OF WITNESSES WITH DISABILITIES

When assessing the credibility and reliability of testimony given by an individual who has an intellectual or developmental disability, courts should be wary of preferring expert evidence that attributes general characteristics to that individual, rather than focusing on the individual's veracity and their actual capacities as demonstrated by their ability to perceive, recall and recount the events in issue, in light of the totality of the evidence. Over-reliance on generalities can perpetuate harmful myths and stereotypes about individuals with disabilities, which is inimical

to the truth-seeking process, and creates additional barriers for those seeking access to justice: *R v Slatter,* 2020 SCC 36

G. WITNESSES (GENERAL)

i. EVALUATION OF CREDIBILITY

A trier of fact is entitled to accept some, none, or all of a witness' evidence. (This may explain a jury's conviction on some counts but not others): *R v Doell,* 2016 ONCA 350 at paras 7-8, 10. There should, however, be a reasonable basis for the choice that is made: *R v Kiss,* 2018 ONCA 184 at para 88

Trial judge's determination of the significance of inconsistencies and related problems in the testimony of any witness, like any other matter going to credibility, must be given considerable deference on appeal: *R v TD,* 2024 ONCA 860, at para 49

A trial judge is entitled to consider all relevant and material collateral facts, whether disputed or admitted, in determining whether the complainant's evidence is reliable: *R v Brown,* 2022 ONCA 417, at para 22

The trial judge is obliged to bear in mind the effect of testifying through an interpreter on the ability to assess credibility and reliability: *R v Kamali-Mafroujaki,* 2017 ONCA 57 at para 4

It is an error of law to treat the absence of embellishment as adding to the credibility of a witness' testimony. It is wrong to reason that because an allegation could have been worse, it is more likely to be true. While identified exaggeration or embellishment is evidence of incredibility, the apparent absence of exaggeration or embellishment is not proof of credibility. This is because both truthful and dishonest accounts can appear to be without exaggeration or embellishment.

On the other hand, a trial judge is permitted to note that things that might have diminished credibility are absent – for example, embellishment or lack of material inconsistencies. These are not factors that show credibility. They are, however, explanations for why a witness has not been found to be incredible: *R v Kiss,* 2018

ONCA 184 at paras 52-53; *R v Alisaleh,* 2020 ONCA 597, at para 16; *R v GD,* 2021 ONCA 414, at paras 19-20; *R v JB,* 2022 ONCA 214, at paras 15-16;

Note that a lack of embellishment may be capable of boosting a complainant's credibility where the defence advances a motive to lie: *R v Gerrard,* 2022 SCC 13; *R v JF,* 2024 ONCA 547, at para 33; *R v DW,* 2024 ONCA 935, at para 20

It is improper for a trial judge to infer that a more modest sexual assault allegation is more likely to be true because a false allegation is likely to be serious: *R v JL,* 2022 ONCA 271, at para 12

It is also an error of law to rely on the fact that there were no material inconsistencies in a witness' evidence, or that the evidence stood up to cross-examination, to find that the witness was credible. These are only explanations for why a witness has not been found to be incredible: *R v BTD,* 2022 ONCA 732, at para 87

The mere mention of the absence of embellishment does not undermine a credibility finding that is otherwise properly supported: *R v Smith,* 2020 ONCA 632, at para 6

It is an error of law to credit a complainant with candour in making admissions that support the accused's innocent narrative of events, while disregarding the fact that those admissions damage the complainant's version of events: *R v Kiss*, 2018 ONCA 184, at para 107.

The inference that the complainant is more credible because she exposed herself to the unpleasant rigours of a criminal trial is impermissible. Using the fact that a complainant pursued a complaint to bolster their credibility is inconsistent with the presumption of innocence: *R v RM,* 2022 ONCA 850, at para 42

There is no generalized standard as to how much detail witnesses should or should not express. The assessment of any witness's evidence requires a contextual approach based on all of the evidence at trial: *R v BTD,* 2022 ONCA 732, at para 30

Peripheral details of a traumatic event can be difficult to recall and accurately describe at a later date: *R v AA,* 2023 ONCA 174, at para 17

The omission from one part of a witness's evidence of a material fact included later can be viewed as an inconsistency: *R v JP,* 2025 ONCA 731, at para 16

An accused may use cross-examination to test one opposing witness' credibility by eliciting contradictory evidence in the cross-examination of a different opposing witness: *R v AC,* 2018 ONCA 333 at para 48

Where a witness appears to have crafted his evidence to respond to information provided to him about the case, that tends to make his evidence suspect: *R v GV,* 2020 ONCA 291, at para 26

Rejection of the witness's denial of what is suggested does not establish as true the cross-examiner's suggestion: *R v Barra,* 2021 ONCA 568, at para 151

A trier of fact is entitled to consider the testimony a witness gave on one count, when considering the credibility of the evidence that witness gave on other counts: *R v DM,* 2022 ONCA 429, at para 97

Where a witness attends court and takes responsibility for the crime, it is improper to discredit that witness' evidence on the basis that, had they been being truthful, they would/should have gone to the police at the outset. This reasoning misunderstands the law because, at trial, the witness is entitled to rely on the protections afforded by s.5 of the Canada Evidence Act and s.13 of the *Charter* – i.e., their evidence could not be used against them; whereas, by going to the police, they become liable to be charged and prosecuted: *R v Yang,* 2023 ONCA 526, at paras 11-14

In *BTD,* the Court of Appeal found uneven scrutiny of the evidence where the trial judge the appellant's evidence as contrived because of its detail but accepted the exact same level of detail in the complainant's version as a mark of credibility and reliability, without explaining why she drew this distinction based on the same factor: *R v BTD,* 2022 ONCA 732, at para 61

For a review of the law governing appellate review of the sufficiency of credibility assessments, see Appeals: Grounds of Appeal: Insufficient Reasons

a) Interested Parties

The fact that a witness has an interest in the outcome of the proceedings is a relevant factor in assessing his/her credibility, but this should not be given undue weight: R v SC, 2016 ONCA 83 at para 34; *R v Labouchan,* 2010 SCC 12, at para 11

The fact that a witness is hostile to the accused does not mean that they have a great interest in the outcome of the proceedings: R v SC, 2016 ONCA 83 at para 40

ii. Collusion

It is well-established that hearing the evidence of other witnesses "can have the effect, whether consciously or unconsciously, of colouring and tailoring a witness's descriptions of the impugned events. For this reason, a trial judge faced with evidence of potential collusion must directly address the evidence and consider its impact on the witness's credibility and reliability. It remains open to the trial judge to rely on the witness's testimony, but only if the trial judge is demonstrably satisfied that the alleged collusion did not taint the witness's credibility or reliability: *R v RI,* 2024 ONCA 185, at para 31

Collusion can arise both from a deliberate agreement to concoct evidence, as well as from communication among witnesses that can have the effect, whether consciously or unconsciously, of colouring and tailoring their descriptions of the impugned events: *R v Clause,* 2016 ONCA 859 at para 81

The "reliability of a witness's account can be undermined not only by deliberate collusion for the purpose of concocting evidence, but also by the influence of hearing other people's stories, which can tend to colour one's interpretation of personal events or reinforce a perception about which one had doubts or concerns.": *Clause* at para 81; see, for example, discussion in *R v EMM,* 2021 ONCA 436, at paras 25-28

Innocent collusion occurs when, through mere conversation, false memories are implanted and overwhelm independent recollection. However, courts must be wary of jumping to the conclusion that that a witness's evidence is no longer independent, and has been tainted by innocent collusion, simply because of a conversation. Witnesses may know each other. It is human nature to discuss what happened immediately after offending behaviour takes place: *R v EMM,* 2021 ONCA 436, at para 19

Once evidence is admitted, “the jury must still be warned to assess the evidence carefully and to consider whether it can be considered reliable given the possibility of deliberate or accidental tainting by collusion among the witnesses.” The jury should consider the opportunities for collusion or collaboration to concoct the evidence and the possibility that these opportunities were used for such a purpose: *Clause* at para 83 and 84

While the law permits witnesses to be called to offer affirmative evidence of collusion, the law does not permit the Crown to discredit its own witnesses as liars in an effort to discredit the accused absent an evidentiary foundation linking the alleged lies of a witness with the accused: *R v Kiss,* 2018 ONCA 184s at para 76

H. RACISM

The existence of anti-Black racism in Canadian society is beyond reasonable dispute and is properly the subject matter of judicial notice. It is well recognized that criminal justice institutions do not treat racialized groups equally. This reality may inform the conduct of any racialized person when interacting with the police, regardless of whether they are the accused or the complainant.

It is incumbent on trial judges to consider relevant social context, such as systemic racism, when making credibility assessments. The trial judge did not err in doing so, and his findings are entitled to considerable deference on appeal: *R v Theriault,* 2021 ONCA 517, at paras 144 and 146

I. STEREOTYPES AND BEHAVOURAL ASSUMPTIONS

See also Sexual Offences: Behavioural Assumptions

Note that in *R v Kruk,* 2024 SCC 7, the Supreme Court of Canada held that The rule against ungrounded common-sense assumptions should not be recognized as giving rise to an error of law. The faulty use of common-sense assumptions in criminal trials should continue to be controlled by existing standards of review and rules of evidence. In some cases, a trial judge’s use of common sense will be vulnerable to appellate review because it discloses recognized errors of law.

Otherwise, like with other factual findings, credibility and reliability assessments — and any reliance on the common-sense assumptions inherent within them — will be reviewable only for palpable and overriding error.

Trial judges are entitled to make common sense assumptions, but they are not entitled to engage in sweeping generalizations about human conduct: *R v PP,* 2025 ONCA 243, at para 11

Evidence of an accused's reaction to allegations is of limited if any probative value. The inferences rest on assumptions about how a "normal" person would react and judicial experience has taught us that this is often wrong: *R v Chafe,* 2019 ONCA 113, at paras 38-40; see also *R v Borel,* 2021 ONCA 16, at para 36

Moreover, perceptions of guilt based on demeanour are likely to depend upon highly subjective impressions that may be difficult to convey to the jury and in any event the significance of the reaction will often be equivocal. Such evidence is predicated on an often unreliable assumption about how a "normal" person would react to a highly stressful and unusual situation, and because it assumes that outward appearance accurately reflects an individual's state of mind: *R v DB,* 2024 ONCA 546, at para 19

The caution not limited to evidence about the accused's demeanour in the sense of his appearance or presentation. It also applies to evidence of an accused's actions or failure to do or say certain things when confronted with an allegation. Like demeanour evidence, the relevance of the accused's failure to deny rests on an unreliable assumption about what a "normal" reaction looks like: *R v DB,* 2024 ONCA 546, at para 20

There are exceptions to this caution, however. For example, in certain circumstances an accused can be taken as having implicitly adopted an accusation as true based on their conduct or demeanour, or even based on their silence in circumstances that give rise to a reasonable expectation of reply: *R v DB,* 2024 ONCA 546, at para 23

Ultimately, it will be up to the trial judge to remain vigilant for this type of evidence and to exercise their gatekeeping role. Where evidence is not relevant to a live material issue, it should be excluded or the jury should at least be instructed that the evidence has no probative value. Even where the evidence is relevant, trial judges still retain the general discretion to exclude relevant evidence when its potential prejudice exceeds its probative force. Where the evidence is admitted, a caution may be extremely important *R v DB,* 2024 ONCA 546, at paras 24, 34

Judges must avoid speculative reasoning that invokes "common-sense" assumptions that are not grounded in the evidence or appropriately supported by judicial notice. the rule against ungrounded common-sense assumptions does not bar using human experience about human behaviour to interpret evidence. It prohibits judges from using "common-sense" or human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour: *R v JC,* 2021 ONCA 131, at paras 58, 61; see, for example, *R v ARJD,* 2018 SCC 6, at para 2; see, for example, *R v BTD,* 2022 ONCA 732, at para 68

This prohibition applies not only to sexual assault complainants, but also to men and how they would conduct themselves in certain circumstances: *R v Le Goff,* 2022 ONSC 609, at para 125

Put simply, trial judges must not make conclusions that are not based in evidence or proper judicial notice: *R v SW,* 2024 ONCA 125, at para 29

However, there is no bar on relying upon common-sense or human experience to identify inferences that arise from the evidence: *R v JC,* 2021 ONCA 131, at para 59

The use of a common-sense approach to credibility assessments is fraught with danger for it can mask reliance on stereotypical assumptions. In contrast, it is permissible for a trial judge to assess credibility based on evidence about what a particular person would do in the specific circumstances of each case: *R v ABA* 2019 ONCA 124, at para. 7; *R v Cepic,* 2019 ONCA 541, at para13

While not all assumptions about ordinary human behaviour rest on impermissible stereotypes, caution must be exercised lest the common sense approach that purports to rely on common sense assumptions masks reliance on stereotypical assumptions: *R v Donnelly,* 2023 ONCA 243, at para 40

The fact that the trial judge had recourse to "a common sense proposition" is not, by itself, an error. Triers of fact are permitted to rely on "logic, common sense, and experience" in making credibility assessments. What constitutes common sense and how common sense applies are determinations for the trier of fact. Error arises where common sense and human experience become a substitute for evidence; and where common sense inferences are "pulled out of thin air at the

whim of the trier of fact" and lack "a reliable factual foundation": *R v Donnelly,* 2023 ONCA 243, at para 38

Factual findings, including determinations of credibility, cannot be based on stereotypical inferences about human behaviour: *R v JC,* 2021 ONCA 131, at para 63

This rule prohibits certain inferences from being drawn; it does not prohibit the admission or use of certain kinds of evidence. For this reason, it is not an error to admit and rely upon evidence that could support an impermissible stereotype, if that evidence otherwise has relevance and is not being used to invoke an impermissible stereotype: *R v JC,* 2021 ONCA 131, at paras 68-69

By the same token, it is not an error to arrive at a factual conclusion that may logically reflect a stereotype where that factual conclusion is not drawn from a stereotypical inference but is, instead, based on the evidence: *R v JC,* 2021 ONCA 131, at para 70

On appellate review, courts must carefully scrutinize reasons to ensure that findings said to be based on common sense or logic are reliably just that, and are not, in fact, unfair and inaccurate external viewpoints that find no foundation in the record: *R v Donnelly,* 2023 ONCA 243, at para 41

i. Cultural Stereotypes

The norms of any particular culture is a question of fact to be resolved according to evidence led at trial, including expert evidence if not a matter of everyday experience of the average person.

Where relevant to a matter in issue, it is permissible for the trier of fact to consider whether the beliefs and practices of a particular culture provide some evidence about what a particular person believes, or explain that person's apparent behaviour. It is, however, impermissible to invite the trier of fact to adopt a stereotype about cultural practices unsupported by evidence and use it to draw conclusions about a witness's beliefs or actions: *R v BG,* 2022 ONCA 92, at paras 11-12; *R v PP,* 2025 ONCA 243, at para 12

Where questioning is heavily freighted with negative cultural stereotyping – stereotyping that may subconsciously resonate with the jurors even though the questions turned up empty – the questioning itself creates a risk that without some instruction from the trial judge, a jury will seize on the stereotype even though it is not established in evidence: *R v BG,* 2022 ONCA 92, at para 29

ii. Standard of Review

Such errors are reversible only when they "ground" the relevant inference by playing a material or important role in the impugned conclusion. Put otherwise, it is not per se a reversible legal error to draw impermissible inferences that do not matter, but it is a reversible legal error to reach a material factual conclusion based on such reasoning.

An error is "based" on a stereotype or improper inference when that stereotype or improper inference played a material or important role in explaining the impugned conclusion. Where it did so, even if the trial judge offered other reasons for the impugned conclusion, it cannot safely be said that the trial judge would have reached the same conclusion without the error: *R v JC,* 2021 ONCA 131, at paras 71, 73

J. APPELLATE REVIEW

Credibility findings are entitled to great deference on appellate review. It is only where the reviewing court has considered all of the evidence before the trier of fact, and determined that the trier of fact made legal errors, or that the credibility determination cannot be supported by that evidence, that the appellate court can overturn it: *R v Roberts,* 2018 ONCA 411 at para 49

The degree of detail required to explain findings of credibility will vary with the evidentiary record and trial dynamics: *R v DES,* 2018 ONCA 1046, at para 9

CROSS-EXAMINATION

A. GENERAL PRINCIPLES

The fundamental importance of cross-examination is reflected in the general rule that counsel is permitted to ask any question for which they have a good faith basis. Uncertainty of result does not deprive a line of questioning of its probative value. However, the right to cross-examine is not unlimited. Cross-examination questions must be relevant and their prejudicial effect must not outweigh their probative value: *R v RV,* 2019 SCC 41

The right to test the Crown's evidence through relevant cross-examination is guaranteed by both the common law and the *Charter* as a core element of the right to make full answer and defence. An accused has the right of cross-examination in the fullest and widest sense of the word as long as that right is not abused. An accused's fair trial rights include not just the fact of cross-examination, but also control over the rhythm of cross-examination. Cross-examination is not so much a series of questions as a process of questioning. Cross-examination involves putting careful questions to a witness that are designed to explore bit by bit the nature and extent of that witness's knowledge, and therefore is effective only where it is permitted to proceed step by step towards the ultimate point, where the examiner can pose the final question (or questions), knowing by that time what the answer(s) will be, having regard to the earlier evidence elicited. When cross-examination is unduly restricted, the effects on the fairness of the trial will often reverberate beyond, and cannot be fully appreciated by parsing, the particular words in a transcript: *R v RV,* 2019 SCC 41 (dissenting opinion of Brown J., but not on this point)

Failure to cross-examine a witness at all or on a specific issue tends to support an inference that the opposing party accepts the witness' evidence in its entirety or at least on the specific point. Such implied acceptance disentitles the opposing party to challenge it later or, in a closing speech, to invite the jury to disbelieve: *R v Quansah,* 2015 ONCA 237, at para 79

i. CROSS EXAMINATION ON PRIOR INCONSISTENT STATEMENTS

Most often for impeachment, the cross-examiner will have a copy of the relevant statement or portions of it in hand. This ensures that what was said previously is accurately put to the witness. But having the statement in hand is not a prerequisite of the right to cross-examine. Sections 20 and 21 of the *Evidence Act*, and ss. 10 and 11 of the *Canada Evidence Act*, are procedural in nature: they assist in proof that a prior statement was made but do not provide a right to cross-examine: *R v Morillo,* 2019 ONCA 714, at para 51

Where the purpose of the cross-examination is testimonial impeachment, the prior inconsistent statement, which has no intrinsic value as evidence, is not filed as a trial exhibit. Thus, it does not go to the jury room with other exhibits for jury review during deliberations: *R v JB,* 2019 ONCA 591, at para 32

Notes made by a third party should not be regarded as a witness' statement unless there is some indication that they accurately set out the witness' evidence. Notes that record brief snippets of what the witness has said provide selective pieces of information, often without a proper context, and may be of uncertain reliability. Cross-examination on such statements may be unfair and may potentially mislead the trier of fact. Ultimately, it is within the discretion of the trial judge to determine, in the particular circumstances of each case, whether a document prepared by a third party is sufficiently reliable to be considered a witness' statement and if so, whether cross-examination on that statement is to be permitted: *R v Mitchell,* 2018 BCCA 52 at paras 36-38, cited in the bail pending appeal decision of *R v KF,* 2025 ONCA 134, at para 32

ii. Right of Accused to Cross-Examine

The right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make a full answer and defence. Commensurate with its importance, the right to cross-examine is now recognized as being protected by ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms. The right of cross-examination must therefore be jealously protected and broadly construed: *R. v Lyttle,* 2004 SCC 5

A prohibition against leading questions can, in some circumstances, impose a significant improper limit on cross-examination: *R v CI,* 2023 ONCA 576, at para 43

An accused may use cross-examination to test one opposing witness' credibility by eliciting contradictory evidence in the cross-examination of a different opposing witness: *R v AC,* 2018 ONCA 333 at para 48

The accused is entitled to cross-examine any co-accused who testifies in his own defence, whether or not that co-accused is adverse in interest to him/her: *R v CI,* 2023 ONCA 576, at paras 35-38

However, the right to cross-examination is not absolute. Cross-examination may be limited where the proposed line of questioning is abusive or has little to no relevance or probative value or is unduly repetitive. When considering the scope of defence counsel's cross-examination, the prejudicial effect of the line of questioning must substantially outweigh the probative value before it can properly be curtailed: *R v AC,* 2018 ONCA 333 at para 48; *R v Polanco,* 2018 ONCA 444 at para 22

The discretion of trial judge's to intervene in cross-examination is part of a trial judge's general discretion to manage a trial. Indeed, trial judges should make reasonable efforts to control and manage the conduct of trials." Even so, trial judges should give defence counsel wide latitude in the way they conduct their cross-examinations. Simply because the trial judge disagrees with defence counsel's approach or line of questioning does not justify judicial intervention unless the approach or questioning is improper: *R v Vorobiov,* 2018 ONCA 448 at para 26

For a review of the principles surrounding intervention of a trial judge in cross-examination raising a reasonable apprehension of bias, see Law: Reasonable Apprehension of Bias

In determining whether the unresponsiveness of a witness during cross examination denies an accused the right to make a full answer and defence and renders the trial unfair, the court must consider three factors: (1) the reason for the unresponsiveness; (2) the impact of the unresponsiveness; and (3) possibilities of ameliorative action: *R v TH,* 2017 ONCA 485 at para 38'

The accused has a right to cross-examine after admission of KGB video-taped statement: R v. Alexander, 2015 ONCA 167

Deficiencies in the ability to cross-examine cannot be remedied through evidence of other witnesses: R v. Jones-Solomon, 2015 ONCA 654 (citing R v. Saleh, 2014 ONCA)

iii. Limitations on Crown's Cross-examination

The Crown cannot harass the accused, engage in sarcasm, seek to demean the accused, or punish the accused for invoking his or her constitutional right: R v. Ahmed, 2015 ONCA 751

The Crown cannot ask questions of the accused that have the potential to illicit answers that are improperly prejudicial to the accused (e.g., to show that many of his acquaintances are shooting victims in a case where the accused is charged with shooting a victim): R v. Ahmed, 2015 ONCA 751

While the crown cannot cross-examine an accused about silence/omissions from prior statements, omissions can be integral to the existence of material inconsistencies between two versions of events. The propriety of cross-examination on a prior statement made by an accused to the police turns on the purpose of the cross-examination. R v. Hill, 2015 ONCA 616.

It is generally improper for a Crown to cross-examine an accused person about the complainant's attractiveness, because this is generally irrelevant and there are dangers associated with this line of questioning: *R v KL,* 2018 ONCA 792, at para 10

it is improper to ask an accused about the conduct of the defence. More specifically, it is improper to ask about why a witness was not cross-examined on a particular issue, or to invite the jury to consider this failure in evaluating the defence case or the adequacy of the case for the Crown. Where an impropriety of this nature has occurred, it may create a risk that the jury will engage in speculation and, by extension, reverse the burden of proof Where either of these prospects emerges, a corrective instruction may be required: *R v JH,* 2020 ONCA 165, at paras 169-170

Although isolated transgressions of the rules governing cross-examination of an accused by Crown counsel may be of little consequence, repeated improprieties

are different. Serial infractions may become abusive and contribute to the danger of a miscarriage of justice: *R v Mohamad,* 2018 ONCA 966, at para 179

On appeal, a reviewing court will look at the overall effect of the improper questions and conduct of the Crown in the context of the full cross-examination and the entire trial. It will only be conduct that compromises trial fairness that will justify ordering a new trial, not merely improper conduct. Finally, while not dispositive of the issue, the failure of defence counsel to object at trial is a relevant factor to consider: *R v KL,* 2018 ONCA 792, at para 8; *R v Onyedinefu,* 2018 ONCA 795, at para 16

The appellate court should also consider whether the allegedly improper cross-examination resulted in a jury hearing or seeing evidence that they should not have heard or seen, for example evidence of extrinsic misconduct and whether the impugned cross-examination was brief or protracted. The Court must further assess any ameliorating steps taken by the trial judge, for example curative instructions specific to the impropriety claimed or those of a more general nature: *Mohamad,* at para 181

For more on Crown misconduct during cross-examination, see The Crown: Crown Misconduct

iv. Accused's refusal to be cross-examined

An accused who elects to give evidence is not entitled to discontinue cross-examination and have his statements simply expunged from the record. In most circumstances, a trial judge faced with an accused who refuses to answer questions on cross-examination is justified in refusing to give any weight to exculpatory evidence while simultaneously relying on evidence given prior to the refusal that supports a finding of guilt: *R v Breese,* 2022 ONCA 482

v. Cross-examining your own witness under s.9 of CEA

When the Crown seeks to cross-examine its own witness, the Crown must clearly set out the justification for that claim and the nature of the cross-examination sought. A trial judge may allow cross-examination on a statement in writing or reduced to writing under s. 9(2) of the *Evidence Act*. The trial judge may allow

cross-examination on all prior statements of a witness if the witness is found to be adverse under s. 9(1). The trial judge may also allow cross-examination at large if the witness is found to be hostile. No matter the level of cross-examination, the Crown must demonstrate that the proposed cross-examination has some probative value. This exercise ensures that the Crown will identify the specific lines of questioning it seeks to pursue with the witness: *R v Figliola,* 2018 ONCA 578 at para 56

To succeed on a s. 9(2) application, the Crown is required to prove: (1) that there was an inconsistency between the prior statement and Ms. witness' evidence at trial; and (2) that the witness made the prior statement. Then the opposing counsel would have had the opportunity to cross-examine the witness as to the circumstances under which the statement was made, and to call evidence for the purpose of showing that cross-examination by the party calling the witness should not be permitted, before the trial judge would rule on the application: *R v Dupuis,* 2020 ONCA 807, at paras 44-45, 57

Even when the Crown is allowed to cross-examine its own witness on prior inconsistent statements, the trial judge should carefully limit cross-examination to specific inconsistencies that have some potential probative value. In some instances, it will be necessary to fully vet the proposed cross-examination on a *voir dire* before determining what part of the cross-examination the jury should be allowed to hear: *Figliola* at para 59

If a witness has relevant evidence to give, the Crown may call that witness, even if the Crown expects that the witness will give evidence that is inconsistent with a prior statement made by the witness and the Crown anticipates bringing an application to cross-examine the witness under s. 9 of the Evidence Act.

A trial judge may refuse to permit cross-examination under s. 9(1), even if the technical requirements for a finding of adversity are met. The trial judge should not permit cross-examination if that cross-examination would undermine the fairness of the trial. Trial fairness will be undermined if there is a real risk that the jury, despite an appropriate limiting instruction, could misuse the cross-examination of the Crown witness in the manner described in *Soobrian*. Generally speaking, however, the concern can be addressed by carefully controlling the questioning of the witness, not by keeping relevant evidence from the jury.

If the Crown is allowed to cross-examine its own witness under s. 9, the trial judge should caution the jury that the cross-examination may be used in assessing that witness's credibility, but that it cannot assist in assessing the credibility of the accused, or in proving the Crown's case against the accused unless the witness adopts the prior statements as true or there is evidence of collusion between the witness and the accused: *Figliola,* at paras 52, 55, 61

If the Crown applies to cross-examine its own witness and the trial judge is satisfied that the cross-examination will create a real risk that the jury will fall into the *Soobrian* error, the trial judge may prohibit cross-examination, even though the witness is adverse. In the same vein, if the trial judge is satisfied that the cross-examination would do no more than put a version of events before the jury, in the form of a prior statement, which the witness will deny and with respect to which there will be no other evidence, the trial judge may decline to allow cross-examination: *Figliola* at para 58

Another situation in which a witness's prior statement may be put before the witness is where counsel is refreshing memory. This is permitted only where the witness is having difficulty remembering. Whether counsel is permitted to refresh memory in this way is in the discretion of the trial judge, and there is a procedure that must be followed. Counsel must lay a foundation by ascertaining whether the witness is having difficulty remembering. Counsel should ask the witness if they wish to refer to a prior statement.

If the witness confirms he or she needs assistance remembering and wishes to refer to the prior statement, counsel should seek leave from the court to refresh the memory of the witness. The statement is produced to opposing counsel, who may object to its use. If the court permits the refreshing of memory, counsel should provide the statement to the witness, and instruct the witness to consult the relevant portion in silence. If the statement does not refresh the witness's memory, no use should be made of it unless the record is admissible under some other rule of evidence: *R v Dupuis,* 2020 ONCA 807, at para 46; see also paras 50-53

There is no temporal consideration associated with the statement when seeking to use a prior statement to refresh a witness' memory or proceed with an application under s. 9(2) of the *Canada Evidence Act*: *R v Slatter,* 2018 ONCA 962, at para 53

vi. Cross-examination on Prior Credibility Findings (Ghorvei)

A witness can be cross-examined on the underlying misconduct that may have given rise to a finding that a witness's evidence was not credible. However, it is not proper to cross-examine a witness on the fact that his or her testimony has been rejected or disbelieved in a prior case. That fact, in and of itself, does not constitute discreditable conduct: *R v Baksh,* 2022 ONCA 481, at para 37

DEMEANOR EVIDENCE

1. OUT OF COURT DEMEANOUR EVIDENCE

The starting point is that although the admission of demeanor evidence may be somewhat rare, there is no bar to the admission of demeanour evidence. It may be admitted where a witness has a basis for believing that an accused's demeanour was unusual: *R v Staples,* 2022 ONCA 266, at para 38

It is improper to elicit *opinion* evidence about the demeanour of the accused and suggest it is indicative of guilt. Demeanour evidence is highly suspect: *R v Borel,* 2021 ONCA 16, at para 36; see for example *R v Staples,* 2022 ONCA 266, at paras 51-56;

A police officer's opinion about the accused's demeanour is inadmissible and cannot be relied upon in any way: *R v Chambers,* 2021 ONCA 337, at paras 4-10, 20; see also *R v Short,* 2018 ONCA 1

This sort of suggestion is potentially dangerous because perceptions of guilt based on demeanour depend on highly subjective impressions. The evidence must be sufficiently unambiguous and demonstrative of a relevant state of mind so as to overcome concerns that a trier of fact may too easily equate what is perceived to be an 'unusual' reaction with a guilty mind: *R v Staples,* 2022 ONCA 266, at para 55

There is also a real risk that a jury might give too much weight to demeanour evidence unless clearly cautioned that the evidence can be misleading and often

provides little or no real insight into a person's state of mind, or the reasons for that person's actions. To the extent that demeanour evidence is properly before the jury, the trial judge must be careful to instruct the jury about the risks inherent in drawing inferences from a witness's description of someone else's demeanour: *R v Short,* 2018 ONCA 1 at paras 53, 55

Demeanour evidence contains two invalid assumptions: 1) for every event there is a normal reaction; and 2) a person's reaction actually reflects his inner emotional reaction or state. As a result of the invalid assumptions that underpin demeanour evidence, this evidence requires a predominance of probative value over prejudicial effect to be admissible: R v Pannu, 2015 ONCA 677 at para 126-127

In *Vernelus,* the SCC upheld the trial judge's reliance on the accused's calm reaction to his arrest for possession of a firearm, as a piece of circumstantial evidence supporting the accused's knowledge of the presence of a weapon in his bag: 2022 SCC 53

The complainant's emotional state following the alleged incident, her out-of-court demeanor at the time. That is properly admissible circumstantial evidence that a trial judge is entitled to consider. The weight to be given to it is in the discretion of the trial judge: *R v Marsh,* 2023 ONCA 830, at para 20

2. DEMANOUR WHILE TESTIFYING

A trial judge may consider demeanor in assessing the credibility of a witness, but must not give undue weight to demeanor evidence because of its fallibility as a predictor of the accuracy of a witness' testimony: R v Hemsworth, 2016 ONCA 85 at paras 44-45; R v AA, 2015 ONCA 558 at paras 133-134

A witness's demeanour cannot become the exclusive determinant of his or her credibility or of the reliability of his or her evidence: *R v Hemsworth*, 2016 ONCA 85, at para 45

It would be dangerous to base findings of harm on demeanour in giving evidence: *R v Marshall,* 2022 ONCA 84, at para 25

Judges should be extremely cautious about relying on emotional upset while testifying as an indicium of truthfulness, given that emotional presentation can vary with maturity, culture, personality, neurodivergence, or even mental health. A judge is apt to lack a baseline for evaluation as well: *R v Reimar,* 2024 ONCA 519, at para 93

Demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom. One of the dangers is that sincerity can be and often is misinterpreted as indicating truthfulness. R v Rhayel, 2015 ONCA 377

Caution is required in considering unfavourable or favourable demeanour evidence, particularly where there are significant inconsistencies and conflicting evidence: *R v RI,* 2024 ONCA 185, at para 25

The trial judge may be entitled to consider the complainant's demeanour at trial in determining whether her professed failure to recall stemmed from her stated wish to reconcile with the appellant: *R v KM*, 2015 ONCA 582 at para 4

3. DEMEANOR IN THE COURTROOM

A trial judge should not rely on the accused's demeanor outside the witness box (e.g., in the courtroom) as part of the basis for rejecting his evidence. An accused person likely has no expectation of being judged while seated in the courtroom and no opportunity to explain whatever observations are made by the trial judge. In addition, the trial judge has no baseline for comparing the accused's reaction to whatever circumstances presented in court: *R v Diabas,* 2020 ONCA 283, at para 30

4. DEMEANOR IN KGB STATEMENTS

When determining the appropriate weight to be given to a KGB statement, the court can consider the witness' demeanor – both at the time of making the statement and at trial: *R v Siddiqi*, 2015 ONCA 548 at para 16

EXPERT EVIDENCE

A. TEST FOR ADMISSIBILITY

There is no bright line for determining whether a witness is offering factual testimony that does not require expertise to present and can be assessed by the jury as a matter of logic and common sense: *R v Vuong,* 2021 ONCA 697, at para 51

As a general rule, that evidence of a witness's opinion is not admissible. The law does, however, permit expert witnesses to state their opinions about matters over which they have special knowledge or skill that the trier of fact does not: *R v Vassell,* 2018 ONCA 721, at para 86

For a review of the governing principles on the admissibility of expert evidence, see *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. The test may be summarized as follows:

Expert evidence is admissible when:

(1) It meets the threshold requirements of admissibility, which are:

a. The evidence must be logically relevant;
b. The evidence must be necessary to assist the trier of fact;
c. The evidence must not be subject to any other exclusionary rule;
d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:
    i. Impartial,
    ii. Independent, and
    iii. Unbiased.
e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,
and

(2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

a. Legal relevance,
b. Necessity,
c. Reliability, and
d. Absence of bias.

When Parliament intends to make evidence automatically admissible, it says so expressly: *R v Bingley,* 2017 SCC 12, at paras. 11-12 and 14.

The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility. Further, at the gatekeeper stage of admissibility the reliability of the proposed expert evidence is central to its probative value and thus to the benefits of admitting it: *R v Abbey,* 2017 ONCA 640 at paras 53-54

The primary danger posed by the admission of expert evidence is that, faced with an expert's impressive credentials and mastery of scientific jargon, jurors are more likely to abdicate their role as fact-finders and simply attorn to the opinion of the expert in their desire to reach a just result. In judge-alone trials, the need to draw the line properly between the role of the expert and the role of the court remains an animating concern when determining the admissibility of expert evidence: *R v PJC,* 2025 ONCA 196, at para 33

Further, when the door to the admission of expert evidence is opened too widely, a trial has the tendency to degenerate into a contest of experts with the trier of fact acting as referee in deciding which expert to accept: : *R v PJC,* 2025 ONCA 196, at para 44

Judges have an ongoing duty to ensure that expert evidence remains within its proper scope. It is not enough to simply consider the Mohan criteria at the outset of the expert's testimony and make an initial ruling as to the admissibility of the evidence. The trial judge must do his or her best to ensure that, throughout the expert's testimony, the expert stays within the proper bounds of his or her expertise and that the content of the evidence itself is properly the subject of expert evidence.: *R v Sekhon,* 2014 SCC 15 at para 46-47

Sometimes in giving evidence at trial, an expert may give opinions that extend beyond the subjects on which the expert has been qualified to give evidence. To the extent that an expert does so, the unqualified opinions are to be disregarded by the trier of fact. Where the trier of fact is a jury, the trial judge should instruct them accordingly.

Sometimes, anecdotal evidence enters the record of trial proceedings during the testimony of an expert. Anecdotal evidence is testimony that does not speak to the facts of the case but reasons from the witness's prior experience to the probability of a particular result or occurrence in the case at hand. Anecdotal evidence is not legally relevant. Nor is it necessary. It lacks probative value. It is inherently prejudicial and tends to shift the onus of proof to an accused: *Sekhon*, at paras. 41, 49 and 50; *Vassel* at paras 93, 94

For example, it is improper for an officer to give an opinion that he had never seen a cocaine user possess two ounces just for personal use: *R v Cook,* 2020 ONCA 731, at para 103

An expert is entitled to give not only opinion evidence but also factual evidence – i.e., evidence based on first-hand observations: *R v. Sheriffe*, 2015 ONCA 880 at para 106

B. THE "RELEVANCE" CRITERION

With respect to the "relevance" criterion, the judge must conduct a cost-benefit analysis to determine "whether its value is worth what it costs." The cost-benefit analysis requires the judge to balance the probative value of the evidence against its prejudicial effect: *R v Sekhon,* 2014 SCC 15 at para 44

There are significant limits on the contribution that expert witnesses can make to credibility assessments, including the rule against oath helping, which prohibits the reception of expert opinion about the truthfulness of a witness: *R v DM*, 2022 ONCA 429, at para 47

C. THE "NECESSITY" CRITERION

It is not enough that the expert evidence be helpful; it must be necessary in the sense that lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts: *R v PJC,* 2025 ONCA 196, at para 34

In other words, finding that expert evidence might reasonably assist the trier of fact is not enough to make out necessity. The trial judge must gone on to determine whether that evidence meets the legal threshold of necessity, in that it is required in the case: *R v PJC,* 2025 ONCA 196, at para 37

If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of [an] expert is unnecessary. Inherent in the application of this criterion [is] that experts not be permitted to usurp the functions of the trier of fact. In other words, an expert cannot testify about matters going to the ultimate issue for the jury to decide: *R v Sekhon,* 2014 SCC 15 at paras 45-51; *R v Sarjoghian,* 2020 ONCA 550, at paras 2-3

No general or bright line rule prohibits either admission or trier of fact's use of expert opinion evidence on the ultimate issue. But the proximity of the opinion to the ultimate issue requires that the evidence be given special scrutiny: *R v Lights,* 2020 ONCA 128, at para 43

Several factors that have been considered in the jurisprudence on the question of whether expert opinion evidence is necessary include:

1. is the subject matter of the expert evidence within or beyond the common experience of lay people?

While distorting opinions can occur within the hard sciences, the risk that they will exist is more prevalent with behavioural science. Put differently,rReliability problems, while not peculiar to behavioural science, tend to be more intense for the behaviourist than for the 'hard scientist

2. how might the admission of the actual subject matter of the expert evidence affect the trial process

For example, there is a distinction between evidence about how psychological influences might affect a witness, and evidence about how psychological influences might affect a judge or jury. A fundamental challenge to the routine, longstanding, and time-tested operation of the system of justice, such as how psychological influences might affect a judge or jury, should be treated with great caution, if not serious skepticism.

3. Does the expert evidence express an opinion on the very question that the trier of fact must answer

There is judicial reluctance to freely admit such opinion evidence because doing so might usurp the task of the trier of fact. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

Sometimes, the problem can be avoided by more careful instructing questions put to an expert by counsel who is alert to this problem or by the trial judge ordering partial redactions of the text of expert reports.

4. Could the caution implicit or explicit in the expert opinion be adequately communicated by a jury instruction or by a judge's implicit or explicit self-instruction?

R v Prasad, 2024 ONCA 601, at paras 41-53

For example, in *Hoggard,* the Court of Appeal held that it was unnecessary to admit expert evidence on the responses of sexual assault victims and the impact of trauma on the brain so as to undercut any resort to stereotypical reasoning or myths. Jury instructions are sufficient for this purpose, and avoid the risks of misuse that can come with such evidence: 2024 ONCA 613

In *PJC,* the Court of Appeal similarly held that it was unnecessary to admit expert evidence on the neurobiology of trauma, as the assessment of the credibility and reliability of witnesses, including those testifying about traumatic events they suffered as children or adults, is within the knowledge and ability of triers of fact and is grounded in common knowledge and experience. Triers of fact are equipped to analyze the evidence of witnesses with frailties in their memory without the assistance of expert evidence 2025 ONCA 196, at para 38

Addressing the extent to which the opinion evidence is necessary, the trial judge will have regard to other facets of the trial process – such as the jury instruction –

that may provide the jury with the tools necessary to adjudicate properly on the fact in issue without the assistance of expert evidence.

For an example of the parameters of acceptable expert opinion in importing cases, see *R v Potts,* 2018 ONCA 294 at paras 41-58

In *Satkunanathan,* the Court of Appeal reversed a conviction on the basis that the trial judge erred in permitting the expert officer to testify that the Percocet pills in question were possessed for the purpose of trafficking: 2022 ONCA 393

Similarly, in *Jenkins,* the Court of Appeal held that it was an error to permit police officers to testify that, based on their experience, the conduct they surveyed of the accused was consistent with someone who was engaged in drug trafficking. The officers were neither qualified as experts to provide this opinion, nor was the opinion necessary to the trier of fact. The error was particularly problematic because, the Crown phrased its questions in eliciting the impugned evidence in a manner that also elicited the experience of the officers in drug investigation surveillance. This had the effect of emphasizing the purported expertise of the officers without actually having them qualified as experts. *R v Jenkins,* 2025 ONCA 533, at paras 25-28, 46

The court went on to explain that, where properly qualified expert opinion evidence is tendered on issues related to drug trafficking, it must be limited to providing the jury with evidence in general terms about the area of expertise (for example, drug pricing; trafficking quantities; methods of drug trafficking), which they may consider and, if they accept it, apply as part of their fact finding to decide what inferences or conclusions to draw from other evidence (for example, surveillance evidence). Expert opinion may not extend to conclusions or inferences to be drawn about the accused's conduct. The inference-drawing process is part of the jury's fact-finding role, and not the province of the expert witness. Thus, an expert providing opinion evidence about indicia of drug trafficking may not opine that the particular acts of the accused were drug trafficking or were consistent with drug trafficking. Those questions are for the trier of fact: *R v Jenkins,* 2025 ONCA 533, at para 31

Expert evidence is not necessary to discuss the general functioning of iPhones. iPhone users can explain what applications are and what use they make of them. And the triers of fact do not need the assistance of persons with specialized knowledge in order to form correct judgments on matters relating to video messaging applications such as FaceTime: *R v Walsh,* 2021 ONCA 43, at para 89

Trial judges deal with issues of intoxication and memory routinely, in sexual assault complaints and in numerous other contexts, and do so without the need for expert evidence: *R v Case,* 2024 ONCA 900, at para 12

That is not to say, however, that expert evidence could never be necessary on the issue of memory. For example, a narrow expert opinion on memory may be admissible in a case to assess the reliability of testimony based on a memory the witness had allegedly formed as a two-year-old, because that might be outside the normal experience of a trier of fact: *R v PJC,* 2025 ONCA 196, at para 42

Significant deference is owed to a trial judge's decision to admit or exclude expert evidence, including findings on the issue of necessity, unless an error in principle can be shown or the decision is found to be unreasonable: *R v PJC,* 2025 ONCA 196, at para 37

The sort of expert evidence that will meet the necessity threshold can be expected to change over time as our common knowledge and understanding evolves: *R v PJC,* 2025 ONCA 196, at para 43

D. THE "QUALIFIED EXPERT" CRITERION

An assessment of whether the witness is a properly qualified expert must take into account the proposed witness' ability to understand and to fulfill an expert's duty to the court to provide impartial, independent and unbiased evidence. Once the expert testifies to this effect, the burden shifts to the party opposing the admission of the evidence to show a "realistic concern" as to why the expert might not comply with that duty. If that realistic concern is shown, the burden shifts back to the party proffering the evidence to demonstrate on a balance of probabilities why the expert is a properly qualified expert. Expert evidence should only be excluded in "rare" and "very clear cases", where the proposed expert is found to be unable or unwilling to provide fair, objective and non-partisan evidence: *R v Wong,* 2023 ONCA 118, at para 63

i. IMPARTIALITY

At the admissibility stage this quality is relevant to the threshold requirement of a properly qualified expert, and it is again relevant at the gatekeeper stage. However,

rarely will a proposed expert's evidence be ruled inadmissible for failing to meet this threshold requirement: *R v Abbey,* 2017 ONCA 640 at para 55

Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her. These concepts, of course, must be applied to the realities of adversary litigation.

Concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are addressed initially in the "qualified expert" element of the Mohan framework. A proposed expert witness who is unable or unwilling to fulfill his or her duty to the court is not properly qualified to perform the role of an expert. If the expert witness does not meet this threshold admissibility requirement, his or her evidence should not be admitted. Once this threshold is met, however, remaining concerns about an expert witness's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

Absent challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met. However, if a party opposing admissibility shows that there is a realistic concern that the expert is unable and/or unwilling to comply with his or her duty, the proponent of the evidence has the burden of establishing its admissibility. Exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable

or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

An expert's prior connection with an investigation does not automatically disqualify that person from giving expert opinion evidence. This determination can only be made within the full context of the specific facts. Relevant factors will be the nature of the prior investigation, the role played by the individual expert in that investigation, and the nature of the proposed expert evidence. In most cases, suggestions that an expert witness lacks independence or impartiality will go to the weight of the expert's evidence rather than its admissibility: *R v Tang,* 2015 ONCA 470 at para 6; *R v McManus,* 2017 ONCA 188

While there is a heightened concern with the ability of police officers offered as expert witnesses to ensure that they are able to give an impartial opinion, their prior knowledge of an offender on its own is not sufficient to ground a finding of bias. In such circumstances, the question is not whether there is a relationship to one of the litigants, but whether the relationship results in the witness being unable or unwilling to carry out his or her duty to the court: *R v Wong,* 2023 ONCA 118, at para 73

In *McManus*, the Court held that a police officer who investigated the offence with which the appellant was charged should have been disqualified as an expert witness: 2017 ONCA 188

In *Cordeiro-Calouro*, the Court of Appeal held that the defence expert could not be expected to uphold his duty to be non-partisan once he was placed in the position of having to become the advocate for the appellant through cross-examination of the Crown's expert: 2019 ONCA 1002

In *R v Natsis,* 2018 ONCA 425 at para 11, the Court of Appeal summarized the principles concerning the admissibility of expert evidence from *White Burgess* as follows:

E. Expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If the witness is unable or unwilling to fulfill that duty, their evidence should be excluded.

F. An expert's attestation or testimony recognizing and accepting their duty to the court will generally suffice to meet the threshold for admissibility as it relates to bias.

G. The burden rests on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable or unwilling to comply with their duty to the court.

H. If the opposing party establishes that there is a realistic concern, then the party proposing to call the evidence must establish that the expert is able and willing to comply with their duty to the court on a balance of probabilities. If this is not done the evidence, or those parts of it that are tainted by a lack of independence or impartiality should be excluded.

I. Even if the evidence satisfies the threshold admissibility inquiry, any concern about the expert's impartiality and independence is still a relevant factor in weighing the *R. v. Mohan*, [1994] 2 S.C.R. 9 factors for admissibility – such as relevance, necessity, reliability, and absence of bias. Bias remains a factor to be considered in determining whether the potential helpfulness of the evidence is outweighed by the risk of the dangers associated with that expert evidence.

J. Expert evidence will rarely be excluded for bias; anything less than clear unwillingness or inability to provide the court with fair, objective, and non-partisan evidence should not result in exclusion. Rather, bias must be taken into account in the overall weighing of the costs and benefits of receiving the evidence. Context is important. Both the extent of the expert's alleged bias and the nature of the proposed evidence are relevant.

ii. TRAINING

Expert witnesses are not barred from assisting the court with their special knowledge simply because they are not trained in the underlying science of the field. Such knowledge is required only where the science is novel. The purpose of the special rule for novel scientific evidence is to ensure that the reliability of the underlying technique or procedure used in forming the opinion has to be established by precedent, evidence, or statute: *Bingley.*

Neither does an expert need to be familiar with the legal standards that must be applied to the expert's opinion. For example, in *Plein,* the Crown objected to the admissibility of a clinical psychologists expert opinion evidence about Mr. Plein's capacity to meet the objective penal negligence standards that apply because Dr. Day was not a forensic psychologist familiar with the governing legal standards.

The Court held that "Dr. Day does not have to make that grade to qualify to offer expert opinion evidence relevant to Mr. Plein's capacity. As a clinical psychologist, Dr. Day clearly possesses special knowledge and experience going beyond that of the trier of fact in measuring cognitive abilities and emotional health, and interpreting psychometric data to offer an opinion about Mr. Plein's capabilities. This is enough to satisfy the expertise requirement:" *R v Plein,* 2018 ONCA 748 at paras 58-59

E. THE USE OF HYPOTHETICALS

Properly framed hypotheticals can and should at times be used to elicit entirely appropriate expert opinions. However, hypothetical questions should not exceed the legitimate purpose for the expert testimony being presented. Trial judges must remain alive to the possibility that certain hypothetical questions are liable to prompt answers that, viewed in the context of all the evidence presented at trial, are far more prejudicial than they are probative.

This is especially so when hypothetical questions parallel the specific allegations before the court. For example, when the hypothetical paralels the specific behaviour of the individual complainant, the evidence serves to improperly bolster the credibility of the complainant and invites the court to accept the complainant's evidence regardless of their conduct and notwithstanding the weaknesses of the testimony. This manner of eliciting expert evidence ought not to effectively mask the weaknesses of a complainant's testimony and to cloak it with a semblance of scientific reliability. Put differently, the expert must not be allowed to argue the theory of the Crown from the witness box and cloth it with the aura of infallibility associated with scientific principles *R v PJC,* 2025 ONCA 196, at paras 49-50, 53

F. WEIGHT OF EXPERT EVIDENCE

Where the expert's opinions are based on statements made to the expert by others, those statements are not admissible for their truth. Where the factual premise of the expert's opinion includes out-of-court statements made by others that are not established by otherwise admissible evidence, as for example by a listed or the principled exception to the hearsay rule, the opinion is entitled to less, and in some cases to no, weight: *R v Sheriffe*, 2015 ONCA 880 at paras 104-105

The failure of an expert to be provided with relevant facts, or the failure of an expert to consider relevant facts, are normally matters that go to the reliability of the expert opinion and the weight to be given to it: *R v AM,* 2022 ONCA 154, at para 33

To the extent that the expert's opinion depends on evidence from a party that must be proven, the lack of such proof will have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point: *R v Gager,* 2020 ONCA 274, at para 50

Where the expert relies on unproven hearsay obtained and acted upon within the scope of the expert's expertise, if otherwise admissible, the weight of the expert evidence need not be discounted: *R v Gager,* 2020 ONCA 274, at para 49

Where the factual basis of an expert's opinion is a melange of admissible and inadmissible evidence the duty of the trial judge is to caution the jury that the weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which it relies: *R v Gager,* 2020 ONCA 274, at para 56

Where expert reports are based on conflicting hearsay statements by the accused (e.g., on an NCR hearing), the trial judge must attempt to reconcile them It is an error for the trial judge to simply assign such conflicting opinions no weight: *R v Sualim,* 2017 ONCA 178 at paras 26-38.

G. RELIANCE ON EXPERT EVIDENCE

A trial judge cannot abdicate to the expert witness his role in determining whether the accused was guilty of the offence. A trial judge's unquestioning acceptance of, and reliance on, an expert opinions bald opinion is a legal error warranting appellate intervention: *R v Toole,* 2017 ONCA 305 at para 11

It is an error of law to apply varying levels of scrutiny to the evidence of experts called by both parties: *R v Awer,* 2017 SCC 2

H. CONFLICTING EXPERT OPINION

In the case of conflicting expert evidence that is crucial to understanding the material issues to be decided, it is tempting for a trier of fact merely to choose one expert over another, and to allow an expert witness's evidence to distort the fact-finding process and overtake the task of objectively assessing the totality of the evidence at trial. Such an approach constitutes legal error. A trier of fact must be careful to consider all of the evidence through the *W.(D.)* analytical framework, including expert evidence: *R v KJ,* 2021 ONCA 570, at paras 18-19

In a case where the accused's liability for the offence falls to be determined by expert evidence, an uncertainty amongst experts may mean that responsibility for the offence cannot be laid to bear on the accused: *R v Doyle,* 2023 ONCA 427, at para 12

I. DISCLOSURE OF EXPERT MATERIALS

The Crown should disclose an expert's final version of his/her report submitted for peer review. This document constitutes fruits of the investigation in the hands of police. Failure to disclosure this constitutes a violation of s.7: *R v Natsis,* 2018 ONCA 425 at paras 31-32

J. TYPES OF EXPERTS

i. Drug Recognition Expert

The evidence of a Drug Recognition Expert is admissible without the need for a *Mohan* voir dire. The DRE's expertise is not in the scientific foundation of the test but in the administration of the test itself: *R v Bingley,* 2017 SCC 12.

Where the probative value of an individual DRE's evidence is diminished such that the benefits in admitting the evidence are outweighed by the potential harm to the trial process, a trial judge retains the discretion to exclude that evidence.

Furthermore, the determination of the DRE is not conclusive of the ultimate question of whether the accused was driving while impaired. It will always be for the trier of fact to determine what weight should be given to a DRE's opinion, influenced by factors such as bias, failure to conduct the drug recognition evaluation in accordance with training, questionable inferences, bodily sample evidence, and evidence of bystanders or of other experts: *Bingley* at paras. 30-31.

ii. Gang Expert

A particular risk of expert evidence concerning gangs is the potential for "bad character" propensity reasoning: *R v Oppong,* 2021 ONCA 352, at para 41

iii. Translation Expert

The tapes of intercepted communications constitute the best evidence of the facts of the conversations sought to be proved. Where the communications are in a foreign language, opinion evidence in the form of a translation will be essential for the trier of fact, either through *viva voce* evidence, a transcript, or both:

A translator of intercepted communications need not possess formal accreditation in order to be qualified as an expert: *R v Abdullahi,* 2021 ONCA 82, at paras 37, 43-46

K. NOTICE REQUIREMENT

s. 657.3(3)(b) of the *Code* requires a party calling an expert to deliver, within a reasonable period before trial, a copy of her report, or if no report was prepared, a summary of the opinion anticipated to be given by her and the grounds on which she based it. Although the *Code* does not specify what the report is required to disclose, a reasonable reading of the provision suggests that it cannot be less than what must be disclosed if there is no report (a summary of the opinion anticipated to be given by the expert, and the grounds on which it is based): *R v Marrone,* 2023 ONCA 742, at para 48

The remedies in s. 657.3(4) of the *Code* for non-compliance (adjournment, further report, recalling witnesses) do not include evidentiary exclusion: *R v Marrone,* 2023 ONCA 742, at para 106

The subjective beliefs about the opposing counsel as to whether or not the report is sufficient/compliant with the statutory requirements of 657.3(3)(b) are irrelevant and the trial judge should refuse to comment on such. The issue is whether, objectively, the report is compliant - judged from the perspective of what would be obvious to a reasonable counsel in the circumstances: *R v Marrone,* 2023 ONCA 742, at para 114

L. APPELLATE REVIEW

Absent an error in principle, a material misapprehension of evidence, or an unreasonable ruling, a trial judge's decision as to the admissibility of expert evidence is entitled to deference: *R. v. Shafia*, 2016 ONCA 812 at paras. 230 and 234; *R. v. McManus*, 2017 ONCA 188, at para. 68; *R v Natsis,* 2018 ONCA 425 at para 16; *R v Wong,* 2023 ONCA 118, at para 59

Where there was no indication that the trial judge relied on the improper opinion evidence, the Court of Appeal will defer to the trial judge, who is presumed to know the law: *R v Tennant,* 2018 ONCA 264 at para 3

EYE-WITNESS IDENTIFICATION

A. FRAILTIES OF EYE WITNESS IDENTIFICATION

Eyewitness identification is inherently unreliable. It is difficult to assess, is often deceptively reliable because it comes from credible and convincing witnesses, and is difficult to discredit on cross-examination for those same reasons. Studies have shown that triers of fact place undue reliance on such testimony when compared to other types of evidence. As a result, many wrongful convictions result from faulty, albeit convincing, eyewitness testimony, even in cases where multiple witnesses identify the same person: *R v MB,* 2017 ONCA 653 at para 29-31; *R v Biddle,* 2018 ONCA 520 at para 31

Particular vigilance is therefore required in relation to this type of evidence: *R v McCracken,* 2016 ONCA 228 at para 25; see also *R. v. Olliffe,* 2015 ONCA 242

The dangers of eye witness identification evidence are especially high where: (1) the witness is identifying a stranger, (2), the circumstances of the viewing raise accuracy concerns, (3) the pre-trial identification procedure is flawed, and (4) there is no independent confirmatory evidence: *R v Layne,* 2024 ONCA 435, at para 24

Concerns about eyewitness identification are particularly high where the person identified is a stranger to the witness and when the identification entails generic descriptors: *R v Bao,* 2019 ONCA 458, at paras 19, 21

Trial judges must carefully, cautiously, and critically analyze the reliability of the witness's description of the perpetrator and that description's similarities and dissimilarities with the accused. Further, they must assess the identification evidence against other potentially exculpatory evidence. Independent confirmatory evidence, accurate viewing opportunity and fair pre-trial identification can go a long way to minimizing the dangers inherent in identification evidence: *R v Layne,* 2024 ONCA 435, at para 25

Failure to mention a distinctive feature is a badge of potential unreliability that requires close scrutiny: *R v Layne,* 2024 ONCA 435, at para 43

The principles of eye-witness identification apply not only to the identification of the accused, but also to the observation of the accused actually committing the actus reus: *R v Lewis,* 2018 ONCA 351 at para 22

Witness identification based on video recordings, on the other hand, can under certain circumstances be more reliable as it allows repeated and unhurried consideration: *MB* at para 32

An eye-witness' confidence in their identification should not be taken as a proxy for confidence: *R v Deakin*, 2021 ONCA 823, at paras. 16, 18; *R v Olliffe*, 2015 ONCA 242, at para 43; *R. v. Goran*, 2008 ONCA 195, at para. 27

Not all discrepancies between the accused and the eye witness' description are fatal, and courts can consider their relative significance and whether they reflect a mistake by the witness: *R v Layne,* 2024 ONCA 435, at para 45
For a comprehensive list of the factors to consider in evaluating a witness' identification evidence, see *R. v. Virk*, 2015 BCSC 981, at para. 117, endorsed in *R v Jimaleh,* 2018 ONCA 841, at para 13

B. FRAILTIES OF EYE WITNESS DESCRIPTION EVIDENCE

Eyewitness identification evidence is not fundamentally different from eyewitness description evidence. The first is an opinion that the accused is the person who committed the offence, while the second is simply evidence describing a characteristic or characteristics of a perpetrator. Both types of evidence raise the same reliability concerns that demand a cautionary instruction: *R v Dosanjh,* 2022 ONCA 689, at paras 34-36

C. TAINTING WITH A SINGLE PHOTOGRAPH

Hearing someone has been involved in an incident and then looking for and finding their image could taint the subsequent identification of that person: *R v Lewis,* 2018 ONCA 351 at para 26; *R. v. T.A.H.*, 2012 BCCA 427; *R. v. Mohamed*, 2014 ABCA 398, 588 A.R. 89, leave to appeal to S.C.C. refused.

It is dangerous and improper to present a potential identification witness with a single photograph of a suspect. The danger is that the witness may have the photo image stamped on his or her mind, rather than the face of the true perpetrator. Presenting a single photograph is highly suggestible and contaminates the identification process in a manner that prejudices the accused person. The same concerns are not present in a simultaneous comparison of a photo with an individual in the course of, for example, a traffic stop: *R v Bao,* 2019 ONCA 458, at paras 27, 34-36; *R v Odesho,* 2024 ONCA 9, at para 45

However, the importance of a photo lineup and the risk of mugshot commitment or contamination is diminished in settings where a witness already has identified the subject as the suspect before the photo identification was made: *R v Odesho,* 2024 ONCA 9, at para 46

D. INSTRUCTION TO THE JURY

The trial judge need not give a caution to the jury about the frailties of eye-witness identification in every case in which the Crown leads identification evidence as part of its case requires a caution. However, where the accuracy of the eyewitness evidence plays any substantial role in the Crown's case, the caution is mandatory: *R v Oswald,* 2016 ONCA 147 at para 4

Where eye-witness identification plays a substantial role, it is insufficient for the trial judge to give a generic instruction on its frailities. Although no specific word formula need be followed, among other things, the instruction should explain the reasons underlying the need for the caution, point out that faulty identifications by honest witnesses in the past have resulted in miscarriages of justice through wrongful convictions, stress the need for careful consideration of all the circumstances, and identify the specific weaknesses alleged in the evidence adduced at trial; *R v Vassel,* 2018 ONCA 721, at para 184; *R v Lewis,* 2018 ONCA 351, at para 18

In *Clark,* for example, the Supreme Court held that the trial judge erred in failing to give an instruction on the frailities of eye-witness identification where the case turned on eye witness evidence on a homicide. The two eye-witnesses did not

know the accused, it was dark outside, and both witnesses were using methamphetamines. Further, the descriptions provided to the police were extremely poor, tentative, and inconsistent, and one witness undertook her own facebook investigation in a question to identify the assailant. Another witneses only saw a portion of the attack: 2022 SCC 49, upholding the dissent in 2022 SKCA 36

Trial judges must remain alive to badges of unreliability in a witness's identification of an accused. In *McFarlane,* for example, the particular badges of unreliability included: the lack of any evidence concerning the witness' prior descriptions of the appellants, followed by her subsequent generic explanations for why she chose their photos from the line-ups. The Court found that the trial judge failed to draw sufficient attention to these frailties in the evidence: *R v McFarlane,* 2020 ONCA 548, at paras 81, 87

The jury ought also to be told that there is no positive link between the confidence a witness expresses in the correctness of his or her identification and the accuracy of that observation: *R v Vassel,* 2018 ONCA 721, at para 185

It may be necessary to instruct jurors on the impact of the failure of a witness to identify a perpetrator in a line-up despite having been an eyewitness to the events. In addition, where a witness has provided a generic description of a perpetrator, a description that generally fits the accused among others, but does not identify the accused as the perpetrator, it may be necessary for a trial judge to instruct the jury that the mere fact that the accused fits the generic description does not, on its own, permit the jury to conclude that the accused is the perpetrator: *R v Vassel,* 2018 ONCA 721, at para 186; *R v Araya*, 2015 SCC 11, at para. 44.

Trial judges should instruct juries that when an eyewitness fails to mention any "distinctive feature of the accused", the reliability of an eyewitness identification may be called into question. When generic eyewitness description is coupled with the failure of the eyewitness to identify the accused as the perpetrator, further instruction may be warranted. When an eyewitness describes distinguishing features, the trial judge should instruct the jury as to the "potential importance of any significant discrepancy between the description of the [perpetrator] provided" and the person's actual appearance. After doing so, the jury is entitled to decide the extent and significance of inconsistencies in the description of the perpetrator and the accused: *R v Heurta,* 2020 ONCA 59, at paras 35-37

On appeal, the court must determine whether the identification evidence, together with the circumstantial evidence, provides a satisfactory basis for the conviction: *McCracken* at para 27

i. Instructions on Exculpatory Eye-Witness Identification

The need for special care concerning eyewitness identification evidence arises because of the danger of a wrongful conviction. That danger does not exist where the eyewitness evidence tends to exculpate the accused. Consequently, where the eyewitness evidence tends to exculpate the accused, the traditional instruction regarding eyewitness identification evidence should be avoided as it could leave the jury with an erroneous impression about the quality of evidence that could leave them with a reasonable doubt: *R v Grant,* 2022 ONCA 337, at para 84

The following principles govern a trial judge's instructions to a jury on eye-witness exculpatory evidence:

- The traditional instruction regarding eyewitness identification evidence and the risk of a miscarriage of justice or wrongful conviction should not be given

- A jury should be given a proper caution about the inherent frailties of both eyewitness identification evidence and eyewitness description evidence and in respect of both inculpatory and exculpatory evidence. Accordingly, a trial judge may instruct a jury to approach certain kinds of defence evidence, including eyewitness identification evidence, with care or caution and explain why caution is needed due to the frailties of the evidence

- While the trial judge should make it plain that the jury need not accept the defence or other exculpatory evidence, the judge must instruct the jury that it is sufficient for acquittal if that evidence leaves them with a reasonable doubt

- A trial judge must not direct the jury that it is dangerous to act on defence identification evidence alone. The instruction must not amount to the functional equivalent of a Vetrovec caution

- As well, the instruction must not expressly or by necessary implication undermine the defence position or shift the onus of proof

- Accordingly, where the trial judge merely instructs the jury to be especially cautious or extremely careful in considering defence evidence and where that instruction is accompanied by an instruction that accords with WD, no error of law occurs.

When a defence witness provides exculpatory evidence, or when a *Crown witness's* failure to identify the accused tends to leave the trier of fact with reasonable doubt about the accused's guilt, the traditional instruction should not be given because it may leave the jury with an erroneous impression about the quality of evidence that could leave them with a reasonable doubt. Instead, the trial judge should alert the jury to the reasons for the frailties of the evidence in the case at hand. The trial judge must also make it plain that the jury need not accept the defence or other exculpatory evidence, but that it is sufficient for acquittal if that evidence leaves them with a reasonable doubt: *R v Vassel,* 2018 ONCA 721, at paras 187-188, 191-192

It is essential that the trial judge not undermine the defence position at trial or, either expressly or by implication, leave the impression that the onus of proof shifts in relation to the subject evidence. No error of law will result, however, where the trial judge merely instructs the jury to be especially cautious or extremely careful in considering defence evidence and where that instruction is accompanied by an instruction that accords with *R. v. W.(D.)*":

Even for a witness that assists the defence, it is not an error for a trial judge to caution the jury concerning the inherent frailties of eyewitness evidence and the reasons for the caution, provided that the instructions do not amount to the equivalent of a Vetrovec caution, expressly or implicitly undermine the defence's position, or shift the onus of proof onto the defense: *R v Dosanjh,* 2020 ONCA 571, at para 30

E. RESEMBLANCE EVIDENCE

Resemblance evidence has little probative value and does not amount to identification evidence. In the absence of some other inculpatory evidence, a resemblance is no evidence: *R v Dodd,* 2015 ONCA 286

In some cases, a failure to mention distinctive characteristics of a suspect in an initial description to the police may be quite material to the reliability of an identification. On the other hand, convictions have been upheld in circumstances of an eyewitness' initial omission of a distinguishing characteristic: *R v Gonsalves,* [2008] OJ No 2711 (Sup Ct Jus) at paras 48-49

The principle emanating from the *Chartier* decision that a jury should be told there was no identification by a witness because of significant dissimilarities between the witness's description of the person observed and the accused only applies to cases in which there is a clear dissimilarity in the witness's identification coupled with a lack of supporting evidence implicating the accused: *R v Grant,* 2022 ONCA 337, at paras 86-87; *R. v. Browne*, 2021 ONCA 836, at para. 48

Where the inculpatory portions of a witness's testimony are easily demarcated from the exculpatory portions, the best course is to specifically refer the jury to the exculpatory portions. Where some of the eyewitness evidence is exculpatory the issue on appeal is whether the charge as a whole, in the context of the particular case, clearly informed the jury that they must determine whether the exculpatory evidence alone, or in combination with other evidence, left them with a reasonable doubt about the accused's guilt: *R v Grant,* 2022 ONCA 337, at para 93

In *Grant,* the Court of Appeal held that the trial judge erred by failing to acknowledge that some eye witness evidence tended to be exculpatory. Further, the charge did not offer the jury any assistance about how to distinguish exculpatory from inculpatory evidence and assess the exculpatory evidence. Finally, the trial judge erred by giving the traditional instruction on eye-witness identification in respect of exculpatory evidence: *R v Grant,* 2022 ONCA 337, at paras 92-94

F. ADMISSIBILITY OF PRIOR IDENTIFICATIONS AT TRIAL

There is an evidentiary value of prior identification statements. Unlike other prior consistent statements, in the context of identification evidence, "the entire

identification process which culminates with an in-court identification" is probative. The probative force of the identification evidence is best measured by a consideration of the entire identification process which culminates with an in-court identification.

However, trial judges retain a discretion to exclude evidence of prior identification where its prejudicial effect outweighs its probative value. In effect, there may be circumstances where it would be appropriate to instruct a jury that some instance of a witness's repeated identification of an accused should not be considered as part of the identification process because its prejudicial value outweighs its probative value: *R v Holder,* 2023 ONCA 688, at paras 11, 16

Tat distinguished between hearsay and non-hearsay uses of prior identifications and descriptions. These prior statements are not hearsay if admitted to buttress the in-court identification rather than to prove their own truth. While identifications and descriptions used for that buttressing purpose are prior consistent statements, they are excepted from the rule against those statements and are admissible even if not adopted and if no hearsay exception applies. In contrast, prior identifications and descriptions are hearsay if the witness does not adopt them and the Crown uses them to prove their truth rather than to bolster in-court testimony.

Tat also held that prior identifications and descriptions used to prove their truth are not categorically excepted from the hearsay rule. Rather, those identifications and descriptions are only admissible to prove their truth if: (1) an exception to the hearsay rule applies, or (2) the witness adopts them. To adopt them, witnesses must testify that they made them and presently recall them to be true.

Tat's distinction between hearsay and non-hearsay uses of prior identifications and descriptions matters if those prior statements are inconsistent with the identifying witness's trial testimony. For instance, if the Crown argues that the trier of fact should find that a prior description inconsistent with the witness's in-court testimony accurately described the perpetrator's appearance on the day of the crime, then the prior description is being used to prove its own truth and not to bolster the in-court testimony that it contradicts. This triggers the hearsay rule, which makes the prior description inadmissible to prove its own truth unless a hearsay exception applies or the witness adopts it. In contrast, this distinction is unimportant if a prior description is consistent with in-court testimony because they then bolster each other's reliability:

G. IN COURT IDENTIFICATION

An in-court identification, standing alone, has little, if any, value as evidence identifying an accused as the person who committed the crime: *R v Bailey,* 2016 ONCA 516 at para 48; *R v Kumi,* 2017 ONSC 5508, at para 33 A jury charge must caution the jury accordingly: *R v Lewis,* 2018 ONCA 351 at para 23; *R v Gonsalves,* [2008] OJ No 2711 (Sup Ct Jus) at para 51

In *Yearly,* the Court found that an in-dock identification, while admissible, was insufficient to sustain a committal for trial at a preliminary inquiry. On a *certiorari* application, the Superior Court of Justice reversed the committal and ordered a discharge: 2022 ONSC 2160, at paras 33-42.

The risks posed by in-court identification increase when there are multiple in-dock identifications: a jury may use the number of identifications to bolster their reliability: *R v Phillilps,* 2018 ONCA 651 at paras 20, 23

In *Phillips*, a case involving multiple in-dock identifications made of the accused, who was the only black person in the courtroom and who was identified for the first time by these witnesses in court, the Court of Appeal held that "nothing less than an instruction that it would have been dangerous to rely on the in-dock identification would do" (para 29).

H. CROSS-RACIAL IDENTIFICATION

There is an added need for caution with eye-witness identification where it involves cross-racial identification: *R v Bao,* 2019 ONCA 458, at para 23; *R v Lam,* 2014 ONSC 3538, at paras 190-191

For a review of the well-recognized danger of cross-racial eye-witness identification, see: *R v Richards,* (2004), 70 OR (3d) 737, at para. 32 (C.A.)

I. RECOGNITION EVIDENCE

Recognition evidence is a subset of eyewitness identification evidence, in which the eyewitness' identification is based on prior acquaintance. As such, the same concerns apply and the same caution must be taken in considering its reliability as in dealing with any other identification evidence: *R v MB,* 2017 ONCA 653 at para 34; *R v McCracken,* 2016 ONCA 228 at para 25

Even though the witness knows the person identified, the time to observe, the circumstances of the observation, and the conflicting evidence constitute factors which the trier of fact must grapple with in order to determine reliability. The usual dangers of eyewitness identification exist in a case of alleged recognition: *R v Chafe,* 2019 ONCA 113, at paras 30-31; *R v Mohamed,* 2023 ONCA 104, at para 83

This type of non-expert opinion evidence is admissible provided that the witness has a prior acquaintance with the accused and is thus in a better position than the trier of fact to identify the perpetrator. The identification of idiosyncrasies of physical appearance or movement were relevant when considering the ultimate reliability of the evidence: *MB,* at paras 35-37

Recognition evidence includes the opinion evidence from Leaney witnesses. In a case where identification is genuinely at issue, the details and extent of the witness' prior familiarity with the accused would be a very important factor for the jury/trier to consider when assessing the reliability of their recognition evidence. If, however, the defence has chosen not to challenge the witness' identification evidence, the trial judge need not instruct the jury on this issue: *R v Bzezi,* 2024 ONCA 530, at para 23

J. PRIOR OUT-OF-COURT IDENTIFICATION

Where a witness identifies the accused at trial, evidence of prior identifications made and prior descriptions given by that witness do not have a hearsay purpose. The evidence is admitted to add cogency to the identification performed in court by strengthening (1) the value of the identification in court by showing that the witness identified the accused before the sharpness of his recollection was dimmed by time; and (2) the weight of the identification in Court by showing that the witness was able to identify the accused before he was aware that the accused

was the person under suspicion by the police: *R v Stojanovski,* 2022 ONCA 172, at para 84

K. PHOTO LINE-UPS

An identification procedure such as a line-up following a one-person show-up or viewing is essentially valueless. A photo line-up should include photos of persons who were approximately the same age and colour as the accused. A photo line-up procedure should be executed using a sequential, not a photo-spread array: A witness should not be subjected to any compulsion to choose a photo. 4. A trier of fact is entitled to look at the likeness of the accused before the court to any photograph shown a witness: *R v Gonsalves,* [2008] OJ No 2711 (Sup Ct Jus) at para 51

The recommendations of the *Sophonow Inquiry*[1] governing the conduct of photo lineups are persuasive tools to avoid wrongful conviction arising from faulty eyewitness investigation. However, the recommendations set out in the report are not conditions precedent to the admissibility of eyewitness testimony. Nor do they establish rules governing the assignment of weight: *R v Phillilp,* 2018 ONCA 651 at para 36

Irreversible prejudice to an accused may flow from the use of inappropriate police procedure for photo line-ups, and, unless adequately counterbalanced during the course of the judicial process, may result in a serious miscarriage of justice: *R v Jimaleh,* 2018 ONCA 841, at para 9

However, questionable identification procedures may not be fatal to a finding of guilt. Improprieties or deficiencies in police procedures do not necessarily destroy the identification evidence or render it inadmissible. The use of inappropriate pre-trial identification procedures affects the weight of the subsequent identification, subject to any s.24 *Charter* relief: *R v Gonsalves,* [2008] OJ No 2711 (Sup Ct Jus) at paras 44-46

1 The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation: https://digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=12713&md=1

It may be necessary to instruct jurors on the impact of the failure of a witness to identify a perpetrator in a line-up despite having been an eyewitness to the events: *R v Vassel,* 2018 ONCA 721, at para 186

L. INDEPENDENCE OF IDENTIFICATION FROM MULTIPLE WITNESSES

The independence principle may be compromised where eyewitnesses have discussed amongst themselves their identification before independently reporting their descriptions or committing the identification to writing: *R v Gonsalves,* [2008] OJ No 2711 (Sup Ct Jus) at para 47

M. APPELLATE REVIEW

Appeal courts also guard against identification evidence's dangers by scrutinizing it more closely under the unreasonable verdict standard of review. Appellate courts apply this standard less deferentially in identification cases to guard against the reliability dangers they pose, which are well-suited to appellate review: *R v Layne,* 2024 ONCA 435, at para 25

Appellate courts will subject identification findings to closer scrutiny than other findings of fact. This is so because of the well-recognized potential for injustice in such cases and the suitability of the appellate review process to cases which turn primarily on the reliability of eyewitness evidence and not the credibility of the eyewitness: *R v MB,* 2017 ONCA 653 at para 30

It is preferable if an officer with no connection to the investigation conducts the photo lineup. It is a significant problem with the photo line-up if the witness is shown a photo of the alleged accused prior to seeing the lineup and is told that this photo will be in the lineup s/he is to be shown: *R v Phillips,* 2018 ONCA 651 at para 39

In *Edwards,* the Court of Appeal held that the trial judge erred in not cautioning the jury on eye witness identification evidence where it was significant to the appellant's guilt. The Court further held that, "while an eyewitness identification

caution may not have benefitted the defence, it was an error by the trial judge not to provide such a caution in the circumstances of this case:" *R v Edwards*, 2022 ONCA 78, at paras 17-22

FINGERPRINT EVIDENCE

Where there is fingerprint evidence linking the accused with an object connected to the crime or the crime scene, there must also be other evidence capable of establishing that the accused touched the object at the relevant time and place so as to connect the accused to the crime. A temporal connection may suffice: *R v Youssef,* 2018 ONCA 16 at paras 10, 17

HANDWRITING EVIDENCE

At common law, proof of handwriting could be made by testimonial or circumstantial evidence. For example, a witness might testify that they saw the act of writing. Or they might give evidence of the circumstances leading up to or pointing back to the act of writing. In a similar way, a qualified witness may testify about the style of the handwriting which requires a comparison between known and the disputed writing

Under s. 8 of the *Canada Evidence Act*, handwriting may be proven by comparison, by expert or lay witnesses, of a disputed handwriting with one that has been proved to be genuine and which has been received in evidence for the purpose of comparison: 16. The section does not preclude a trier of fact from comparing disputed handwriting with admitted or proved handwriting in documents

which are properly in evidence and drawing available inferences: *R v. MeGill,* 2021 ONCA 253, at paras 84-87

HEARSAY EVIDENCE

A. TEST FOR ADMISSIBILITY

A critical feature of the hearsay rule is the purpose for which the evidence, which is said to be hearsay, is tendered. It is only where the evidence is offered to prove the truth of its contents that the hearsay rule applies and renders the evidence *prima facie* inadmissible:

The central underlying concern with the admission of hearsay evidence is the inability of the party opposite to cross-examine the declarant on the truth and accuracy of the reported statement, to test his or her perception, memory, narration and sincerity.

What a person says may have probative value as non-hearsay, as for example, to establish the identity of the speaker. Used in this way, no assumption of the truth of the statement is required and the hearsay rule is not implicated: *R v Tsekouras,* 2017 ONCA 290 at paras 147, 181-182

Before admissibility can be properly determined, the party tendering the evidence must clearly articulate the precise purpose for which the out-of-court statement is being tendered. Different parts of the same out-of-court statement may be offered for different evidentiary purposes requiring a different analysis and possibly leading to a different admissibility ruling: *R v Short,* 2018 ONCA 1 at para 65

Necessity and reliability under the principled approach to hearsay work in tandem; in particular if the reliability of the evidence is sufficiently established, the necessity requirement can be relaxed. However, the necessity of receiving hearsay evidence is never so great that the principled approach's requirement of threshold reliability can be sacrificed. Admitting unreliable hearsay evidence against an accused compromises trial fairness, risks wrongful convictions and undermines the integrity of the trial process. Threshold reliability must be established in every case: *R v Furey,* 2022 SCC 52

i. NECESSITY

This indicium refers to the availability of the evidence, not the availability of the hearsay declarant as a witness. The physical availability of the declarant does not necessarily put rest to any claim of necessity: *R v Kler,* 2017 ONCA 64 at para 77

Necessity may be established where a witness dies, recants, or refuses to testify: *R v McMorris,* 2020 ONCA 844, at para 22

Necessity is not established when there has been no effort to locate the witness: *R v Baldree,* 2013 SCC 35

That being said, a trial judge may rely on common sense reality that the declarants would be unlikely, if located, to assist the police, coupled with the evidence of a police officer regarding the lack of cooperation of individuals in such circumstances: *R v Omar,* 2018 ONCA 787 at paras 14-19

Necessity may be established not only by the unavailability of the declarant for testing by cross-examination, but also where we cannot expect to get evidence of the same value from the same or other sources. Whether the necessity criterion has been met requires a consideration of all of the circumstances in each individual case: *R v Tsekouras,* 2017 ONCA 290 at para 205

Necessity is not met where the statement is repetitious of statements already made/admitted into evidence, and therefore of little probative value relative to the prejudicial impact of the evidence. Where a declarant made multiple hearsay statements,, therefore, only one can be considered admissible: *R v Rhayel,* 2015 ONCA 377

On the other hand, the reception of multiple statements from a hearsay declarant may be admitted where it is necessary to do so to obtain a full account from that declarant: *R v Mohamad,* 2018 ONCA 966, at para 97

In some cases, weaknesses in necessity may be compensated by strengths in threshold reliability: see, for example, *R v Omar,* 2018 ONCA 787 at para 16

The necessity criterion is not measured by the overall strength of the adducing party's case, and whether the evidence is "necessary" for them to successfully advance their case: *R v Rowe,* 2021 ONCA 684

ii. THRESHOLD RELIABILITY

The credibility of the narrator is insufficient. Threshold reliability serves as a substitute for cross-examination of the declarant, not the narrator: *R v Vickers,* 2020 ONCA 275, at para 58

The factors to be considered on the inquiry into reliability cannot be categorized in terms of threshold and ultimate reliability. Trial judges are to undertake a more functional approach with their focus on the particular dangers raised by the hearsay evidence tendered for admission. But the approach of the trial judge to the reliability requirement and, more broadly, the issue of admissibility, must respect the distinction in roles between the trier of law and the trier of fact. To retain the integrity of the fact-finding process, the issue of ultimate reliability must not be pre-empted by a determination made on the admissibility *voir dire*: *R v Tsekouras,* 2017 ONCA 290, at paras 152, 153, 156

A proponent who seeks the reception of hearsay evidence under the principled exception usually tries to satisfy the reliability requirement in either of two ways. One way is to show that no real concern exists about the truth of the statement because of the circumstances in which the statement came about (substantive reliability). Another way of satisfying the reliability requirement is to demonstrate that no real concern arises from the introduction of the statement in hearsay form because, in the circumstances, the opponent can sufficiently test its truth and accuracy (procedural reliability).

Procedural reliability is established when there are adequate substitutes for testing the evidence tendered for admission given that the declarant has not provided that evidence in court, under oath, in the presence of the trier of fact and under the scrutiny of contemporaneous cross-examination. These substitutes for traditional safeguards, such as video recording the statement, the presence of an oath, and a warning about the consequences of lying must provide a satisfactory basis for the trier of fact to rationally evaluate the truthfulness and accuracy of the hearsay statement. That said, some form of cross-examination of the declarant is usually required, whether at a preliminary inquiry or at trial: *R v Mohamad,* 2018 ONCA 966, at para 100

In fact, the most important factor supporting the admissibility of a prior statement of a non-accused witness for the truth of its contents is the availability of that witness for cross-examination at trial: *Mohamad* at para 117; *R v Rowe,* 2021 ONCA 684

In *Rowe,* for example, the Court of Appeal found that procedural reliability was made out as a result of the declarant being available for cross-examination, notwithstanding that she was not under oath or cautioned when she provided her statement. The fact that the declarant was at a police station, having been arrested, and already told she was going to be released, made it clear that she appreciated the solemnity of the occasion and the need to tell the truth: *R v Rowe,* 2021 ONCA 684

Note, however, that the ability of a jury to explore, using other evidence, an issue that could be the subject of cross-examination of the declarant is not an adequate procedural safeguard that can substitute for that cross-examination: *R v Carty,* 2017 ONCA 770 at para 6

Where the declarant is not available for cross-examination, the focus of the reliability inquiry will necessarily be on the circumstances in which the statement came about. The trial judge should consider the cumulative effect of all the evidence relevant to the reliability issue with his or her focus on the particular dangers presented by the evidence: *Tsekorous* at para 152

Although procedural and substantive reliability are not mutually exclusive and "factors relevant to one can complement the other great care must be taken to ensure that a combined approach to threshold reliability does not lead to the admission of statements despite insufficient procedural safeguards and guarantees of inherent trustworthiness to overcome the hearsay dangers. The threshold reliability standard always remains high and the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents: *R v Lako,* 2025 ONCA 284, at para 50

In *Mohamed,* the Court of Appeal held that it was unclear how prior legal advice can provide a meaningful basis for evaluating the truthfulness of a statement under the procedural reliability analysis, given that the content of legal advice will generally be unknown. This, the Court held, is particularly so where voluntariness is conceded: 2023 ONCA 104, at para 42

Substantive reliability is established by showing that the statement proposed for admission is inherently trustworthy. To determine inherent trustworthiness, a court can consider the circumstances in which the statement was made, as well as any evidence that corroborates or conflicts with the statement.

The standard for substantive reliability is high. Although a trial judge need not be satisfied about reliability to an absolute certainty, the judge must be satisfied that the statement is sufficiently reliable that contemporaneous cross-examination would add little, if anything, to the process: *R v Mohamad,* 2018 ONCA 966, at paras 100-102

A proponent may rely on procedural reliability, substantive reliability, or some combination of each to satisfy the reliability prerequisite. The alternatives are not mutually exclusive. Where the elements of one have been established on a balance of probabilities, it is no answer for an opponent to contend that the evidence does not satisfy the other. Procedural reliability and substantive reliability afford two routes to the same destination – threshold reliability. They are equivalents in the quest to establish threshold reliability: *Mohamad,* at paras 99, 115

The credibility and reliability of a hearsay witness is not relevant to the threshold reliability inquiry because the threshold reliability inquiry is meant to serve as a substitute for cross-examination of the declarant, and because the hearsay witness is fully available to be cross-examined at trial. The threshold reliability inquiry focuses on the reliability of the hearsay statements themselves based on the circumstances in which the statements were made: *R v Cote,* 2018 ONCA 870 at para 30

In *SS,* the SCC found the hearsay of a 7-year-old child sexual assault complainant who was too traumatized to testify was admissible as hearsay. With respect to threshold reliability, the court agreed with the dissenting opinion by Macpherson J.A. in the Ontario Court of Appeal that “the inherent trustworthiness of the statement emerge[d] from the fact that its truth explains how th ecomplainat was able to give such detailed descriptions of these acts: *R v SS,* 2022 ONCA 305, at para 98; upheld at 2023 SCC 1

A) Considering Corroborative Evidence

A trial judge can only rely on corroborative evidence to establish substantive reliability if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

First, corroborative evidence must go to the truthfulness or accuracy of the material aspects of the hearsay statement.

Second, corroborative evidence must assist in overcoming the specific hearsay dangers raised by the tendered statement. Corroborative evidence does so if its combined effect, when considered in the circumstances of the case, shows that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. Otherwise, alternative explanations for the statement that could have been elicited or probed through cross-examination, and the hearsay dangers, persist.

In short, the test to determine whether corroborative evidence is of assistance in the substantive reliability inquiry is as follows:

A. identify the material aspects of the hearsay statement that are tendered for their truth;
B. identify the specific hearsay dangers raised by those aspects of statement in the particular circumstances of the case;
C. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
D. determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement: *R v Bradshaw,* 2017 SCC 35

Any speculative explanation, in short, must be plausible on a balance of probabilities. not just any speculative explanation or fanciful idea suffices to abort the threshold reliability analysis – only those that are, on reflection, reasonably plausible: *R v McMorris,* 2021 ONCA 844, at paras 33-34

The Bradshaw framework serves to ensure that corroborative evidence is used only in cases where it bears on the aspect sought to be proved by adducing the

statement. The requirement for a connection between the corroborative evidence and the aspect in question flows from the role that such evidence must play. Corroborative evidence must make it possible, given the circumstances of the case, to rule out plausible explanations other than the truth or accuracy of the material aspects of the statement: *R v Charles,* 2024 SCC 29

Put differently, corroborative evidence need not rule out implausible speculative possibilities to support a finding of substantive reliability. It need only rule out plausible possibilities: *R v Mohamed,* 2023 ONCA 70, at para 104

Corroborative evidence cannot be derived from the hearsay declarant themselves, as this would be circular: *R v Mohamed,* 2023 ONCA 70, at para 78

Corroborative evidence that confirms the truthfulness of some of what the declarant says is insufficient if the specific hearsay dangers identified by the statement are not overcome: *R v Mohamed,* 2023 ONCA 70, at paras 54-55, 79

In *Tsega,* the Court of Appeal reversed a manslaughter conviction on the basis that the trial judge did not apply the hearsay analysis mandated by *Bradshaw* (which was released after the conviction), and that, on the basis of the *Bradshaw* analysis, the hearsay statement would not have been admissible: 2019 ONCA 111

B) Lack of Opportunity to Cross Examine

Where the accused is deprived of a meaningful opportunity to cross-examine the complainant, this may render a statement unreliable and inadmissible, under the right circumstances: *Zaba,* see cases cited at para 13; see also para 16.

The accused's loss of opportunity to cross-examine on the declarant's demeanour on a videotaped statement may serve to defeat the introduction of an out of court video statement: *R v PMC,* 2016 ONCA 829 at paras 27-28

C) Incomplete Context

Hearsay evidence is not rendered inadmissible because the witness is equivocal in their testimony or cannot recall the micro-context of the statement. To the extent that a witness's uncertainty or imperfect recollection is related to admissibility

(rather than weight), they are properly to be considered by the trial judge when balancing probative value against prejudicial effect. Thus, the fact that a witness cannot recall the exact words used does not mean that such evidence has no relevance. The focus should remain on whether the jury can give meaning to the witness's testimony in a manner that is non-speculative: *R v Schneider,* 2022 SCC 34

Where a witness can provide testimony about what a statement communicated, or there is context for assessing the meaning of words spoken, the evidence is admissible, with the weight of the statement being a matter for the trier of fact to determine: *R v Merritt,* 2023 ONCA 3, at para 74

Where a partial or incomplete statement is offered into evidence as a party admission, but lacks sufficient context to give meaning to the words, that partial or incomplete statement is irrelevant and lacks probative value. It is therefore inadmissible. It follows that if a partially heard statement – in this case proof of an incomplete sentence – is admitted into evidence in a jury trial and the jury determines that there is insufficient context to give meaning to the words, the jury must disregard the partial or incomplete statement. No jury can properly rely on evidence that is irrelevant and lacking in probative value. Jurors must therefore be provided with a direction that if they cannot determine the meaning of the partial or incomplete statement, they cannot use it as an admission and must disregard it: *R v Merritt,* 2023 ONCA 3, at paras 63, 75, 77, 80-83

There are two mechanisms in the law of evidence for excluding incomplete statements that have been offered as admissions. First, if it is found by the trial judge that there is insufficient context to enable meaning to be given to identified words, such statements are not admissible because they fail to meet the basic rule that to be admissible evidence must be relevant. Second, incomplete statements may lack sufficient probative value to admit, and therefore require exclusion through the application of the trial judge's exclusionary discretion: *R v Merritt,* 2023 ONCA 3, at para 78

D) Standard of Review

Absent an error in principle, the trial judge's determination of threshold reliability is entitled to deference: *R v Woodman,* 2016 ONCA 63 at para 13; *R v Zaba*, 2016 ONCA 167 at para 11; *R v Tsekorous,* 2017 ONCA 290, at para 146

Absent a demonstrated error, decisions regarding whether the circumstances support threshold reliability and necessity, and the balance between probative value and prejudicial effect, are owed deference: *R v Dirie,* 2022 ONCA 767, at para 33

iii. Residual Discretion to Exclude

Even when hearsay evidence is technically admissible there is a discretion to exclude it where its potential probative value is exceeded by its potential prejudicial effect. In rare cases, the evidence of a hearsay witness can be incredible or unreliable enough to deprive the evidence of its probative value and necessitate discretionary exclusion. It is for trial judges to determine whether to exercise the exclusionary discretion. Appellate deference is owed to those decisions: *R v Cote,* 2018 ONCA 870, at paras 31, 33; *R v Fucile,* 2020 ABCA 189; see *R v Lako,* 2025 ONCA 284, at para 113

Where the proponent of the evidence is an accused, this exclusionary discretion becomes engaged only where the probative value of the statement is substantially outweighed by its prejudicial effect: *R v Srun,* 2019 ONCA 453, at para 128

Probative value relates to the degree of relevance to trial issues and the strength of inference that can be drawn from evidence. Prejudicial effect relates to the likelihood that a jury will misuse the evidence. Judges sitting with juries should consider the extent to which the cost associated with the evidence (i.e., the prejudice) can be attenuated by appropriate instructions to the jury as to the use to which the evidence can properly be put. A trial judge's determination that the probative value of evidence outweighs its prejudicial effect is discretionary and should be reviewed with deference: *R v Schneider,* 2022 SCC 34

iv. Residual Discretion to Admit

A judge has a residual discretion to admit hearsay evidence under the principled exception despite the proponent's failure to satisfy the requirements of that exception. This discretion may be exercised when the proponent of the evidence

is an accused and the admission of the evidence is necessary to prevent a miscarriage of justice. But this inclusionary discretion is not so expansive as to countenance an abandonment of the inquiry into threshold reliability: *R v Srun,* 2019 ONCA 453, at para 129; see also *R v Young,* 2021 ONCA 535, at para 65; at paras 68-80

v. Credibility and Reliability of the Narrator

In cases where the recipient of the out-of-court statement is not available for cross-examination, his or her credibility and truthfulness may play an important role in assessing the question of threshold admissibility.

There may be cases where the credibility or reliability of the narrator of the out-of-court statement is so deficient that it robs the out-of-court statement of any potential probative value. In such cases, a trial judge could conclude that the narrator's evidence was so incredible or unreliable as to necessitate the exclusion of the evidence based on the exercise of his or her residual discretion: *R v McMorris,* 2021 ONCA 844, at paras 38-40

This exception may be referred to as the *Humaid* exception.

In considering whether the *Humaid* exception should serve to exclude otherwise admissible hearsay evidence, a trial judge is entitled, in the exercise of their case management powers, to direct that the voir dire be decided on the basis of transcripts or other evidence, rather than viva voce testimony. The issue of whether cross-examination should be permitted depends on the circumstances of each case: *R v Dirie,* 2022 ONCA 767, at paras 60-64

B. Common Law Exceptions to the Hearsay Rule

i. Party Admissions

Party admissions include any acts or words of a party offered as evidence against that party. In criminal trials, a party admission will be evidence that the Crown

adduces against an accused. The common law justifies allowing party admissions into evidence on the basis that a party cannot complain of the unreliability of his or her own statements. Unlike many other exceptions, justification for allowing party admissions does not relate to necessity or reliability; accordingly, they are admissible without reference to necessity or reliability: *R v Schneider,* 2022 SCC 34

ii. Text Messages

Where an accused person has engaged in a text conversation with another person, the statements by the accused are admissible as an exception to the hearsay rule. The statements by the other party to the conversation are generally admissible only as context − to understand what the accused person was saying − but not for the truth of their contents. But if it is apparent that the accused is adopting the other person's statements, or the factual premises of them, as true, those statements can also be treated as an admission by the accused and therefore as admissible for their truth: *R v NG,* 2024 ONCA 20, at para 56

iii. Co-Conspirator's Exception

For a comprehensive review of the law on the co-conspirator's exception, see *R v Kler,* 2017 ONCA 64 at paras 63-84

The co-conspirators' exception to the hearsay rule permits statements made by a person engaged in an unlawful conspiracy to be received as admissions against all those acting in concert if the declarations were made while the conspiracy was ongoing and were made towards the accomplishment of the common object. The exception extends beyond statements to acts done by co-conspirators during the currency of the conspiracy in furtherance of its objects

The statement (or objects) must be made by a "person engaged in an unlawful conspiracy". A person is "engaged in an unlawful conspiracy" if his or her own acts or statements establish his or her probable membership in it. The statement must also be made by the conspirator "while the conspiracy was ongoing." On some occasions, however, statements made after the offence object of the conspiracy has been committed may be admissible under this exception. Finally, the statement of the co-conspirator must be made "in furtherance of" the offence that is the object of the conspiracy.

In order to be admissible, the trier of fact must first find: 1) beyond a reasonable doubt, that there was a conspiracy; 2) there is other evidence directly receivable against the accused (i.e., his words and/or actions) showing, on a balance of probabilities, that the accused was a member of the conspiracy; and 3) there is some evidence capable of sustaining a finding that a statement of a co-conspirator was "in furtherance" of the conspiracy.

Once this threshold is met, the jury may then consider the hearsay statements in making the ultimate determination of whether: 1) the statement is in fact "in furtherance" of the conspiracy; and 2) the accused was in fact a member of the conspiracy.

The co-conspirator's exception to the hearsay rule is subject to the principled approach to hearsay, and can be challenged on the basis of necessity and reliability. If necessary, the traditional exception may be modified to bring it in line with the principled approach. The onus falls upon the party seeking exclusion to establish that the evidence, admissible under the co-conspirators' exception, does not meet the requirements of necessity and reliability and, thus, should be excluded. It will be an exceptional case where the exception does not meet the principled approach.

Evidence of things done and said by alleged co-conspirators may be admitted as circumstantial evidence of the existence of an agreement. Admissibility on this basis for this purpose depends on the inferences available from the evidence as a whole. Evidence of things done and said admitted for this purpose need not be done or said in furtherance of the common design: *R v Tsekouras,* 2017 ONCA 290 at para 183; see *R v Dawkins,* 2021 ONCA 113, at paras 35-42

At stage one of the analysis of admissibility of evidence under the co-conspirator's exception, the question is the existence of the agreement, and not the identification of the parties to the agreement. Step one is not concerned with whether the evidence shows someone to be a party to the agreement, but only with whether the evidence supports the inference that the agreement existed.

Evidence of acts done and statements made by alleged parties to an agreement can amount to circumstantial evidence of the existence of the agreement if, as a matter of common sense and logic, they make the existence of the agreement more likely. Used in this way, the evidence is not hearsay, and its admissibility is

not dependent on whether the act or statement is in furtherance of the agreement, or was done or made during the existence of the agreement.

For example, the statement of a person that he was a party to a previous or ongoing agreement can, as a matter of common sense, make the existence of that prior agreement more likely. The statement would be admissible at stage one of the *Carter* inquiry. Put differently, a statement to the police admitting involvement in an agreement will qualify as evidence of the existence of the agreement at step one of the *Carter* analysis: *R v Cargioli,* 2023 ONCA 612, at paras 73-79

In charging the jury on this issue, the trial judge should instruct them to consider whether on all the evidence they are satisfied beyond a reasonable doubt that the conspiracy charged in the indictment existed. If so, they must then review the evidence and decide whether, on the basis of the evidence directly receivable against the accused, a probability is raised that he was a member of the conspiracy. If this conclusion is reached, they then become entitled to apply hearsay exception and consider evidence of the acts and declarations performed and made by the co-conspirators in furtherance of the objects of the conspiracy as evidence against the accused on the issue of his guilt. This evidence, taken with the other evidence, may be sufficient to satisfy the jury beyond a reasonable doubt that the accused was a member of the conspiracy and that he is accordingly guilty.

The pleas of guilty or convictions of other alleged co-conspirators are not admissible to prove the existence or fact of the conspiracy in the trial of another or other alleged co-conspirators: *R v Tsekouras,* 2017 ONCA 290 at para 177

The trial judge may admit, under the co-conspirator's exception, hearsay statements made after the offence underlying the conspiracy is complete in order to determine whether the appellant was a member of the conspiracy: *R v Buttazzoni,* 2019 ONCA 645, at paras 38-41

While the *Carter* rule is often referred to as the co-conspirator's exception to the hearsay rule, it serves a broader purpose of preventing the Crown from relying on the acts and declarations of others against the accused unless and until there is an initial showing of proof of the accused's own connection to the alleged conspiracy.

It is important to recall in this regard that, by virtue of co-conspirators joint enterprise, the principle of implied agency is triggered. By reason of their

partnership in crime, co-conspirators become one another's agents, vicariously owning each other's acts and declarations made and spoken in pursuit of the unlawful object during the currency of the conspiracy: *R v Dawkins,* 2021 ONCA 113, at paras 49-55

The co-conspirators instruction to a jury should be avoided unless the evidence clearly requires it to be given, as it is universally acknowledged to be a complicated instruction and a difficult instruction to absorb and apply: *R v Panzo,* 2022 ONCA 359, at para 35

iv. Public or Judicial Documents Exception

A photocopy of court documents such as a recognizance of bail is admissible under the public or judicial documents exception to the hearsay rule: *R v Salvati,* 2024 ONCA 380, at paras 25-29

v. Past Recollection Recorded

Where a witness professes a genuine absence of memory at the time of testifying, but can recall giving an earlier truthful statement, the earlier statement may be admitted as an exception to the hearsay rule under the "past recollection recorded" category. The necessary criteria are that:

1. The past recollection must have been recorded in some reliable way.
2. At the time, it must have been sufficiently fresh and vivid to be probably accurate.
3. The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he "knew it to be true at the time".
4. The original record itself must be used, if it is procurable: *R v Slatter,* 2018 ONCA 962, at para 52; *R v Fliss,* 2002 SCC 16, at para 16

vi. Res Gestae Exception

A spontaneous (or excited) utterance is one of the categories of *res gestae* recognized to be a traditional exception to the hearsay rule. A spontaneous utterance resulting from a startling event is admissible if the circumstances in which it was made exclude the possibility of concoction or distortion and there are no special features of the case that give rise to a real possibility of error. The circumstances of the making of the statement provide the circumstantial guarantee of trustworthiness to alleviate any hearsay dangers. A functional analysis of the surrounding circumstances of the statement should be undertaken: *R v Badger,* 2021 SKCA 118, at para 28; aff'd at 2022 SCC 20

To be admissible, a "res gestae" statement need not necessarily be made contemporaneously with the event in question. Reliability derives not from contemporaneity, per se, but from the fact that the declarant is so overwhelmed with, or shocked by, the pressure or involvement of the event that the declarant would have no real opportunity for the reflection required to concoct a story. To be clear, since the sense of pressure or involvement in the event will reduce over time, temporal considerations are not immaterial, but the focus must be on whether the effects of the pressure or involvement from the event are operating at the time the statement is made: *R v Hartling,* 2020 ONCA 243, at paras 59-60

Trial judges should ask themselves whether the event was so unusual or startling that it would dominate the thoughts and expressions of the person making the utterance. While exact contemporaneity of the startling event or condition is not required, it must be reasonably contemporaneous and the nature of the event must be such that it would still be dominating the mind of the declarant when the statement is made. Some of the cases also require that there be an absence of special features that could likely result in an error by the declarant: *R v Badger,* 2021 SKCA 118, at para 31; aff'd at 2022 SCC 20

The admissibility of the declaration as a spontaneous utterance is assessed not simply by mechanical reference to time but rather in the context of all of the circumstances surrounding the utterance at the time, including those which tell against the possibility of concoction or distortion: *R v RA,* 2024 ONCA 696, at para 34

While it is not necessary that a spontaneous utterance be made exactly contemporaneous to the triggering event, a trial judge should nonetheless assess any intervening events to determine whether they undermine the statement's trustworthiness: : *R v RA,* 2024 ONCA 696, at para 44

Where the only evidence that a statement was made in a state of emotion generated by a triggering event comes from the very person whose credibility is being challenged, a trial judge has to turn their mind as to whether there is a risk of bootstrapping. The "bootstrapping" label is usually reserved to circular arguments in which a questionable piece of evidence "picks itself up by its own bootstraps" to fit within an exception. For example, a party claims it can rely on a hearsay statement because the statement was made under such pressure or involvement that the prospect of concoction can fairly be disregarded, but then relies on the contents of the hearsay statement to prove the existence of that pressure or involvement.

When the only source of evidence of a startling event leading to a spontaneous utterance is the evidence of the declarant, the assessment of whether the circumstances of the utterance do not give rise to a risk of concoction and fabrication is extremely important: *R v RA,* 2024 ONCA 696, at paras 40-43

In *Badger,* the Supreme Court of Canada affirmed a decision by the Saskatchewan Court of Appeal refusing to recognize that eye witness identification evidence shoud be recognized as a special feature to be considered at the threshold reliability stage such as to narrow the availability of the res gesta exception to the hearsay rule. Rather, the SKCA held that the trial judge should simply consider he surrounding circumstances in which the identification was made in the evaluation of threshold reliability. The Court went on to reason that, it is at the point of weighing the evidence that the inherent and situation-specific frailties of the eyewitness identification evidence should be more fully considered.

The Court also refused to recognize whether intoxication can be categorized as a special feature, or whether it is considered as part of the circumstances being evaluated, holding that, in either case, the intoxication of the declarant is an appropriate basis for seeking to exclude an unreliable statement: *R v Badger,* 2021 SKCA 118, at paras 34-37; aff'd at 2022 SCC 20

Factual findings regarding the circumstances surrounding a spontaneous utterance are subject to review on a standard of palpable and overriding error. The admissibility of hearsay evidence is a question of law; however, when evaluating hearsay evidence, a trial judge's determination of threshold reliability is entitled to deference. Hearsay decisions, if informed by the correct principles of law and reasonably supported by the evidence, are entitled to deference on appeal: *R v Badger,* 2021 SKCA 118, at para 32; aff'd at 2022 SCC 20

vii. Statements Against Penal Interest

The criteria for the declaration against penal interest exception to the hearsay rule are as follows:

a. the declaration must be made to such a person and in such circumstances that the declarant should have apprehended a vulnerability to penal consequences as a result;
b. the vulnerability to penal consequences must not be remote;
c. the declaration must be considered in its totality, so that if, upon the whole tenor, the weight of it is in favour of the declarant, the declaration is not against his or her interest;
d. in a doubtful case, a court might consider whether there are other circumstances connecting the declarant with the crime, and whether there is any connection between the declarant and the accused; and
e. the declarant must be unavailable because of death, insanity, grave illness that prevents the declarant from giving testimony even from a bed, or absence in a jurisdiction to which none of the court's processes extends

R vYoung, 2021 ONCA 535, at para 24; see also para 46

viii. Statements Made Upon Being Found in Possession

Hearsay evidence may be admissible by the common law rules that permit reception of spontaneous statements or statements accompanying and explaining a relevant act, as well as a statement made by an accused upon first being found "in possession" of an object: *R v Camara,* 2021 ONCA 79, at para 89

ix. Intersection of Common Law and Principled Exception

In a rare case, a hearsay statement that is admissible under a common law exception will nonetheless be inadmissible under the principled exception to hearsay. *R v Nurse,* 2019 ONCA 260; *R v Wise,* 2022 ONCA 586, at paras 44.

The party opposing admission of hearsay that meets the traditional exception must demonstrate that there are particular reliability concerns that warrant a "rare exception" inquiry. The reliability analyses focuses on whether there are unique reliability concerns that extend beyond the reliability concerns inherently captured in the hearsay exception: *R v MacKinnon,* 2022 ONCA 811, at para 104; see also para 105

x. State of Mind of Deceased

Evidence of the deceased's fear of the accused can be admitted as one piece of circumstantial evidence relevant to motive. Such information may afford evidence of the accused's animus or intention to act against the victim: *R v Dirie,* 2022 ONCA 767, at paras 39-40

C. DOUBLE HEARSAY

Hearsay that is itself embedded in an otherwise admissible *K.G.B.* statement will not be admissible unless that embedded "double hearsay" qualifies for admission pursuant to its own hearsay exception. A jury who receives such evidence must be instructed to disregard it: *R v Hoffman,* 2021 ONCA 781, at paras 58, 67

D. GUILTY PLEAS

It is rare for a guilty plea to be admitted in evidence at the trial of a co-accused. The Crown is generally not entitled to lead an accomplice's guilty plea: *R. v. Caesar*, 2016 ONCA 599, at para. 54.
A guilty plea by a co-accused, not called at trial, cannot be used to support the Crown's case: *R v CG,* 2016 ONCA 316, at paras 7-8. The plea of guilty of one person accused of a crime is not evidence, much less proof, that another, accused of the same crime, committed it: *R v Tsekouras,* 2017 ONCA 290 at para 176

It is hearsay and presumptively inadmissible. The same logic applies to an agreed statement of facts supporting a guilty plea: *R v McMorris,* 2020 ONCA 844, at paras 99-101

A co-actor's guilty plea is proof of nothing other than that the pleader was arraigned, pled guilty to the offence, and that there was some evidence to support that plea. It is an actual admission of guilt against the pleader only. To be clear, it establishes nothing in relation to alleged co-actors. It does not even prove the facts underlying the plea: *R v Dawkins,* 2021 ONCA 113, at paras 13, 15

The pleas of guilty or convictions of other alleged co-conspirators are not admissible to prove the existence or fact of the conspiracy in the trial of another or other alleged co-conspirators: *Tsekouras* at para 177; *Dawkins* at para 14

Where a plea of guilty by a third party is admissible in a criminal trial, it may be proven in a variety of ways. For example, the person who pleaded guilty may testify to that effect. Documentary evidence of the plea may be received under the principles relating to the admission of public documents or court records or the provisions of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. See, *R. v. Caesar*, 2016 ONCA 599 at para. 33; *Tsekouras* at para 178

Transcripts of court proceedings, including transcripts of guilty pleas, may be admissible to prove what was actually said or what actually happened in an earlier proceeding, but they are not rendered admissible as evidence of the truth of their contents, unless they can meet the test for admissibility of hearsay test simply because of their nature, common law principles or statutory provisions: *Caesar*, at para. 47; *Tsekouras* at para 179

E. INVESTIGATIVE HEARSAY

In the absence of an allegation of an inadequate investigation, the Crown is not permitted to adduce police opinion evidence (or investigative hearsay evidence). If such evidence is adduced, there must be a cautionary instruction that this type of evidence cannot be used to infer guilt: *R v Daou,* 2021 ONCA 380, at para 78, summarizing the conclusion of the SCC in *R v Van,* 2009 SCC 22

A denial of liability and the contention that a purported confession is not truthful cannot be equated with an attack on the integrity of the investigation: *R v Daou,* 2021 ONCA 380, at para 86

Even when investigative hearsay is admissible to respond to an attack on the adequacy of an investigation, the jury must be given a caution on the limited use

to make of the evidence: *R v Daou,* 2021 ONCA 380, at para 90, referencing *R v Van,* 2009 SCC 22

F. IMPLIED ASSERTIONS

Hearsay typically consists of spoken words, but it can also consist of conduct. Hearsay evidence includes communications expressed by conduct: *R v Borel,* 2021 ONCA 16, at para 42

G. STATUTORY EXCEPTIONS TO THE RULE

i. PRELIMINARY INQUIRY EVIDENCE AND S. 715(1) OF THE CRIMINAL CODE

Section 715(1) provides that a deceased witness' preliminary inquiry evidence is admissible if it was taken in the presence of the accused, unless the accused proves that he did not have full opportunity to cross-examine the witness.

A denial or restriction can only have taken place if the accused intended or desired to pursue certain questions and was frustrated in that intention or desire. It is the opportunity to cross-examine and not the fact of cross-examination which is crucial if the accused is to be treated fairly

A full opportunity to cross-examine under s. 715 does not generally include a right to cross-examine regarding events which have occurred since the preliminary inquiry. Nor does an accused's ignorance of potentially useful information, or discovery of such information after a witness has testified, deprive the accused of a full opportunity to cross-examine within the meaning of s. 715(1)

Inability to effect a complete cross-examination of a witness at preliminary inquiry due to the witness' failure of memory does not bar reception of the testimony as a prior inconsistent statement for substantive purposes. Similarly, the refusal of a witness at preliminary inquiry to answer certain questions in cross-examination does not negate the opportunity to cross-examine:

Defence is not deprived of a full opportunity to cross-examine a witness at a preliminary inquiry merely because defence counsel, for tactical reasons, has conducted the cross-examination of a witness differently than he would have at trial.

There is a discretion to disallow use of the prior testimony even if the s. 715 conditions for admissibility are met. The discretion to exclude under s. 715(1) encompasses situation where the testimony was obtained in a manner which was unfair to the accused or where its admission at trial would not be fair to the accused. However, in both situations the discretion should only be exercised after weighing the fair treatment of the accused and society's interest in the admission of probative evidence in order to get at the truth of the matter in issue: *R v Blanchard,* 2016 ABQB 652 at paras 35-43

In determining applications under s.715(1), a two-step process applies. At the first stage, the disputed issue is typically whether there was full opportunity to cross-examine the witness. This takes into account cases where, for example, a witness refuses to answer questions in cross-examination, a witness dies or disappears in the midst of cross-examination, or where the presiding judge curtails cross-examination by imposing improper limitations or restrictions. It does not factor in cases where the failure to cross-examine stems from an accused person's ignorance of potentially useful information, no matter the cause or reason.

The second stage involves a residual discretion on the trail judge to exclude the evidence, notwithstanding an opportunity to cross-examine at the preliminary inquiry. This discretion may typically be exercised where (1) unfairness arises from the manner in which evidence is obtained; and (2) admission of the prior testimony impacts on the fairness of the trial. This latter category may arise where defence counsel does not pursue certain lines of questioning in cross-examination for tactical reasons, although the jurisprudence typically does not endorse exclusion of the evidence on this basis: *R v Kuzmich,* 2020 ONCA 359, at paras 81-89

Failures to cross-examine because of defence's ignorance of potentially useful information is analyzed under the trial fairness requirement and the exclusionary discretion. A failure to disclose evidence, which prevented significant defence cross-examination, may warrant exclusion of the evidence – for example, information that could have been used to impeach the credibility of the witness: *R v Blanchard,* 2016 ABQB 652 at paras 35-43

715 (1) are the crucial nature of the evidence itself and the crucial nature of the credibility of the witness whose evidence is tendered for admission. The circumstances in which the evidence may be excluded are comparatively rare: *R v Saleh*, 2013 ONCA 742; *R v Jones-Solomon*, 2015 ONCA 654; see also *R v Headley,* 2018 ONCA 915, at para 11

Even when defence counsel tactically does not cross-examine a witness on inconsistencies at the preliminary inquiry, and the evidence is admitted at trial under s.715, any such inconsistencies are nonetheless relevant to the weight ot be given to such evidence: *R v Kuzmich,* 2020 ONCA 359, at para 93

ii. Child video statement's under s.715.1 of the Criminal Code

Statements admitted under s. 715.1 are not treated as prior statements made by a witness. Instead, "the statement becomes part of the child's in-court testimony as if the child were giving the statements on the videotape in open court": *R v RK,* 2023 ONCA 865, at para 41

For this statement to become evidence at trial, the party tendering it as evidence must establish that the complainant adopted the contents of the videotape while giving evidence at trial.

The test for adoption does not require that the witness have a present recollection of the events discussed. The witness need not meet the standard for adoption of a prior inconsistent statement by an adult witness. Under s. 715.1, the statement is adopted if the complainant or witness recalls making the statement and trying to be truthful at the time the statement was made: *R v KS*, 2017 ONCA 307 at paras 12-13

Contradictions emerging in cross-examination of parts of a video admitted under s. 715.1, do not render the contradicted parts inadmissible. A contradicted videotape may be accorded less weight in the final determination of the issues. It is open to the trier of fact to conclude that the inconsistencies are insignificant and find the video more reliable than the trial testimony: *R v Radcliffe,* 2017 ONCA 176 *at para 40*

While s. 715.1(1) demands that the passage of time between the alleged offence and the video recording be calculated, the result of that calculation alone will not

determine what constitutes a "reasonable time" for purposes of s. 715.1(1). Parliament left it to the courts to determine reasonableness in the specific circumstances of each case: *R v PS,* 2019 ONCA 637, at paras 19-20

iii. Testimony of Disabled Witnesses under Section 715.2

Section 715.2 of the *Criminal Code* makes admissible the videotaped statement of a witness with a mental or physical disability if, in part, "the victim or witness, while testifying, adopts the contents of the video recording."

The witness "adopts" a prior statement if he recalls giving the statement and testifies that he was, at the time of giving the statement, attempting to be truthful. There is no requirement that the witness have an independent, present recollection of the subject matter of the statement: *R v Osborne*, 2017 ONCA 129.

H. TRANSCRIPTS OF OTHER PROCEEDINGS

Transcripts of judicial proceedings may be admissible to prove what was actually said or what actually happened in an earlier proceeding, but they are not rendered admissible as evidence of the truth of their contents. The hearsay rule intercedes and must be overcome to prove the truth of their content: *R v Tsekouras*, 2017 ONCA 290, at para. 179, leave to appeal refused, [2017] S.C.C.A. No. 225; *R v Nolan*, 2019 ONCA 969, at para 22

When transcripts are admissible for their truth, the trier of fact may consider that nuances and emotion are lost when considering transcripts. With transcripts, the trier of fact is unable to assess the witness's demeanour when testifying and is therefore left without the potentially important insights that the ability to observe the witness when testifying can afford to a fact finder in the assessment of that witness's credibility: *R v Walsh,* 2021 ONCA 43, at para 101

IDENTITY

A. GENERAL PRINCIPLES

Proving the identity of an accused person at a preliminary inquiry does not necessarily require an in-doc identification. Where the complainant identifies the name of her assaillant, and that name is the same as the name of the person charged, this constitutes some evidence of identitty: *R v Webster*, **2016 ONCA 189** at para 6

It is all the more so when the complainant also identifies an address and other biographical details that are similar to those provided in the charging documents against the accused: *Webster* at para 6

The failure of the preliminary inquiry justice to consider the identity of names as some evidence of identity amounts to a failure to consider the whole of the evidence as required by **s. 548(1)** of the Criminal Code. Such a failure constituted a jurisdictional error: *Webster* at para 7

B. LEANY EVIDENCE

With respect to the threshold requirement for admissibility of identification evidence, the focus is on the level of familiarity the witness has with the person to be identified, to be assessed by considering the nature of the relationship, which includes the frequency and intensity of past interactions: *R v Farah,* 2022 ONCA 243, at para 14

C. NIKOLOVSKI

The *Nikolovski* analysis does not require that the photo or video being relied on to establish guilt must actually show the accused committing the offence: *R v Keating,* 2020 ONCA 242, at para 24

A factfinder who concludes that an accused has intentionally altered their appearance between the time of commission of the offence and the time of trial may consider this as evidence that they have altered their appearance with the intention of making it more difficult for a witness to identify the accused: see generally footnote 3 at *R v Murtaza,* 2020 ABCA 158 [commentary not opined upon by SCC at 2021 SCC 4

D. PROOF OF IDENTITY IN FAIL TO COMPLY/APPEAR CASES

The onus is on the Crown to prove (or in the case of a directed verdict, to present some evidence) that the person named in the information and before the court is the person who was the subject of the promise to appear.

It is not essential that the original arresting officer provide in-court identification of the accused where other circumstantial evidence provides evidence on the issue: *St. Pierre* at para 9

In *St. Pierre*, for example, the Court of Appeal held that the following evidence, taken together, afforded some evidence that the accused was the person identified in the promise to appear, sufficient to dismiss a motion for a directed verdict:

A. The fact that the same name and date of birth were listed on the promise to appear and the information charging the accused with failing to attend (para 10)
B. the fact that the accused turned himself in on his own volition for an outstanding warrant for failing to attend court (para 11)
C. the fact that the accused conceded confirmation of the promise to appear "effectively accepting that he was named in a promise to appear and that the promise to appear was served on him" (para 12)
D. the fact that the certificated tendered at trial demonstrate that the accused was named in the promise to appear, the promise to appear was confirmed by a justice, and that he failed to attend court as required (para 12)

E. PROOF OF IDENTITY FROM VISUAL IMAGES/RECORDINGS

A trier of fact, in particular, a judge sitting without a jury, may identify a person depicted in a photographic image as an individual who appears in the courtroom. That person may be an accused.

Caution is required when a trial judge considers visual images as evidence of identification. The clarity and quality of the image may not be good. There may be changes or differences in the appearance of the persons involved: *R v CB,* 2019 ONCA 380, at paras 101-102

F. PROOF OF IDENTITY FROM HEARSAY

Out-of-court statements of a declarant may have probative value on the issue of identity in certain circumstances because the fact that certain representations are made is probative as it narrows the identity of the declarant to the group of people who are in a position to make similar representations: *R v Smithen-Davis,* 2019 ONCA 917, at para 41

LOST EVIDENCE

A. THE TEST

The leading case on the failure to preserve evidence is R. v. La, [1997] 2 S.C.R. 680, the principles of which are summarized in *R v Bero* (2000), 151 CCC (3d) 545, 39 CR (5th) 291 (Ont CA), at para 30

In order to establish "unacceptable negligence", it is not necessary to show that the conduct in question was sufficient to shock the conscience of the average citizen.

Rather, conduct that shocks the conscience of the average citizen is relevant to determining whether a failure to meet the disclosure obligation constitutes an abuse of process.

Note, however, that it is not necessary that an accused establish abuse of process for the Crown to have failed to meet its s. 7 obligation to disclose": *R v Laing,* 2016 ONCA 184 at para 36

The police are not held to a standard of perfection in their duty to preserve evidence. Evidence - even relevant evidence - will occasionally be lost by the police whose conduct was nonetheless reasonable. But the degree of care expected of the police increases with along with the relevance of the evidence: *R v Laing,* 2016 ONCA 184 at para 37

MISAPPREHENSION OF EVIDENCE

See Chapter on Appeals: Grounds of Appeal: Misapprehension of Evidence

MOTIVE

Evidence of motive is material because it helps to establish two critical components of the case for the Crown: the identity and state of mind of the person who is alleged to have committed the offence.

Evidence of motive is a species of circumstantial evidence used to prove, or to assist in proving, a human act. By nature, evidence of motive is prospectant: because a person had a motive to do an act X, that person probably did the act X alleged. Said another way, a subsequent course of conduct is inferred from the existence of prior state of mind: *R. v. Salah*, 2015 ONCA 23 at para 64; *R v McDonald,* 2017 ONCA 568 at paras 71-72; *R v Burnett,* 2018 ONCA 790, at para 98

Evidence of motive is relevant and admissible even though motive is *not* an essential element of an offence charged and thus legally irrelevant to criminal responsibility. Evidence of motive may assist in proof not only of elements of

the *actus reus* of an offence, but also of the state of mind or fault element that accompanied it: *Burnett* at para 99

Motive evidence does not fit neatly within the normal similar fact evidence test because its probative value does not arise from any similarity: *R v Phan,* 2020 ONCA 298, at para 113

It is open to the Crown to adduce evidence that shows or tends to show the intensity and permanence of a motive since this may enhance the probability that the person with the motive acted in accordance with it: *R v Phan,* 2020 ONCA 298, at para 98

Motive may be evidenced by a person's words, conduct or some combination of each. On occasion, the conduct said to establish motive may involve the commission of offences other than those charged or other extrinsic misconduct. The evidence of extrinsic misconduct must be relevant to prove the alleged motive and properly admissible under the rules of evidence: *R v McDonald,* 2017 ONCA 568 at para 73

There is a distinction between absence of evidence of proof of motive, on the one hand, and evidence of a proven absence of motive, on the other. Absence of proven motive does not constitute evidence of proven absence of motive: *R v Hassanzada,* 2016 ONCA 284 at para 109; *R v Bartholomew,* 2019 ONCA 377, at paras 22-23; *R v MS,* 2019 ONCA 869, at para 13; *R v Dindyal*, 2021 ONCA 234, at para 23; *R v SSS,* 2021 ONCA 552, at paras 29-31

An absence of evidence of a motive to fabricate (that is, no evidence either way) may be considered in assessing the credibility of a witness, but it is only one element. On the other hand, a proven absence of a motive to fabricate (that is evidence that establishes that no motive existed may be a compelling reason to conclude that the witness is telling the truth: *R v Ignacio,* 2021 ONCA 69, at paras 37-60. It is an error to use absence of evidence of motive to fabriate to conclude that the complainant must be telling the truth: *R v Dindyal*, 2021 ONCA 234, at para 24

Reasoning from the apparent absence of a motive to fabricate undermines the presumption of innocence by reversing the burden of proof and fails to recognize that motives to mislead can be hidden: *R v BTD,* 2022 ONCA 732, at para 82

There is no connection between the absence of motive to fabricate and the reliability of a witness' memory. A trier of fact cannot equate an absence of motive with enhanced reliability: *R v Clyd,* 2024 ONCA 113, at paras 14-15

In *BTD,* the Court of Appeal held that the trial judge erred by relying on her observation that the complainant did not demonstrate animosity towards the accused during her testimony. The Court reasoned that this equated to using the absence of evidence of motive as a makeweight in the assessment of the complainant's credibility: *R v BTD,* 2022 ONCA 732, at para 83

The importance of evidence of motive in the purported demonstration of guilt varies from one case to the next. Motive is of greater importance where the case for the Crown consists entirely or substantially of circumstantial evidence: *Burnett* at para 100

Generally, evidence that an accused has a certain level of income or is on government-assisted income is, on its own, insufficient to support an inference of a motive to commit a profit-motivated crime. Further, this evidence must not be used as a basis for a disguised form of propensity reasoning. However, financially straitened circumstances may provide an accused with a motive to commit a crime for a financial reward: *Burnett* at paras 104-106; *R v N'Kansah,* 2019 ONCA 290, at paras 17-18

An accused's motive may be influenced by group membership. To determine if this has occurred, the trier of fact must first decide whether the accused is a member of a group. If they find that to be the case, they may consider whether the accused was influenced by a group motive: *R v Phan,* 2020 ONCA 298, at para 97, 99

Evidence of the deceased's fear of the accused, without any suggestion of a third-party suspect, can be admitted as one piece of circumstantial evidence relevant to motive: *R v Dirie,* 2022 ONCA 767, at para 40

In *SS,* the Court of Appeal found the trial judge erred in finding that the child sexual assault complainant had no motive to fabricate. The evidence showed that she did not want to live with the accused (her uncle) and did not like him. This lead to a potential that she may have been motivated to fabricate the sexual abuse to have her uncle removed from the home: 2022 ONCA 305, at paras 66-69

NARRATIVE

Narrative evidence is “evidence that tells the story of a crime in a manner that makes it possible for the jury to properly carry out its fact-finding function: *R v Phan,* 2020 ONCA 298, at para 92

It may well be prudent for trial judges to exercise discretion to prevent out of court statements from being admitted as narrative where those statements happen to include factual claims a party is attempting to prove as part of its case, and where that witness’s evidence can be presented effectively without including that narrative. Admitting statements unnecessarily as narrative when they contain relevant factual detail can create a risk that jurors will misuse that evidence: *R v Millard,* 2023 ONCA 426, at para 107

NOTES (OFFICERS)

See Witnesses: Police Officers

OPINION EVIDENCE

i. General Principles

It is a fundamental principle in our trial process that the ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact. It is improper for counsel to elicit opinion evidence as to the truthfulness of a witness because it is not proper for a witness to give an opinion about the credibility of any other witness. It is also improper to elicit opinion evidence about the demeanor of an accused and whether it is indicative of guilt: *R v Borel,* 2021 ONCA 16, at paras 26, 36

The line between properly admissible descriptive evidence (e.g., of an injury) and inadmissible expert opinion evidence can sometimes be a difficult line to draw. To preserve the record, counsel should object when the line appears to be crossed: *R v JM,* 2018 ONCA 361 at paras 10-11

The trial judge has an important gatekeeping function to decide the allowable scope of opinion evidence. The trial judge should consider, amongst other things, whether the witnesses had the knowledge and experience to offer such an opinion, the potential harm that could result from the opinion evidence, and the extent to which the opinion involves after-the-fact reasoning: *R v Moreira,* 2023 ONCA 807, at paras 38-39

Non-expert opinion evidence is admissible where it is practically impossible to separate the witness's opinion from the factual observations upon which the opinion is based. Lay opinion evidence has been admitted on a wide variety of subjects, including identification of handwriting, persons and things, apparent age, the bodily plight or condition of a person, the emotional state of a person, the condition of objects, estimates of speed and distance, and intoxication.

The court should have regard to whether there are policy reasons that might justify excluding this kind of evidence; for example, where there is a risk of confusing the issues, misleading the jury, unfair surprise, or undue consumption of time: *R v Nagy,* 2023 ONCA 193, at paras 63-65

While the a lay opinion going to the ultimate issue in a case is not necessarily inadmissible, these opinions continue tareo be treated with caution: *R v Moreira,* 2023 ONCA 807, at para 44

ii. Inadmissible Lay Opinion Evidence

In the absence of an allegation of an inadequate investigation, the Crown is not permitted to adduce police opinion evidence (or investigative hearsay evidence). If such evidence is adduced, there must be a cautionary instruction that this type of evidence cannot be used to infer guilt: *R v Daou,* 2021 ONCA 380, at para 78, summarizing the conclusion of the SCC in *R v Van,* 2009 SCC 22

An officer or witness' opinion about an accused's veracity is irrelevant to a jury's deliberations. The trial judge must make this clear to the jury: *R v Short,* 2018 ONCA 1 at para 58; see also *R v Van*, 2009 SCC 22 at para. 73.

So too is an officer's opinion about the truthfulness of the accused's confession. This amounts to an opinion about the guilt of the accused, which is irrelevant and prejudicial: *R v Daou,* 2021 ONCA 380, at paras 67-89

Opinions about the appellant's demeanour and the inferences that could be drawn from that demeanour could not be used by the jury as evidence of the appellant's guilt: *R v Short,* 2018 ONCA 1, at para 58; see also *R v Borel,* 2021 ONCA 16

Evidence that certain force would likely kill a person, or the mechanics of injury causation is not admissible lay opinion evidence and should be subject to a voir dire: 2023 ONCA 807, at paras 36, 42

In *Nguyen,* the Court of Appeal held that it was erroneous to permit a police officer to state the following: "Yeah I, I formed the opinion that it was consistent with one male picking up or dropping off property to each other. And in this, based on this investigation of what we, we – the information received, it was consistent with drug-related activity." The Court ruled that this was opinion evidence that was neither necessary nor admissible as lay opinion evidence. The absence of objection by defence counsel had "little effect" on the recognition of this legal error. The Court reasoned that "given how prejudicial opinion evidence can be, trial judges are assigned a gate keeping role… it is prudent for trial judges to raise the issue to ensure that inadmissible evidence is not received: *R v Nguyen,* 2023 ONCA 531, at para 49-54

For a thorough review on the jurisprudence related to opinion evidence from police officers, see *R v Pico,* 2016 ONSC 1470, at paras 59-87

iii. Admissible Lay Opinion Evidence

Lay opinion evidence can be received if the witness is providing a compendious statement of facts in circumstances where the witness had an opportunity for personal observation and is in a position to give the Court real help. Lay opinion evidence may assist witnesses to recount events more accurately than if the testimony were limited to factual observations, and it may remove the sometimes artificial distinction between fact and opinion in this context.

The non-exhaustive list of subjects upon which witnesses can provide lay opinion evidence includes:

(i) the identification of handwriting, persons and things;
(ii) apparent age;
(iii) the bodily plight or condition of a person, including death and illness;
(iv) the emotional state of a person e.g., whether distressed, angry, aggressive, affectionate or depressed;
(v) the condition of things e.g., worn, shabby, used or new;
(vi) certain questions of value; and
(vii) estimates of speed and distance:

Lay opinion evidence about the apparent health of another person, including whether a witness believes the person *to be* dead when they approach him, falls within the "bodily plight" category and would therefore be admissible even when that opinion goes to the ultimate issue in the case: *R v Moreira,* 2023 ONCA 807, at paras 31-35

It is often difficult to distinguish between an observed fact and an opinion, as well as between opinions that can be given by lay persons and those that require an expert. However, an opinion that is based on information gained by ordinary as opposed to specialized training or experience is not an expert opinion, even if that experience may not be common. So long as the witness has the non-expert experience required to form the opinion, it will be admissible: *R v Kwok,* 2023 ONCA 458, at paras 37-38

In *Kwok,* for example, the Court of Appeal held that the trial judge was correct to permit an officer to given an opinion that rock climbing equipment was present in the basement, reasoning that "there is no basis for inferring that the recognition of rock climbing equipment requires specialized experience, education, or acumen even though the activity may be less common than other sporting activities. Prior exposure to such equipment would be enough to permit a lay witness to offer this kind of opinion": *R v Kwok,* 2023 ONCA 458, at para 40

In Freedland, the Court of Appeal held that the lay opinion of a gun store clerk owner that the appellant appeared inexperienced with firearms was admissible, given the clerk's "considerable experience with customers seeking to purchase firearms: *R v Freedland,* 2023 ONCA 386, at paras 26-27

In *Millard,* the Court of Appeal held that the lay opinion of a veterinarian about information he acquired through the ordinary experiences gained operating a veterinary business relating to the protocols and restrictions on incinerating animals was admissible: *R v Millard,* 2023 ONCA 426, at para 108

PRIOR STATEMENTS

A. PRIOR CONSISTENT STATEMENTS

For comprehensive overview of the law on prior consistent statements, click here:

i. General Rule

Evidence of a prior consistent statement may come from the declarant or from the recipient of the statement: *R v Anderson,* 2018 ONCA 1002, at para 35

Prior consistent statements are generally inadmissible because they lack probative value, are hearsay, are often self-serving, repetition does not make a statement more likely to be true, and they are not corroborative because they lack independence: *R v Rhayel,* 2015 ONCA 377; *R v Luceno*, 2015 ONCA 759; *R v Warren,* 2016 ONCA 104 at para 10; *R v Bo Zhou,* 2017 ONCA 90 at paras 34-50; *R v MP,* 2018 ONCA 608 at para 77; *R v DK,* 2020 ONCA 79, at paras 34-35

It is an error of law for the trial judge to rely on a prior consistent statement for the truth of its contents, and to bolster the complainant's credibility: *R v AK,* 2020 ONCA 58, at paras 15-20; *R v DK,* 2020 ONCA 79, at paras 46-48. It is likewise an error to rely on a prior consistent statement to bolster the complainant's reliability: *R v GJS,* 2020 ONCA 317, 45-51

Because prior consistent statements are presumptively inadmissible, the party seeking to tender prior consistent statements should seek a ruling on admissibility *prior* to tendering such evidence: *R v RM,* 2022 ONCA 850, at para 50

Exceptions to this rule allow prior consistent statements to be admitted for the following purposes:

A. as narrative;
B. to rebut an allegation of recent fabrication; and
C. to rebut an attack on a witness' credibility based on prior inconsistent statements concerning the same subject-mater:
D. to establish prior witness identification
E. to prove evidence of the emotional state of the complainant or a witness: *R v MP,* 2018 ONCA 608 at para 75, 78; *R v SC,* 2023 ONCA 832, at para 15

There is also an exception allowing a trial judge to consider consistent aspects of a prior statement in order to appraise the defence's submission that there were prior material inconsistencies: *R v PC,* 2018 SCC 20; see also *R v E.N.*, 2018 ONCA 538;

Where a witness' credibility is attacked on the basis of prior inconsistent statements, the question becomes whether a prior consistent statement can assist the trier of fact in making a more accurate assessment of the witness' credibility by taking away potentially erroneous impressions fostered by the incomplete picture of what the witness has previously said. This rule allows for a balanced perspective on the witness' prior statements and gives the jury a proper and accurate context in which to consider the defence attack upon the credibility and reliability of the witness based upon alleged prior inconsistencies: *R v GS,* 2023 ONCA 712, at para 38

However, even when a prior consistent statement is admissible under one of these exceptions or on some other proper basis, it must "almost always" be accompanied by a limiting instruction to prevent the evidence from being used for impermissible purposes: *R v SC,* 2023 ONCA 832, at para 16

Further, even where an exception to the general rule of exclusion applies, trial judges must remain on high alert when dealing with prior consistent statements. This is because, even where an exception applies, a risk of prejudice can still flow from the admission of such statements, particularly when unaccompanied by

strong jury instructions. Therefore, even after a finding of admissibility is made, it remains incumbent upon trial judges to consider limiting how the prior consistent statement is to be elicited. This includes assessing whether the full content of the statement, or just a part of it, needs to be elicited to achieve the purpose of admission. And, indeed, it includes determining whether it is sufficient to simply elicit the fact that a prior consistent statement was made, without actually placing the statement before the trier of fact: *R v GS,* 2023 ONCA 712, at para 44

ii. The Use to be Made of PCS

Prior consistent statements may assist a jury in assessing the reliability of a complainant's testimony, flowing not from the consistency of the statements but from the manner in which the prior statements were revealed (i.e., circumstantial evidence of reliability): *R v LO*, 2015 ONCA 394

Prior consistent statements may be relevant to reliability on the basis of the consistencies between the statements where the defence is alleging that the declarant is unreliable based on alleged inconsistencies (i.e., to rebut allegations of inconsistency): *R v LO*, 2015 ONCA 394; *R v. Perkins,* 2015 ONCA 521

While a trier is not entitled to use a PCS in a 911 call as corroborative of the complainant's evidence, the trier is entitled to use a complainant's demeanour on the 911 call to draw inferences about the credibility of the complainant's account, and to rely on this evidence as supporting her testimony of having experienced a violent sexual assault: *R v Brown,* 2022 ONCA 417, at para 14

Prior consistent statements may be admissible as part of the witness' narrative or to rebut an allegation of recent fabrication, including an allegation of tainting and collusion amongst multiple complainants: *R v. Luceno*, 2015 ONCA 759; *R v Anderson,* 2018 ONCA 1002, at paras 28, 30; *R v SK,* 2019 ONCA 776, at para 126

However, "'narrative' is too often used by counsel, supported by trial judges, as a vehicle for the admission of evidence that is otherwise inadmissible and prejudicial. The practice of using this route to admit prejudicial evidence must stop because this error will often lead to the requirement for a new trial, with the resulting hardships and expense that inevitably flow. Trial judges must be alert to the

potential for such misuse and be on guard to bar this door." *R v Borel,* 2021 ONCA 16, at para 48

In sexual assault cases, prior consistent statements that are admissible as part of the narrative may be used by the trier of fact to understand how the complainant's story was initially disclosed. It is impermissible for the narrative evidence to be used to confirm a complainant's in-court testimony However, the narrative evidence can be used for the "permissible purpose of showing the fact and timing of a complaint, which may then assist the trier of fact in the assessment of truthfulness or credibility. Particularly in cases involving the sexual abuse of children, the prior consistent statements of a complainant may assist the court in assessing the complainant's likely truthfulness: *R v AJD,* 2022 ONCA 867, at para 71

In *R v Langdan*, 2020 SCC 33, the SCC endorsed the reasons of Justice Bauman of the BCCA, finding that the complainant's text messages were properly admissible under the narrative as circumstantial evidence exception to the rule against prior consistent statements. Justice Bauman reasoned that "Inferences arising from the content and context of the prior consistent statement are permissible -- "[w]here logic yields inferences based on the fact statements are made and the circumstances in which they were made there is nothing improper in drawing them:" Further, in the circumstances of the case, the messages were said to have probative value "based on their conversational nature." 2019 BCCA 467, at paras 93, 97; see also para 101; see *R v CP,* 2023 ONCA 70, at para 22

Prior consistent statements may also be admissible to explain a long delay in reporting a sexual assault: *Anderson* at para 29

When evidence is admitted pursuant to section 715.1, the jury is entitled to look at in/consistencies between the video statement and the in court testimony to assess the witnesses credibility and reliability: *R v LO*, 2015 ONCA 394. It is generally appropriate for a TJ to give a limiting instruction on the use of PCS: *R v AMV,* 2015 ONCA 457 at para 16

Prior consistent statements may be admitted to rebut an allegation of recent fabrication, but their use beyond this point to bolster credibility and reliability is an error: *R v RP,* 2020 ONCA 637, at paras 38-40

iii. Witness Adopting PCS

A witness adopts a prior inconsistent statement where they testify that they made the prior statement, and that, based on their present memory, the prior statement is true. A witness may adopt none, part, or all of a prior statement by words, action, conduct, or demeanour while testifying: Where a prior statement is adopted, it is incorporated into the witness' evidence at trial such that the prior statement is to be considered part of their trial testimony and can be used as evidence to prove the truth of its contents.

The decision as to whether or not a witness has adopted all or part of a prior inconsistent statement must be made by the trier of fact. However, before this determination can be put to the trier of fact, the trial judge must be satisfied that there is an evidentiary basis upon which the trier of fact could conclude that the witness did, in fact, adopt the statement. In determining whether such an evidentiary basis exists, the trial judge must be alive to whether the witness had a present recollection of the details contained within the prior statement. Where a witness does not have a present recollection of the content of their prior statement, an evidentiary basis will not exist. This means that the mere acknowledgement by the witness that the prior statement was made or that questions were asked and answered is not sufficient to establish an evidentiary basis. Rather, what is necessary is evidence that could establish both that the witness made the prior statement, and that they had a present recollection of the contents of the statement such that they could accept it as true while testifying.

However, regardless of the circumstances, where a prior inconsistent statement is at issue, the trial judge must instruct the jury that a prior inconsistent statement is not evidence of the truth of its contents, except where they find that it has been adopted as true by the witness. If not adopted, a prior inconsistent statement can only be used to assess the credibility of the witness: *R v Abdulle,* 2020 ONCA 106, at paras 136-138

iv. Limiting Instructions

Limiting instructions play an important role in cases involving prior consistent statements given the reasoning dangers associated with these statements, and their limited use. The trier of fact may infer that consistent repetition is evidence of the truthfulness of the statement, and the trier of fact may infer that this repetition corroborates the testimony of the witness. These risks are particularly important to address in jury trials: *R v DC,* 2019 ONCA 442, at para 22; *R v AMV,* 2015 ONCA 457 at para 16

It is generally appropriate/required for a TJ to give a limiting instruction on the use of PCS: *R v AMV,* 2015 ONCA 457 at para 16; *R v Warren*, 2016 ONCA 104 at para 11. This instruction should indicate that the prior complaints are not admitted for the truth of their contents and that the jury is to consider only the fact that the complainants were made to assist them in understanding what occurred and why: *Warren* at para 11.

The limiting instruction must also instruct the jury that the prior consistent statement is not to be used to bolster the witness' credibility, or to corroborate his/her testimony: *R v SH,* 2020 ONCA 34, at para 10

A limiting instruction is particularly necessary where the complainant's prior statements could serve to shore up the complainant's trial evidence about offence that is otherwise questionable: *Warren* at para 30

Where credibility is an important issue at trial, the trial judge is obliged to impart to the jury that "the existence of a prior consistent statement cannot in and of itself enhance the credibility" of the witness: *R v DC,* 2019 ONCA 442, at para 27

Limiting instructions are necessary even when the prior consistent statements are properly elicited by the Crown in response to defence cross-examination that highlights prior inconsistent statements. The jury must still be told about the permitted and prohibited uses to make of the evidence, and the failure to advise the jury accordingly will lead to reversible error: *R v WEG,* 2021 ONCA 365, at paras 28, 35

However, limiting instructions on the use of prior consistent statements are not always necessary. The issue must be assessed in the context of the particular case and on a functional basis: *R v AMV*, 2015 ONCA 457 at para 16; *R v DC,* 2019 ONCA 442, at para 24

Inadequacies in an instruction on prior consistent statements are not necessarily fatal: *R v Hungwe,* 2018 ONCA 456 at paras 76-77; *R v MP,* 2018 ONCA 608 at para 80; *R v Anderson,* 2018 ONCA 1002, at para 32. Some factors to be considered in this regard include:

A. Did the prior consistent statement extend beyond the mere fact of its making to include incriminatory details?
B. How many prior consistent statements were introduced or repeated?
C. Who introduced the evidence?

D. Did the party introducing the evidence rely on it for a prohibited purpose?
E. Was any objection taken to the introduction of the prior consistent statements or to the failure to provide instructions limiting their use? *MP* at para 80

A limiting instruction may be confusing where "the defence was relying on the prior statement to support its theory," "where it was clear to the jury that the prior statement was not offered as proof of the underlying facts, or where the concern about self-corroboration is simply not present": *Warren* at para 12.

A limiting instruction is not required where the truth of the prior consistent statements becomes relevant - e.g., where defence counsel is arguing that the complainant came up with a quick lie to exculpate himself: *Warren.*

To succeed on appeal, the appellant must establish that a jury instruction concerning containing a limiting instruction should have been given and that its omission amounted to legal error: *R v Warren,* 2016 ONCA 104 at para 9

A submission that the failure to give a limiting instruction with respect to prior consistent statements does not constitute a reversible error, often rests on two overlapping arguments. First, it is sometimes argued that a limiting instruction, while appropriate if given, was not necessary to a proper jury charge in the circumstances of the particular case. This submission is usually premised on the minor role played by the prior consistent statements in the overall evidentiary picture presented at trial. This argument reflects the well-established principle that jury charges must be assessed from a functional perspective. Not every legal principle engaged in the course of a trial, no matter how peripheral, needs to be the subject of judicial instruction. The appellant bears the burden of demonstrating that non-direction in the particular case amounts to misdirection constituting an error in law.

The second argument sometimes advanced accepts that the non-direction constituted an error in law, but argues that the error caused no substantial wrong or miscarriage of justice. In invoking the curative proviso, the Crown will often point to many of the same factors relied on to support the argument that a limiting instruction was unnecessary. For example, the relative insignificance of the prior consistent statements in the overall evidentiary picture will often figure prominently in the Crown's no substantial wrong argument. In support of the no substantial wrong claim, the Crown will also usually refer to the overall strength of the Crown's case: *R v Freedland,* 2023 ONCA 386, at paras 39-40

In *Joynt,* for example, the Court of Appeal overturned a verdict where Crown counsel invited the jury in closing submissions to use a complainant's prior consistent statement for it's truth, and the trial judge did not providing a correcting or limiting instruction. Because the Crown's similar fact evidence application was granted, allowing the jury to use the complainant's evidence in deliberating on the verdict in relation to a second complainant, the error tainted those convictions as well. A new trial was ordered on all charges: *R v Joynt,* 2018 ONCA 856

v. The Edgar Exception

To review the principles involved in the admissibility of prior consistent statements under the Edgar exception – i.e., when first confronted with an accusation or a crime, see: *R v Liard*, 2015 ONCA 414

Not unlike in the case of a "spontaneous utterance" admitted as an exception to the hearsay rule, the probative value of an Edgar denial arises, if at all, from the reaction of the accused. Regardless of the cause of the failure of an accused to project an innocent reaction to an arrest, without it there is little indicium of reliability to draw on: *R v CB,* 2022 ONCA 572, at para 26

B. PRIOR INCONSISTENT STATEMENTS

These statements are admissible to undermine the credibility of a witness. However, they do not go in for their truth, unless the party has successfully adduced them through the principled approach to hearsay.

When a witness adopts a prior inconsistent statement, the whole statement is goes in for its truth and is to be considered in assessing the witness's credibility. Jurors may decide what inconsistencies exist, how they impact on her credibility, and what weight to give to any of those statements: *R v. Modeste*, 2015 ONCA 398

Where the witness does not adopt the prior inconsistent statement, the trial judge must provide a limiting instruction to the jury that it cannot be used for the truth of its contents. Failure to do so constitutes reversible error: *R v GH*, 2020 ONCA 1, at paras 32-37

Unlike with an ordinary witness, the prior inconsistent statement of an accused who testifies is admissible as substantive evidence as an admission even without adoption: *R v JB,* 2019 ONCA 591, at para 31

However, a prior inconsistent statement of an accused that is not an admission but is simply inconsistent with his testimony at trial cannot be used for the improper purpose of grounding inferences about the accused's guilt arising from the fact of the inconsistency: *R v Davidov,* 2023 ONCA 766, at para 6

The practice in Ontario is that, when a non-accused witness is cross-examined on a prior inconsistent statement, the statement is not filed as a numbered exhibit and does not go to the jury room. Where the witness cross-examined on the prior inconsistent statement is the accused, the statement is received for substantive purposes. The statement also retains its impeachment value as a prior inconsistent statement: *R v JB,* 2019 ONCA 591, at paras 45, 47

A party need not have a transcript to cross-examine a witness about their prior inconsistent testimony. Pursuant to s. 20 of the *Evidence Act*, R.S.O. 1990, c. E.23, "[a] witness may be cross-examined as to previous statements that have been […] reduced to writing […] without the writing being shown to the witness". If the witness agrees they made the prior inconsistent statement, the contradiction is established. The risk in not having a transcript is that if the witness denies making a prior inconsistent statement when asked, that denial cannot be contradicted and hence the contradiction cannot be proved: *R v Morillo,* 2018 ONCA 582 at para 26

C. VIDEO STATEMENTS UNDER S.715.1

See section on witnesses, in particular, child witnesses and disabled witnesses

D. MIXED STATEMENTS

The mixed statement rule provides that if the Crown chooses to tender an out-of-court statement of the accused at trial, it must tender the whole statement, including any exculpatory aspect, and both inculpatory and exculpatory elements

are admissible for the truth of their contents: *R v Bagherzadeh,* 2023 ONCA 706, at para 29; *R v Verma,* 2025 ONCA 122, at para 37

A mixed statement of an accused led by the Crown is admissible for its truth both for and against the accused when the accused does not testify: *R v Bagherzadeh,* 2023 ONCA 706, at para 24

A mixed statement introduced by the Crown is admissible for the truth of its contents for and against the accused, whether or not the accused later testifies in a manner consistent with the exculpatory aspect of that statement. However, the exculpatory aspect of a prior consistent mixed statement cannot be used for two impermissible lines of reasoning. First, the mere fact that a statement has been repeated does not mean that it is more likely to be true. Second, exculpatory aspects of the accused's prior out-of-court statement cannot be treated as if it were independent verification of the accused's in-court testimony, because it comes from the same source: *R v Bagherzadeh,* 2023 ONCA 706, at paras 7, 43, 50

The jury should also be instructed that it may consider the statements along with the rest of the evidence in deciding whether it has a reasonable doubt about the accused's guilt; that it may give any of his statements as much or as little importance as it deserves in deciding the case; and that it is only part of the evidence and should be considered along with and in the same way as all of the evidence: *R v Bagherzadeh,* 2023 ONCA 706, at para 51

In some cases, the relevancy of the truth of the contents of the prior consistent statement may be functionally eclipsed by the subsequent consistent in-court testimony of the accused, and the prior consistent out-of-court statement may only retain value because of the context in which it was uttered. For example, the prior consistent statement may be relevant to the credibility of the accused as evidence of the reaction of the accused to the accusation and as proof of consistency. This may serve to prevent the jury from drawing an adverse inference from the absence of evidence about what an accused said upon arrest or to rebut the implicit impermissible suggestion or potential inference that the accused tailored his or her evidence based upon pre-trial disclosure or having heard the Crown's evidence in advance of testifying: *R v Bagherzadeh,* 2023 ONCA 706, at para 56

POST-OFFENCE CONDUCT

A. GENERAL PRINCIPLES

For overview of law, see *R v White,* 2011 SCC 13; and *R v Calnen,* 2019 SCC 6; *R v McGregor,* 2019 ONCA 307, at paras 98-108

Post-offence conduct refers to anything said or done by an accused after the commission of an offence. It comprises a vast array of words and conduct.. It is generally admissible to show that the accused acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person: *R v SB1,* 2018 ONCA 807, at para 67

Most evidence of post-offence conduct is admitted routinely as part of the narrative of events presented at trial: *R v Vant*, 2015 ONCA 481 at para 123; *R v Pannu,* 2015 ONCA 677 at para 124

Post-offence conduct invokes a restrospectant chain of reasoning. The trier of fact is invited to infer from a subsequent act, state of mind, or state of affairs that a prior act was done or that a state of mind or of affairs existed at a material time in the past: *R v Smith,* 2016 ONCA 25 at para 76; *R v Adams,* 2018 ONCA 678, at para 57; *R v SB1,* 2018 ONCA 807, at para 66

Post-offence conduct should be considered a whole. It should not be considered in a piecemeal fashion: *R v Moffit*, 2015 ONCA 412; *R v McLellan,* 2018 ONCA 510 at para 47

The bulk of evidence of post-offence conduct enters the trial record as an unremarkable part of the narrative of relevant events. Where evidence of post-offence conduct is received as pure narrative, no special or limiting instruction about its use is required: *R v Adams,* 2018 ONCA 678 at para 58

As a general rule, evidence of post-offence conduct is not subject to special admissibility rules. Nor does it require that a trial judge caution the jury about its use in proof of guilt: *Adams* at para 58

The Crown will tender evidence of post-offence conduct as an essential component of its case. When this is so, it is for the Crown to satisfy the trial judge, as with any item of evidence, that the evidence is relevant and admissible. To meet

the modest threshold for *relevance*, the Crown must establish that the evidence of post-offence conduct, as a matter of logic, common sense and human experience, has a tendency to help the jury resolve a live factual issue in the trial. To meet the *admissibility* requirement the Crown must show that no exclusionary rule bars reception of the evidence: *White*, at paras. 36, 140, 169; *Adams* at para 60

Where evidence of post-offence conduct is put forward as an integral element in the Crown's attempt to establish guilt, it is ultimately for the jury to decide, on the basis of the evidence as a whole, whether the evidence of post-offence conduct relates to the offence charged rather than to something else and, if so, how much weight, if any, the evidence should be accorded in the final determination of guilt or innocence: *Adams* at para 62

A general instruction that jurors might consider an accused's "words and actions before, at the time, and after" the conduct that constitutes the *actus reus* of an offence in determining the accused's state of mind is simply a general guideline that encourages jurors to consider an accused's actions in their totality. As such, it is not an instruction to infer an accused's state of mind merely from conduct after the incident: *Adams* at 68

As a matter of law, post-offence conduct cannot be used as evidence of guilt if there is an alternative explanation that is not rejected. Where there is an alternative explanation available, it is for the trier of fact to choose whether the inculpatory inference should nonetheless be drawn. In order to do so fairly in a judge alone trial, a trial judge must properly consider the evidence relating to that alternative inference: *R v Rudder,* 2023 ONCA 864, at para 52

To meet the general concern that such evidence may be highly ambiguous and susceptible to jury error, the jury must be told to take into account alternative explanations for the accused's behaviour. In this way, jurors are instructed to avoid a mistaken leap from such evidence to a conclusion of guilt when the conduct may be motivated by and attributable to panic, embarrassment, fear of a false accusation, or some other innocent explanation: *R v Calnen,* 2019 SCC 6, at para 117

i. When is it Probative?

The probative value/prejudicial effect test is of particular importance when considering post-offence conduct evidence because of the recognized concern

regarding its potential misuse by jurors. The failure to consider the probative value/prejudicial effect analysis in determining the admissibility of post-offence conduct is an error of law: *R v McKenna,* 2018 ONCA 1054, at paras 23, 24

Post-offence conduct evidence is circumstantial evidence which may be probative of guilt. There is no special rule governing when evidence of post-offence conduct will be probative of guilt. Its probative value depends on:

A. the totality of the evidence
B. the positions of the parties
C. the fact the proponent seeks to have inferred from that conduct
D. the issues at trial
E. the nature of the post-offence conduct,

The overriding question is this: what do "logic and human experience" suggest that a jury can legitimately or rationally infer from the accused's post-offence conduct? Post-offence conduct is admissible where, as a matter of logic, common sense, and human experience, it has a tendency to help the trier of fact resolve a live factual issue and there is no exclusionary rule barring its reception. It is then for the trier of fact to determine whether the evidence relates to the offence charged and, if so, how much weight should be attached to the evidence: *R v Moffit,* 2015 ONCA 412 at para 41; *R v Vant*, 2015 ONCA 481 at paras 121-125; *R v Pannu*, 2015 ONCA 677 at para 125; *R v SB1,* 2018 ONCA 807 at para 68

Like all circumstantial evidence, evidence of post-offence conduct is all about inferences grounded on logic, common sense, and human experience. Accordingly, a single piece of circumstantial evidence may sponsor a range of inferences but that does not nullify it as a means of proof or render it irrelevant. In most instances, it is for the trier of fact to choose the inference it will draw from the array of possibilities: *R v Calnen*, 2019 SCC 6 at para. 112 *per* Martin J. (dissenting, but not on this point); *R v Adan,* 2019 ONCA 709, at para 67

Post-offence conduct is not subject to “blanket rules;” its probative value depends on the nature of the evidence, the issues at trial and the positions of the parties. There is no *per se* rule declaring post-offence conduct irrelevant to the perpetrator's state of mind. the proper approach is to view the post-offence conduct as a whole. It should not be considered in a piecemeal fashion: *R v McLellan,* 2018 ONCA 510 at paras 46-47; *SB1* at pars 69-71; see also paras 74-92

Post offence conduct may be probative of an accused’s culpability but is usually not probative of the level of that culpability: *R v Gayle,* 2017 ONCA 297 at para 50.

However, in some cases, it may assist a jury in this regard: *R v Café,* 2019 ONCA 775, at para 55

That being said, there is no legal impediment in using the after-the-fact conduct to determine intent or distinguish between different levels of culpability: *R v Morin,* 2021 ONCA 307, at para 49

A judge does not err in instructing the jury that they may consider after-the-fact conduct evidence on the issue of provocation if it is arguably relevant and the jury is appropriately cautioned about its use, including being reminded to consider other explanations for the conduct and to not assume it supports a finding of murder. The extent of any necessary caution and limiting instruction will be assessed against the positions of the parties at trial and whether the defence objected to the instruction on after-the-fact conduct.

After-the-fact conduct can be relevant to the accused's state of mind, when "as a matter of common sense and human experience, the evidence [is] capable of supporting an inference that an accused had a particular state of mind": *MacKinnon*, at pp. 383-84. Evidence of behaviour immediately after the state of mind that was said to exist may shed light on whether it actually did exist at the relevant time: *R v Yaborow,* 2023 ONCA 400, at para 30; see also paras 43-47

ii. Examples

The absence of any noticeable reaction to a shooting is probative of whether the shooter had the intent to shoot. Logic and human experience suggest that people are more likely to show some outward sign, such as hesitation, before continuing on with their actions, when they do something accidentally than when they do it on purpose. This is all the more so when the accident involves a sharp physical effect on the person (the discharge of a gun in one's hand) and results in a terrible consequence, such as having killed another person: *R v McLellan,* 2018 ONCA 510, at paras 40-43; see also *R v SB1,* 2018 ONCA 807, at para 63

Evidence that a person did not render aid to someone, who they had shot, is more consistent with intending (or being reckless regarding) the death of the person than not: *R v Campbell,* 2018 ONCA 837, at para 12

The appellant's failure to appear at his first trial is circumstantial evidence from which an inference of guilt may be drawn. However, the accused's explanation for his failure to attend may bear on the probative value/prejudicial effect analysis, such that a legitimate excuse (e.g., illness) may negate the probative value of the evidence and therefore defeat its admissibility: *R v McKenna,* 2018 ONCA 1054, at para 59; rev'd on other grounds at 2019 SCC 24

Immediate flight by two accused persons from the scene of a crime together, and continued association on good terms after an offence may be probative of planning and deliberation: *R v Atienza,* 2023 ONCA 537, at para 92

iii. Limiting Instructions

A specific caution or limiting instruction aimed at specific reasoning risk may be required when there is a question about the relevance of the after-the-fact conduct evidence to a particular issue: *R v Ethier,* 2023 ONCA 600, at para 59

The *relevance* of the evidence of post-offence conduct in the concrete reality of the case in hand determines its use and the necessity for, and content of, any instructions about jury use of the evidence: *R v McGregor,* 2019 ONCA 307, at para 128

A limiting instruction is required where a trier of fact may find the evidence of greater value than its intrinsic worth. This typically arises in respect of post-offence demeanor conduct: *R v Pannu,* 2015 ONCA 677 at paras 125-127

It is useful to charge the jury that post offence conduct may appear more probative than it really is, and may be, by its very nature, less reliable than it seems, or may be consistent with other less obvious explanations than the one advanced by Crown counsel: *R v McKenna,* 2018 ONCA 1054, at para 38

The jury must be cautioned that there might be alternative explanations for the impugned conduct. This is because of the risk that juries might jump too quickly from evidence of post-offence conduct to an inference of guilt. The best way for a trial judge to address that danger is simply to make sure that the jury are aware of any other explanations for the accused's actions, and that they know they should reserve their final judgment about the meaning of the accused's conduct until all the evidence has been considered in the normal course of their deliberations. The

failure to so instruct the jury is a serious error: *R v McKenna,* 2018 ONCA 1054, at paras 30-31, 36-37, 40, 43

For example, when the post-offence conduct points equally to a third party suspect as it does to the accused, the trial judge must caution the jury to consider this point. The jury must understand what the other possible explanations for the evidence are: *R v Maestrello,* 2019 ONCA 952, at para 64-65

Another example arises where an accused flees the jurisdiction after learning that the police are looking for him. A possible explanation for this is that the accused feared being wrongly arrested for the offence: *R v Bzezi,* 2024 ONCA 530, at para 30

In *Ethier,* for example, the trial judge instructed the jury that the post-offence conduct could be used in relation to the issue of the level of cognitive impairment of the accused, but the instructions also invited the jury to use the after the fact conduct in assessing evidence of his mens rea on murder. The Court of Appeal held that the trial judge erred in failing to give a limiting instruction and caution in respect of the use of the evidence. The court highlighted that the charge failed to caution the jury about the use of after-the-fact conduct evidence and thus to counter the "jump too quickly" risk. The charge did not tell the jury that such conduct has only an indirect bearing on the issue of guilt. It did not tell them to be careful about using such evidence to infer guilt as there might be other explanations for that conduct. It did not tell them to consider alternative explanations for the conduct before drawing an inference of guilt or that they could use the evidence to support an inference only if they rejected any other explanation for the conduct: *R v Ethier,* 2023 ONCA 600, at paras 68-74

Indeed, the Court of Appeal hs repeatedly highlighted the necessity of making the distinction between using after-the-fact conduct evidence to rebut the effect of intoxication and using the evidence to otherwise distinguish between manslaughter and murder In *Ethier,* the Court held that "the appellant's flight from the scene, disposal of the knife, and travel to various locations would not as a matter of logic, common sense, and experience assist the jury in its assessment of whether this was an intentional homicide beyond assisting them to evaluate the effect of intoxication": *R v Ethier,* 2023 ONCA 600, at para 74

If post-offence conduct admitted at trial itself constitutes a criminal offence, trial judges should consider, in appropriate cases, including the equivalent of a "bad

character" instruction, advising the jury that even if they do not view the post-offence conduct as evidence tending to show the accused is guilty of the offence being tried, they must also ensure that they do not use the evidence to conclude that the accused person is the type of person who would have committed the offence: *R v McKenna,* 2018 ONCA 1054, at para 45

A no probative value instruction is not required where the accused denies involvement in the charged offence, and seeks to explain his or her conduct by an unrelated culpable act. In these circumstances, it will "almost invariably fall to the jury to decide whether the evidence of post-offence conduct can be attributed to one culpable act rather than another": *R v Al-Kazragy,* 2018 ONCA 40 at para 21
In some instances, evidence of post-offence conduct can logically support an inference of guilt with respect to one offence rather than another. In such circumstances, the judge must give a limiting instruction as to the appropriate and inappropriate inferences to be drawn from the evidence. A trial judge's failure to instruct a jury on the limited use of or inferences available from the post-offence conduct evidence may constitute reversible error: *R v DM,* 2022 ONCA 429, at paras 85, 86, 89

iv. When to Give a 'Non Probative Value' Instruction

When post-offence conduct has no probative value with respect to a particular issue, the jury should be so instructed.

The issue of a "no probative value" instruction frequently arises when the post-offence conduct evidence is equally consistent with two or more offences (e.g., murder and manslaughter). If so, the jury must not consider that evidence in determining which of the offences was committed: *R v Moffit,* 2015 ONCA 412 at paras 42-43.

For example, where the accused has admitted to the *actus reus* of the offence, after-the-fact conduct evidence will often not be relevant to distinguishing between different *mens rea*, as such evidence will be equally consistent with multiple offences: *R v Ethier,* 2023 ONCA 600, at para 60

Although there will be uncommon situations where post-offence conduct is ambiguous enough to have no probative value, a no probative value limiting instruction is not required where a jury can reasonably infer that the post-offence conduct is more consistent with the offence charged*: R v Johnson-Lee,* 2018 ONCA 1012, at para 12

For example, when an accused's after-the-fact conduct is out of proportion to an alternative explanation, the evidence may be relevant in discerning an accused's level of culpability: *R v Ethier,* 2023 ONCA 600, at para 61

v. The "Hall" Error

It is an error for the trial judge to instruct the jury to determine whether the appellant acted as he did because he was conscious of having done what was alleged against him.

This employs tautological reasoning and invites the jury to jump directly to the issue of guilt as a pre-condition to the use of the evidence of post-offence conduct in determining whether guilt has been established. In other words, the jury is required to consider whether the accused was conscious that he committed the offence before they can use the post-offence conduct evidence to decide if he committed the offence: see generally *R v Moffit,* 2015 ONCA 412 at paras 53-55; *R v Taylor,* 2015 ONCA 448 at para 141, but see paras 142-143

This kind of direction can be read as inviting the jury to reason in a circular fashion by using a finding of fabrication to draw an inference of consciousness of guilt and only then, after drawing that inference, to go on to look at the rest of the evidence. The concern, in other words, is that the inference will drive the conclusion before all of the evidence is considered: *R v Johnson-Lee,* 2018 ONCA 1012, at para 17

Note, however, that the "*Hall*" error, standing on its own, is not fatal: *R v Nur,* 2018 ONCA 008 at para 8; *R v Nur,* 2018 ONCA 8 at para 8

B. POST-OFFENCE CONDUCT AND INTENT

i. General

Whether or not a given instance of post-offence conduct has probative value with respect to the accused's level of culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial.

Where an accused's conduct may be equally explained by reference to consciousness of guilt of two or more offences, and where an accused has admitted culpability in respect of one or more of these offences, a trial judge should instruct a jury that such evidence has no probative value with respect to any particular offence. This instruction may also apply where culpability on an offence has been established not because the accused admitted it, but because the fact finder has determined it. It should not matter whether the culpability arises from an admission or a finding to that effect: *R v Calnen,* 2019 SCC 6, at paras 119-123

When hypothetically it could be one offence or another, common sense and experience may support one inference over the other. Any threshold determination of relevance must also respect that it is normally the function of the trier of fact to determine what inference is accepted and the weight to be given to it: *Calnen* at para 124

ii. Homicide

Destruction of a body can be probative of intent if it is reasonable to infer the accused destroyed the body after causing that person's death "because he knows that the victim suffered injuries that are inconsistent with a non-intentional cause of death". The inference is that the accused intended to conceal the exact cause of death and nature of the injuries: *R v Moffit,* 2015 ONCA 412at para 48

The inference is appropriate where the accused took extreme steps to conceal the injuries, such as cremating the body. The inference is less appropriate where the accused merely buries the body - which is equally consistent with a mere intention to hide the body than to conceal the extent of injuries: *R v Moffit,* 2015 ONCA 412 at para 49

See Example: R v. Hill, 2015 ONCA 616, at paras 51-62

iii. PROVOCATION

In some cases, after-the-fact conduct evidence can be properly left with the jury on the issue of provocation. However, such evidence would need to be subject to cautionary and limiting instructions to avoid potential misuse: *R v Yabarow,* 2023 ONCA 400, at para 47

PRIVILEGE

A. INFORMER PRIVILEGE

i. Definition

Informer privilege is a fixed rule of law. In order to overcome that privilege, an accused person must persuade a judge that their innocence is at stake unless the privilege is set aside: *R v Ruthowsky,* 2018 ONCA 552 at para 35

Informer privilege arises in circumstances where police receive information under a promise of confidentiality. Such a promise can be explicit, or can arise implicitly from police conduct that would have led a person in the shoes of the potential informer to believe, on reasonable grounds, that his or her identity would be protected. Informers are entitled to rely on the promises that police officers make to them because they are otherwise at serious risk of potential personal danger if their cooperation becomes known. And when it is known in the community that an individual's identity is privileged if he or she provides confidential information to the police, others may come forward: *R v Brassington,* 2018 SCC 37, at para 34

The "circle" of informer privilege constitutes the group of people who are entitled to access information covered by informer privilege and who are bound by it. Traditionally, this circle is tightly defined and has only included the confidential informer himself or herself, the police, the Crown and the court. Defence counsel are outside of the circle of privilege. In all cases where informer privilege applies, disclosure outside the circle requires a showing of "innocence at stake": *Brassington* at paras 41, 42, 46.

Informer privilege is particularly important for anonymous informers, as it is the promise of anonymity which allays the fear of criminal retaliation which otherwise discourages citizen involvement in reporting crime: *R v Hayes,* 2020 ONCA 284, at para 57

ii. Piercing Privilege

The standard for piercing informer privilege is onerous. The privilege should be infringed only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction. This *McClure* application is typically made at the close of the Crown's case so courts only consider piercing informer privilege when strictly necessary. There are no other exceptions to informer privilege.

The test involves a two-stage process. The first stage typically takes place in open court, with the accused and all counsel present. At this stage, as a threshold matter, the accused must establish that the privileged information is not available from any other source and that, in light of the Crown's case, there is no other way for him or her to raise a reasonable doubt. At this stage he or she must also establish an evidentiary basis to conclude that a communication exists that could raise a reasonable doubt as to his guilt.

If such a basis exists, the second stage of the process occurs. At this stage, the trial judge should proceed to examine the communication to determine whether, in fact, it is likely to raise a reasonable doubt. Depending on the circumstances of the case, the trial judge may review the information alone, or with the assistance of Crown counsel, or with the assistance of *amicus* where necessary, *in camera.*

The law does not permit the piercing of informer privilege solely based on the speculative possibility that relevant exculpatory information might be revealed. Nor does it permit disclosure simply because disclosure *might* be helpful to the defence. The standard remains "innocence at stake."

Accordingly, police officers facing criminal charges are not entitled to disclose confidential informer information to their lawyers: *R v Brassington,* 2018 SCC 37, at paras 36-38, 49, 52; see also *R v Hayes,* 2020 ONCA 284, at paras 57-58

iii. Crown's duty to maintain privilege

Subject to a person successfully raising the innocence at stake exception, confidential informant privilege acts as a complete bar to disclosing not only the identity of a confidential informer, but as a complete bar to disclosing any information which might tend to identify an informer", or, "any information that might lead to identification". That includes any information that "might implicitly reveal" the informer's identity

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Therefore, when it comes to protecting the identity of informants, the Crown is without discretion. The Crown must not disclose "in any proceeding, at any time", information that may tend to identify a confidential informant.

A heavy burden is placed upon the court, police and Crown to protect confidential informant privilege – an obligation that must be actively and sensitively embraced by all. It is essential that all approach the task with a keen understanding that even seemingly innocuous information may reveal an informant's identity when it is disclosed to an accused. Those who have to make calls about disclosure do not know what the accused and others already know. Accordingly, the law requires that those disclosure decisions err on the side of caution, assuming that even the disclosure of seemingly bland information can result in a narrowing of the pool. Even the slightest piece of information about the informer gleaned from the police files could serve to eliminate some members of the pool or identify the informer.

In assessing a claim that the Crown breached confidential informant privilege, the question is whether any disclosure made by the crown "could" not "might" have tended to disclose the accused' status as an informant.

A crown breach of confidential informant privilege constitutes an abuse of process that necessitates a stay of proceedings on the basis that it occasions prejudice to the integrity of the justice system that will be manifested, perpetuated, or aggravated through the conduct of the trial: R v AB, 2024 ONCA 111, 34-38, 43

iv. Appeals under s.37.1 of the CEA

Section 37.1 of the *Canada Evidence Act* gives the Crown the right to commence an incidental appeal proceeding in the course of a criminal proceeding in order to object to the disclosure of information resting on confidential informer privilege: *R v Brassington,* 2018 SCC 37, at paras 26-28.

B. PROBATION OFFICER-CLIENT PRIVILEGE

There is an argument to be made that a case-by-case privilege might well attach to communications between a convicted person and his/her probation officer: *R v Thomas,* 2018 ONCA 694, at 57

C. SOLICITOR-CLIENT PRIVILEGE

i. Definition

Solicitor-client privilege protects from disclosure and compulsion the accused's communications with counsel, subject to very narrow, limited exceptions: *R v Brassington,* 2018 SCC 37, at para 48

The proper functioning of the adversarial system depends on the assurance, given to every accused, that communications with their lawyer for the purpose of receiving legal advice are, subject to certain exceptions, privileged. Individuals facing criminal charges must be free to discuss their case openly with their lawyer, so that their lawyer can help them navigate the system and give them competent legal advice.

In *Olusoga,* the Court of Appeal found that the protections afforded by solicitor client privilege were undermined when information improperly disclosed to the trier of fact in breach of solicitor-client privilege were used by the trier of fact to support a conviction. Despite the fact that the trial judge's reliance on the improperly disclosed information was not determinative of his reasons in convicting the Appellant, the Court held that the existence of actual prejudice was unnecessary to establish that a miscarriage of justice had occurred. "Sometimes, public confidence in the administration of justice is just as shaken by the appearance as

by the fact of an unfair proceeding:" *R v Olusoga,* 2019 ONCA 565, at paras 12-16

ii. Whether it Exists

Whether a communication is protected by solicitor-client privilege depends upon the nature of the relationship between the client and counsel, the subject matter upon which the advice is sought and given, and the circumstances in which it arises. Generally speaking, where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose are privileged: *R v Dosanjh,* 2022 ONCA 689, at paras 147-148

The purpose for and context in which information is sought is highly relevant when determining whether the information at issue is protected by privilege: *R v Singh,* 2016 ONCA 108 at para 60

The presumption of privilege can be rebutted where disclosure will not violate the confidentiality of the solicitor-client relationship by revealing, directly or indirectly, any communication protected by the privilege: *Singh* at para 60

iii. Piercing Privilege

Where the police voluntarily disclose that they sought or received legal advice on an issue between the parties, and attempt to rely upon having received legal advice to justify a course of action, they will be found to have impliedly waived their privilege over that advice. However, where police disclose the obtaining of legal advice only as part of the narrative of events, and not to asset good faith, privilege is not waived: *R v R v Dosanjh,* 2022 ONCA 689, at paras 150-151

iv. Fees not Privileged

Disclosure of information related to fees paid, and possibly also the specific details of the fee arrangement, where it is unrelated to the merits of a case and will not cause prejudice to the client, does not attract the protection of solicitor-client privilege: *R v Singh,* 2016 ONCA 108 at para 61-62

The fact that a client is legally-aided does not constitute privileged information: *Singh* at para 61

An accused who claims costs against the Crown, based in part on his counsel's account, must expect that the account will be scrutinized for reasonableness: *Signh* at para 61

D. SPOUSAL COMMUNICATION PRIVILEGE

i. Spousal Communication Privilege

The spousal communication privilege in s. 4(3) of the CEA does not extend to common-law spouses: *R v Nero, 2016 ONCA 160* at para 185; *R v Nguyen, 2015 ONCA 278* at paras 16-18.

The spousal communication privilege is testimonial in nature. Properly invoked by the recipient spouse, it precludes the reception of communications during marriage as evidence in the proceedings. The information conveyed, however, is not itself privileged: *R v Nero,* 2016 ONCA 160 at paras 186*; R v Nguyen,* 2015 ONCA 278 at paras 134-136;

The privilege belongs to the spouse receiving the communication and can be waived by him or her: *R v Couture,* 2007 SCC 28, at para 41

Two historic rationales for this privilege have survived to this day, including: i) the promotion of marital harmony, and; ii) the prevention of the indignity of having one spouse testify against another:

Spousal privilege does not survive the dissolution of a marriage: *R v Al-Enzi,* 2021 ONCA 81, at paras 183, 193-207

i. Common Law Spouses

The spousal incompetency rule does not extend to common-law relationships. As a result, an accused's common-law spouse is a competent and compellable witness for the Crown at the accused's trial: *R v Nero,* 2016 ONCA 160 at para 184; *R v Nguyen*, 2015 ONCA 278 at paras 7, 158

ii. Section 189(6) of the Criminal Code

Section 189(6) of the *Criminal Code* states that:

> Any information obtained by an interception that, but for the interception, would have been privileged remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege.

Section 189(6) does not create a privilege, but rather preserves any existing privilege that attaches to information despite its interception: *R v Nero,* 2016 ONCA 160 at para 188

For the purposes of the spousal communication privilege, and despite pronouncements that the information itself is not privileged, s. 189(6) excludes as privileged any information the recipient "husband" or "wife" had a right not to disclose: *Nero* at para 189

E. NEW CATEGORIES OF PRIVILEGE

For an overview on the case-by-case model of privilege, see *R v National Post,* 2016 SCC 16, at paras 50-69

PROPENSITY OF VICTIM

The past propensity of a victim towards violence is relevant to corroborating the accused's evidence that he acted in self-defence. In *Deslauriers,* the SCC held that criminal investigative reports respecting the victim should have been disclosed to the accused through a third party record application as they were likely relevant to the issues at trial and were necessary to make full answer and defence: 2021

SCC 3; see also majority decision of the Quebec Court of Appeal at 2020 QCCA 484, at paras 54-76

QUESTION OF FACT OR LAW?

A. ERRORS OF LAW:

It is an error of law to make a finding of fact for which there is no supporting evidence. However, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule. Rather, it is a conclusion that the standard of persuasion beyond a reasonable doubt has not been met.The legal effect of findings of fact or of undisputed facts may give rise to an error of law. An assessment of the evidence based on a misapprehension or misdirection concerning a legal principle is an error of law. A a failure to consider all the evidence in relation to the ultimate issue of guilt or innocence is also an error of law: *R v Chapman,* **2016 ONCA 310** at para 14; see also para 21 (citing *R v JMH*, 2011 SCC 45, [2011] 3 SCR 197)

RECONSIDERING RULINGS OR ADMITTED EVIDENCE

A trial judge has discretion to re-consider rulings made earlier in the proceedings if there is a material change of circumstances: *R v RV,* 2019 SCC 41; *R v Lo,* 2020 ONCA 622, at para 119

The decision to allow or reject subsequent motions on the same evidence is a matter for the discretion of the trial judge. It is recognized that prosecutions are fluid and that a ruling made at one point may need to be revisited at another point if circumstances change: *R v Whiston,* 2024 ONCA 79, at para 5

A judge has discretion to allow counsel to challenge evidence already received and will do so where the interests of justice so warrant: see *R. v. Gundy*, 2008 ONCA 284 at para. 22.

It is difficult to see how a denial by an accused of an essential element of the offence would ever, in itself, be a new and unexpected issue that could give rise to a basis to revisit an earlier ruling: *R v Bush,* 2024 ONCA 245, at para 27

Further, when evidence is excluded on the basis that the prejudicial effect outweighs the probative value, there would have to be something new that suggests that this balancing has changed to make the evidence admissible: *R v Bush,* 2024 ONCA 245, at paras 28-29

REEXAMINATION

The permissible scope of re-examination is linked to its purpose and the subject-matter on which the witness was cross-examined.

The purpose of re-examination is largely rehabilitative and explanatory. The witness is afforded the opportunity, under questioning by the examiner who called the witness in the first place, to explain, clarify or qualify answers given in cross-examination that are considered damaging to the examiner's case.

The examiner has no right to introduce new subjects in re-examination, topics that should have been covered, if at all, in examination-in-chief of the witness: *R. v Candir*, 2009 ONCA 915, at para 148

The trial judge has the discretion to grant counsel leave to introduce the new subject on re-examination. The trial judge also had the discretion to decide what to do with the re-examination: *R v AJD,* 2022 ONCA 867, at para 68

RELEVANCE

Relevance is a matter of everyday experience and common sense. An item of evidence is relevant if it renders the fact that it seeks to establish slightly more or less probable than that fact would be without the evidence, through the application of everyday experience and common sense

It follows that, to be relevant, an item of evidence need not conclusively establish the proposition of fact for which it is offered, or even make that proposition of fact more probable than not. All that is required is that the item of evidence reasonably show, by the application of everyday experience and common sense, that the fact is slightly more probable with the evidence than it would be without it.

Relevance is assessed in the context of the entire case and the positions of counsel. Hence the importance that the proponent identify the issue(s) to which the evidence is relevant: *R v McDonald,* 2017 ONCA 568 at paras 56-58

If evidence is too equivocal to support logical inferences, it cannot meet the test of relevance because its meaning is speculative: *R v Merritt,* 2023 ONCA 3, at para 76

To determine relevance, a judge must ask whether, in light of all the other evidence, the at-issue evidence logically tends to make a fact in issue more or less likely. The threshold is low and judges can admit evidence that has modest probative value. Concepts like ultimate reliability, believability, and probative weight have no place when deciding relevance; they are reserved for the finder of fact. The evidentiary context that trial judges can use to determine whether evidence is capable of meaning such that it could be relevant includes evidence that parties have adduced and evidence that a party indicates that they intend to adduce: *R v Schneider,* 2022 SCC 34

RELIABILITY

While recovered memory evidence is admissible, a jury should be cautioned regarding its reliability. Hearing someone has been involved in an incident and

then looking for and finding their image could taint the subsequent identification of that person: *R v Lewis,* 2018 ONCA 351 at paras 24, 26

Credibility and reliability are not the same thing. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall, recount events in issue. Thus credibility is not a proxy for reliability: a credible witness may give unreliable evidence: *R v Slatter,* 2019 ONCA 807, at para 60

REPLY / REBUTTAL EVIDENCE

A. GENERAL PRINCIPLES

The general rule is that the Crown is not allowed to split its case. The Crown must enter all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to the issues raised in the indictment and any particulars.

The rule is intended to ensure 1) that trials are not unduly prolonged and 2) that the accused knows the full case that must be met before s/he responds.

However, where the defence evidence raises a new matter, a new fact, or a defence which the Crown had no opportunity to deal with, or could not have reasonably anticipated, the Crown may be allowed to call evidence in rebuttal after completion of the defence case. Further, evidence which is marginally relevant, and thus strictly speaking admissible as part of the Crown case in chief, may nonetheless be admissible in reply where it takes on real significance only because of a position advanced during the defence case. Another way of saying the same thing, adopted in several Canadian cases, is that the matter to which the proposed reply evidence relates only became a “live issue” once the defence put in its case. The trial judge has discretion to admit such evidence in reply/rebuttal.

However, rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown’s case which could have been brought before the defence was made.

R v Sanderson, 2017 ONCA 470 at paras 32-45; see also *R v Graziano*, 2015 ONCA 491 at paras 34-40; *R v SM,* 2025 ONCA 18, at para 16

Where rebuttal evidence is permitted to refute a defence, it does not give rise to concerns about case-splitting. This is so because an accused could not be surprised by rebuttal evidence on an issue they themselves raised. Further, the fact that an issue was "foreshadowed" does not necessarily preclude the admission of rebuttal evidence: *R v SM,* 2025 ONCA 18, at para 17

What is so objectionable about allowing the Crown's case to be reopened after the defence has started to meet that case is that it jeopardizes, indirectly, the principle that an accused not be conscripted against him- or herself. . . . [T]here is a real risk that the Crown will, based on what it has heard from the defence once it is compelled to "meet the case" against it, seek to fill in gaps or correct mistakes in the case which it had on closing and to which the defence has started to respond: *R v P(MB),* [1994] 1 S.C.R. 555 (SCC).

The trial judge's discretion to allow the Crown to reopen its case is very much constrained. The "ambit" of that discretion also falls on a scale: it becomes narrower as the trial proceeds because of the increasing likelihood of prejudice to the accused's defence as the trial progresses. The trial judge has broad discretion before the Crown has closed its case; more limited discretion after the Crown has closed but before the defence has elected whether or not to call evidence; and extremely narrow discretion once the defence has already begun to answer the Crown's case: *R v JJ,* 2022 SCC 28, at para 166-167

SEXUAL OFFENCES (EVIDENTIARY ISSUES)

See also Witnesses: Stereotypes and behavioural Assumptions

A. BEHAVIOURAL ASSUMPTIONS, STEREOTYPES, AND CREDIBILITY

Reliance upon stereotypical views about how victims of sexual assault would behave is an error of law: *R v ABA,* 2019 ONCA 124, at paras 5-7

It is also an error of law to rely upon stereotypical views on how a sexual assault complainant will process a traumatic event: *R v Rose,* 2021 ONCA 408, at para 39

Reliance on myths and stereotypes about how a typical victim of domestic abuse would behave is inappropriate, whether it is directed at assessing the behaviour of a person accused of sexual assault or that of a complainant: *R v Dupuis,* 2020 ONCA 807, at para 78

For example, in *DR,* the SCC held that the trial judge erred in doubting the complainant's evidence that she was sexually assaulted by her grandfather by relying on evidence that the complainant had a strong and normal relationship with him. This reasoning relied on stereotypical reasoning, rather than the entirety of the evidence, which constituted an error of law: 2022 SCC 50.

Although trial judges must exercise common sense when making credibility findings and resolving what actually happened in a case, relying upon assumptions about what young women will and will not do may impact a judge's objective deliberation of the reasonable doubt standard. In *JJ,* for example, the Ontario Court of Appeal held that the trial judge fell into legal error by relying on an assumption regarding what young women will and will not do, as if it were a fact, and in light of the centrality of that assumption to the trial judge's reasoning: *R v JJ,* 2018 ONCA 756 at para 47

It is an error of law to judge credibility based on the expected behaviour of stereotypical victims of sexual assault – either to bolster or compromise credibility: *R v ARJD,* 2018 SCC 6; *R v Kiss*, 2018 ONCA 184 at para 101; *R v Cepic,* 2019 ONCA 541, at para 14; *R v JC,* 2021 ONCA 131, at para 62

It is equally wrong to draw inferences from stereotypes about the way accused persons are expected to act*: R v JC,* 2021 ONCA 131, at para 63

The rule against stereotypical inferences does not bar all inferences relating to behaviour that are based on human experience. It only prohibits inferences that are based on stereotype or "prejudicial generalizations": *R v JC,* 2021 ONCA 131, at para 65

This rule prohibits certain inferences from being drawn; it does not prohibit the admission or use of certain kinds of evidence. For this reason, it is not an error to admit and rely upon evidence that could support an impermissible stereotype, if that evidence otherwise has relevance and is not being used to invoke an impermissible stereotype: *R v JC,* 2021 ONCA 131, at paras 68-69

By the same token, it is not an error to arrive at a factual conclusion that may logically reflect a stereotype where that factual conclusion is not drawn from a stereotypical inference but is, instead, based on the evidence: *R v JC,* 2021 ONCA 131, at para 70

A finding on the ultimate issue of guilt or innocence based on stereotypical assumptions that are not properly grounded in the record would constitute an error of law: *R v LB,* 2024 ONCA 88, at para 27

Complainants may delay reporting for a variety of reasons. A delay in disclosure, standing alone, does not give rise to an adverse inference against the credibility of a complainant. For this reason, in assessing the credibility of a complainant, the timing of disclosure of an allegation or allegations is simply one circumstance to consider in the context of all of the evidence: *R. v. D.D.,* 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 65. However, D.D. does not stand for the proposition that timing of disclosure is irrelevant to credibility. Rather, any issues of timing of disclosure must be assessed in the context of the trial evidence as a whole: *R v SG,* 2022 ONCA 727, at para 43

It is dangerous for a trial judge to find relevance in the fact that a complainant has exposed herself to the unpleasant rigours of a criminal trial. The fact that a complainant pursues a complaint cannot be a piece of evidence bolstering her credibility. Otherwise it could have the effect of reversing the onus of proof. This would itself rest in gender-related stereotypical thinking that sexual offence complainants are believable.

Using a complainant's readiness to advance a criminal prosecution cannot be reconciled with the presumption of innocence. The trial is to begin on the rebuttable premise that the accused is not guilty, not on the basis that the mere making of a criminal sexual assault allegation favors a finding of guilt: *R v JC,* 2021 ONCA 131, at paras 88-89

It is an error to rely on the complainant's failure to avoid her abuser as a factor going to credibility. In *KG,* the Court of Appeal upheld the trial judge's refusal to allow the defence to cross-examine the complainant on this issue. The court reasoned that, exploring why the complainant did not do more to avoid the appellant could shed no light on whether the sexual abuse occurred. Nor could it be properly considered in assessing her credibility, since it would impermissibly seek to measure her behaviour against that of a stereotypical abuse victim: *R v KG,* 2024 ONCA 879, at para 9

The Supreme Court of Canada's rejection of a rule against ungrounded common-sense assumptions in *Kruk,* 2024 SCC 7, did not alter or erode in any way the existing rules which do not permit stereotypical reasoning in relation to the expected or appropriate conduct of a victim of sexual assault: *R v GH*, 2024 ONCA 523, at para 21

i. Standard of Review

Such errors are reversible only when they "ground" the relevant inference by playing a material or important role in the impugned conclusion. Put otherwise, it is not per se a reversible legal error to draw impermissible inferences that do not matter, but it is a reversible legal error to reach a material factual conclusion based on such reasoning.

An error is "based" on a stereotype or improper inference when that stereotype or improper inference played a material or important role in explaining the impugned conclusion. Where it did so, even if the trial judge offered other reasons for the impugned conclusion, it cannot safely be said that the trial judge would have reached the same conclusion without the error: *R v JC,* 2021 ONCA 131, at paras 71, 73

B. HEARSAY OF COMPLAINANT'S REACTION

The complainant's shocked reaction to being told she had had sex with the accused is admissible as either (1) non-hearsay circumstantial evidence of the complainant's present state of mind or (2) an implied hearsay assertion according

under the “statements of present state of mind exception” to the hearsay rule: *R v FBP,* 2019 ONCA 157, at para 8

C. POST OFFENCE DEMEANOUR

Evidence of the post-event demeanour of a sexual assault complainant can be used as circumstantial evidence to corroborate the complainant’s version of events, where it is sufficiently damning that it may be considered by a jury to be more consistent with her denial of consent than with the existence of consent. Such post-event demeanour evidence can be invoked by either side: it can assist the defence in raising a reasonable doubt on the issue of consent, or it can assist the Crown in proving non-consent: *R v Rose,* 2021 ONCA 408, at para 22-23

D. EXPERT EVIDENCE

Expert evidence on the behaviour of child sexual assault victims, sometimes known as Child Sexual Abuse Accommodation Syndrome and popular in the 1990s, has been found to be inadmissible. An allegation of a scientific link between the complainant’s weird/bad behaviour and sexual abuse by an expert could be unduly prejudicial to the accused. Triers of fact are capable of relying on their common sense and experience to understand why a complainant may act in a certain way: *R v. R.O.*, 2015 ONCA 814; *R v RD,* 2018 ONCA 356 at para 13

It is an error, however, to use a complainant’s evidence of emotional and psychological problems to bolster the reliability of their evidence of being assaulted. This reasoning reveals a fatal circularity. The trier of fact would be accepting the complainant’s evidence that the sexual assault by the accused precipitated her subsequent emotional and behavioural problems to support the reliability of the complainant’s assertion that the accused sexually assaulted her: *R v RD* at paras 16-18

E. MOTIVE

Evidence of possession of child pornography does not provide evidence of motive to commit sexual assault on a minor and is highly prejudicial on such counts: *R v. L.O.* 2015 ONCA 394

F. PRIOR ALLEGATIONS

Evidence that a complainant made a prior sexual assault allegations against another person is irrelevant and inadmissible unless it can be established that s/he recanted or that the other allegation is demonstrably false: *R v DK,* 2020 ONCA 79, at para 69

G. APPLICATIONS UNDER SECTION 276 AND 278

i. General Principles

The Section 276 regime applies to any proceeding in which an offence listed in s.276(1) has some connection to the offence charged, even if no listed offence was particularized in the charging document. The ultimate responsibility for enforcing compliance with the mandatory s. 276 regime lies squarely with the trial judge, not with the Crown: *R v Barton,* 2019 SCC 33

Section 276 prohibits inferences from the sexual nature of the activity, not inferences from other potentially relevant features of the activity: "If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted": *R v AM,* 2024 ONCA 661, at para 122

The section 276 regime applies to general evidence of a sexual relationship between the parties, as well as evidence of specific instance of sexual assault: *R v LS,* 2017 ONCA 685

The section 276 regime applies to preliminary inquiries: *R v Kuzmich,* 2020 ONCA 359, at para 34

In advancing a s.276 application at trial, the defence cannot rely on the complainant's testimony regarding prior sexual activity given at a preliminary inquiry where that evidence was improperly obtained without a s.276 application: *R v Kuzmich,* 2020 ONCA 359, at paras 41-45

Section 276 deals with whether or not evidence that is "relevant to an issue at trial" and, thereby, ordinarily would be admissible should nonetheless be screened out. Collateral matters should already have been screened out by the collateral fact rule: *R v SB,* 2016 NLCA 20 at para 26; aff'd at 2017 SCC 16

The process prescribed by s. 276 for the admission of evidence of prior sexual history is mandatory. It applies even when the evidence in question is sought simply for the purpose of testing the complainant's credibility on a prior inconsistent statement: *R v Vassell,* 2016 ONCA 786 at paras 4-8

The stage one application for a hearing is meant to winnow out applications that, on their face, have no realistic prospect of succeeding, not only to avoid wasteful hearings but to spare complainants from the unnecessary embarrassment and indignity of a s. 276 hearing. The stages of the two-stage process should be kept distinct: *R v Reimar,* 2024 ONCA 519, at para 34.

Where challenging the Crown's evidence of the complainant's sexual history directly implicates the accused's ability to raise a reasonable doubt, cross-examination becomes fundamental to the accused's ability to make full answer and defence and must be allowed in some form. The more important evidence is to the defence, the more weight must be given to the rights of the accused: *R v RV,* 2019 SCC 41

Evidence of a relationship that implies sexual activity clearly engages s. 276(1), and, to be admissible, must satisfy the requirements of s. 276(2). It is not admissible as "context" for the relationship: *R v Goldfinch,* 2019 SCC 38

Evidence of a complainant's sexual history is not admissible merely to establish "context". Sexual evidence of a generalized nature risks invoking the line of twin-myth reasoning that because the complainant had previously consented to sexual activity in the past (the "context"), she was more likely to have consented to the sexual activity at issue: *R v Goldfinch,* 2019 SCC 38, at para 119

Bare assertions that evidence of a complainant's extrinsic sexual activity is relevant to provide context for other evidence, to amplify the narrative or to impugn

the complainant's credibility, fall short of the standard required by s. 276(2)(b): *R v OF,* 2022 ONCA 679, at para 53

Prior sexual activity may become relevant where the complainant places the nature of her relationship with the accused in issue, and when the complainant testifies about her prior relationship in a manner that is contradicted by defence evidence, and thereby calls into question her credibility: *R v Kuzmich,* 2020 ONCA 359, at paras 61-65

There may be cases in which the evidence, while relevant to specific facts or issues relating to the accused's defence, bears only marginally on it. In such cases, the trial judge may, in his or her discretion, exclude the evidence on the basis that countervailing considerations, such as the need to protect the privacy rights and dignity of the complainant, outweigh the tenuous connection the evidence has to the accused's ability to make full answer and defence.

To the extent sexual activity evidence is ultimately admitted, the trial judge must explain to the jury, in clear and precise terms, the uses for which the evidence may — and may not — be used: *R v Goldfinch,* 2019 SCC 38

Broad exploratory questioning is never permitted under s. 276 . Where targeted cross-examination of the complainant is permitted, trial judges must strike a delicate balance between giving counsel sufficient latitude to conduct effective cross-examination and minimizing any negative impacts on the complainant and the trial process. Proposed questions should be canvassed in advance and may be re-assessed based upon the answers received. In certain cases, it may even be appropriate to approve specific wording: *R v RV,* 2019 SCC 41

In *R v Walendzewicz*, 2018 ONCA 103, counsel's failure to attempt to bring a 276 constituted ineffective assistance of counsel and caused a miscarriage of justice where the credibility of the complainant was central and the 276 would have allowed the defence to explore a major contradiction in her evidence

There is no fixed rule allowing accused persons to prove that the complainant's other sexual activities may have caused a physical condition the Crown relies upon to confirm an alleged offence. *Seaboyer* does, however, affirm that such cases exemplify situations where the proof of other sexual activity may well be important enough to admit: *R v RV,* 2018 ONCA 547 at para 37

A complainant can testify to her virginity without triggering s. 276: *RV,* 2018 ONCA 547, at para 78

Cross-examination that challenges claims about the absence of sexual experience falls squarely within s. 276: *RV,* 2018 ONCA 547, at para 79

ii. Applicability of 276 to non-enumerated offences

Section 276 does not apply categorically to all proceedings where an accused is charged with a sexual service or human trafficking offence but not a listed offence. Rather, whether a listed offence is implicated in the proceeding, and accordingly whether s. 276 applies, must be determined on a case-by-case basis having regard to the charges, the Crown's proposed evidence, and whether the defence proposes to lead evidence of a listed offence.

Section 276 is not engaged by the mere alignment of 'some elements' of the charged offence and an enumerated offence" but requires the complete constellation of elements comprising a listed offence.

The common-law procedure established by the Supreme Court of Canada in *Seaboyer* should not be required in all cases involving non-enumerated offences such that an accused person charged with a sexual service offence would be obliged to bring a written application when seeking to admit evidence of a complainant's extraneous sexual activity

However, regardless of whether s. 276 applies in a particular case, trial judges remain responsible as gatekeepers to prevent accused persons from adducing evidence from complainants that improperly engages myths and stereotypes

The trial judge has the ability to intervene, with or without objection at trial, to preclude questions from being answered on the basis of relevance or where the probative value of the evidence is substantially outweighed by its prejudicial effect: *R v Gorges,* 2024 ONCA 857, at paras 33-35

The categorical disregard by a trial judge of a complainant's evidence regarding 276 activity when analyzing the evidence and arriving at a verdict when 276 does not properly apply to the case constitutes an error of law. While it is commendable and in fact necessary for trial judges to guard against the misuse of evidence that could engage myths and stereotypical thinking, that does not mean that all evidence regarding a complainant's involvement in the sex trade should be disregarded in every case.

Section 276 seeks to guard against "inferences from the sexual nature of the activity, not inferences from other potentially relevant features of the activity. If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted. The same principle necessarily applies to the admissibility of evidence regarding a complainant's prior sexual activity for non-enumerated offences. *R v Gorges,* 2024 ONCA 857, at paras 48, 51

If the trial judge has concern over the admissibility of this evidence, the should give the parties an opportunity to make further submissions. The judge should not reject the evidence in the reasons for the verdict without first inviting submissions on the issue: *R v Gorges,* 2024 ONCA 857, at para 55

iii. Subject Matter of the Charge

There are cases where proximate sexual activity that is not the immediate subject of a prosecution will be sexual activity that forms the subject matter of the charge, and therefore exempt from having to meet s. 276 scrutiny to gain admissibility: *R v Reimer,* 2024 ONCA 519, at para 44; see also para 42

In deciding whether proximate sexual activity that is not the immediate subject of a prosecution will fall outside of the purview of s. 276, the place to begin is by characterizing the "subject matter of the charge" the accused is facing. This phrase relates to the "components of the *actus reus* of the specific charge that the Crown must prove at trial. The *actus reus* concept extends to all of the physical elements of the offence, including the factual conditions that must exist for the offence to be complete. This goes beyond the isolated and immediate sexualized physical act of the accused that is being prosecuted, and encompasses the entire specific factual event in which the allegedly criminal act occurred.

To meet this standard, it is not enough for the uncharged sexual activity to be proximate in time and place to the allegedly criminal act of the accused. Nor is it enough that the uncharged sexual conduct is relevant to the charged event. Rather, the uncharged sexual activity must be so integrally connected, intertwined or directly linked to that activity that it is effectively part of the transaction or event that is being prosecuted. Generally, the sexual activity must also be closely

connected by time and circumstance to be considered to be part of the same transaction. In short, previous sexual activity that is not the immediate subject of the prosecution should be characterized as other sexual conduct and vetted for admission under s. 276 unless it is clearly integrally connected, intertwined, or directly linked to the event being prosecuted. If a judge harbours some reservations about this they should act with caution and proceed with a s. 276 analysis: *R v Reimar,* 2024 ONCA 519, at paras 45-48

iv. Definition of a Record under s.278.1

Whether a document counts as a "record" depends first on whether the document contains personal information for which there is a reasonable expectation of privacy, and second on whether it falls into the exemption for investigatory and prosecutorial documents. Section 278.1 provides an illustrative list of some types of records that generally give rise to a reasonable expectation of privacy, but other documents will still be covered if they attract a reasonable expectation of privacy. Trial judges will usually assess reasonable expectations on the basis of the type of document at issue.

Police occurrence reports prepared in the investigation of previous incidents involving a complainant or witness other than the offence being prosecuted count as "records" and are subject to the *Mills* regime: *R v Quesnelle,* 2014 SCC 46

v. Likely Relevance and Probative Value

For a comprehensive review of the s.278 regime, including the definition of a record, the role of the complainant, the requirements involved in an application, and the applicable stage 1 and 2 tests, see *R v JJ,* 2022 SCC 28

"Likely relevant" relates not only to the events in issue but also the credibility of witnesses; considerations of privacy and admissibility are not relevant at this first stage of the inquiry: *R v Gravesande*, 2015 ONCA 774

Relevance sets a low bar. Evidence is relevant to a fact in issue if it directly or indirectly makes the existence of that fact more or less probable. Evidence must, however, be more than merely relevant to be admissible under s. 278.92(2)(b). A finding of relevance engages the balancing of probative value and prejudicial effect

described in s. 278.92(2)(b). Some relevant evidence will be excluded as a result of that balancing: *R v CI,* 2023 ONCA 576, at paras 96-97

Evidence does not have to establish a fact to be relevant, nor need it be determinative. It must simply have some tendency in logic to increase the probability of the inferred fact: *R v Reimer,* 2024 ONCA 519, at para 71

Section 276 applications should not be granted on the theory that the sexual experience evidence is relevant to narrative. Narrative evidence is simply background information that is received even though it is not relevant to an issue at trial, because it enables testimony to unfold in a natural and comprehensible fashion. The accused must show that the sexual experience evidence is relevant to an identified live issue in the case: *R v Reimer,* 2024 ONCA 519, at para 63

Statements made or adopted by the parties about what they intended to do during a pending meeting are relevant. Even though individuals can say things that they do not really mean or change their minds, it is an incontrovertible proposition of logic and human experience that a statement of present intention to do an act at a future time increases the likelihood that the speaker will engage in that act on that future occasion. In *Reimer,* the Court of Appeal found that the fact that the complainant communicated an intention to engage in consensual sexual acts with Mr. Reimer when they got together, is logically relevant to the likelihood that she did so when they got together: *R v Reimer,* 2024 ONCA 519, at paras 70-72

The fact that consent must be contemporaneous does not mean that evidence relevant to the factual question of consent must also be contemporaneous. The complainant's words and actions, before and during the incident" can be considered in determining whether a complainant has consented at the time of the sexual activity. So long as the earlier words or action are relied upon because they have a tendency in logic and human experience to support the likelihood that the complainant consented at the time of the sexual activity, they are not rendered legally irrelevant by the contemporaneity rule: *R v Reimer,* 2024 ONCA 519, at para 74

Nor does such reasoning engage any twin myths. Relevance does not derive from the sexual nature of the activity of sexting. It derives from the complainant's stated intentions relating to the specific occasion in question. There are rare cases where other sexual activity will be relevant to consent without engaging twin myth reasoning: *R v Reimer,* 2024 ONCA 519, at paras 75, 81

While the mere assertion that a record is likely relevant to an issue under s.278.3(4), such as credibility, is insufficient, disclosure can nonetheless be ordered where the accused can point to case-specific evidence or information justifying the assertion: *R v KC,* 2021 ONCA 401

However, the fact that the accused has case-specific evidence or information justifying the assertion does not obviate the need for access to the disclosure. Such an approach would put the accused in an impossible situation: requiring case specific evidence to establish he likely relevance of the records, but then saying that such evidence undercuts the claim of likely relevance: *R v KC,* 2021 ONCA 401, dissent of Jamal J.A. [not on this point] at para 52

Probative value refers to the ability of evidence to prove or disprove a fact in issue. Probative value is measured by reference to the significance in the litigation of the fact to which the evidence is directed, and the ability of that evidence to prove or disprove that fact. In the weighing exercise the trial judge is concerned with probative potential, while the ultimate determination of probative value is for the trier of fact.

Prejudice in s. 278.92(2)(b) encompasses several diverse considerations. The prejudice assessment must have regard to the impact of the exclusion of the evidence on the accused's right to a fair trial, but also the impact of the admission of the evidence on the fundamental rights of the complainant and broader societal concerns.

In weighing probative value and prejudice, the trial judge must have regard to the nature of the issues raised and the factual matrix disclosed in the evidence: *R v CI,* 2023 ONCA 576, at paras 98-101

In CB, the Court of Appeal discussed a potential divide in the jurisprudence when considering whether a record is "likely relevant" at the first stage. In some cases, the jurisprudence suggests that " the sole question for resolution in assessing the likely relevance of third-party records is whether there is case-specific information showing a reasonable possibility that the third-party record contains logically probative evidence." Elsewhere, the jurisprudence suggests that the Court may consider the availability of other evidence available to the accused to advance the issue (e.g., motive) for which the records are sought. The Court did not resolve the divide in the case law, concluding that the Court is nonetheless entitled to consider the availability of other evidence when weighing the "interests of justice" factor under s.278.5(1): *R v CB*, 2022 ONCA 572, at paras 5-7

vi. Reasonable Expectation of Privacy

In *R v Bartholomew,* 2017 ONSC 3084*,* the Ontario Superior Court ruled that a complainant in a sexual assault case does not have a reasonable expectation of privacy in his/her psychiatric records that were filed, unsealed, in a prior proceeding. Such records are not subject to the s.278 regime.

The complainant has a limited expectation of privacy in CAS records involving an investigation into the accused in respect of the very allegations before the court. Any statements made by the complainant to the CAS in respect of the investigation would reasonably possibly be relevant: *R v SSS,* 2021 ONCA 552, at paras 46-49

The fact that a record exists, relates to psychiatric treatment, therapy or counselling the complainant has received or is receiving, may relate to the incidents that are the subject-matter of the charge, or may relate to the credibility of the complainant, are not sufficient on their own to justify a s. 278.3 order: s. 278.3(4): *R v KG,* 2024 ONCA 879, at para 12

vii. Specific Instances of Sexual Activity

Section 276(2)(a) does not always requires particularization of identifiable instances of sexual activity. What s. 276(2)(a) requires is adequate identification of the target evidence to enable a proper s. 276 evaluation to be undertaken, and to enable the Crown to safeguard the complainant's legitimate interests. For example, it would be sufficient that the accused was seeking to cross-examine the complainant about particular occasions in a certain month of the year when the complainant engaged in sexual activity capable: *RV,* 2018 ONCA 547, at para 40; rev'd on other grounds at *R v RV,* 2019 SCC 41

Thus the phrase "specific instances of sexual activity" does not require, as a necessary condition, the particularization of identified instances of sexual activity. It requires instead that the proposed evidence be adequately identified to enable a proper s. 276 evaluation to be undertaken, and for the Crown to safeguard the complainant's legitimate interests. Where the defence is seeking to lead affirmative

exculpatory evidence, the question is whether that proposed evidence has been adequately identified. Where the defence seeks to obtain evidence through cross-examination, it is the subject area of the cross-examination that must be adequately identified: *RV,* 2018 ONCA 547, at paras 45, 46, 53, 65; rev'd on other grounds at *R v RV,* 2019 SCC 41

Evidence of a relationship that implies sexual activity inherently encompasses specific instances of sexual activity. To satisfy s. 276(2)(a), the accused must point to identifiable activity, but the degree of specificity required in a particular case will depend on the nature of the evidence, how the accused intends to use it, and its potential to prejudice the administration of justice.

Where the accused seeks to introduce evidence of an individual instance of sexual activity, he must identify that instance with specificity. By contrast, where the accused seeks to introduce general evidence that describes the nature of the relationship between the accused and the complainant, the specificity requirement speaks to factors relevant to identifying the relationship and its nature and not to details of specific sexual encounters. These factors will include the parties to the relationship, the relevant time period, and the nature of the relationship: *R v Goldfinch,* 2019 SCC 38 (majority and concurring opinions)

viii. Society's Interest in Encouraging Reporting

In *NG,* the Court of Appeal held that the fact that the appellant was purporting to introduce evidence from a cellphone he had stolen and withheld from the complainant, in circumstances where he was in a position to manipulate its contents, was relevant to whether the evidence should be admitted under s. 276(2) of the *Code*, particularly s. 276(3)(b) of the *Code,* which expressly permits the court, in determining whether to admit such evidence, to consider "society's interest in encouraging the reporting of sexual offences": 2024 ONCA 20, at para 37

ix. Crown-Lead Evidence

Section 276(1) and the common law principles apply to Crown-led evidence of a complainant's sexual history: *R v RV,* 2019 SCC 41

Crown-led evidence of prior sexual activity is similarly governed by the principles set out in s. 276(1). Defence counsel cannot, in the absence of a s.276 application, rely on the fact that the Crown "opened the door" to this line of questioning in chief. The ultimate responsibility for ensuring that the s.276 regime is applied lies with the judge: *R v Kuzmich,* 2020 ONCA 359, at paras 52-55; see also *R v Barton,* 2019 SCC 33

x. Non-Enumerated Offences

Section 276 does not apply to all sexual offences. Rather, the provisions lists 14 specific offences and states that it applies to proceedings in respect of those offences. The jurisprudence now establishes a "broad relational test" for applying s. 276 to proceedings in which no listed offence has been charged, with the question being whether in substance a listed offence is implicated in the proceeding.

For there to be "some connection" between a listed offence and the charged offences, it is not sufficient that the offences merely share a common feature or element – such as the fact that they are all sexual offences, or that the complainant engages in sexual activity in circumstances of exploitation. Rather, what is required is that the commission of a listed offence, while not charged, arises on the facts such that it is, in substance, implicated in the particular proceeding.

Put differently, the issue is whether the proceeding is, in substance, in respect of one of the listed offences. The question must be determined "in the context of the particular prosecution, taking into account the charges, the nature of the allegations, and the subjects about which the accused seeks to cross-examine the complainant.

Sexual assault is not an included offence to procuring, even when it is alleged that the accused has committed the offence by exercising control over the complainant's movements. The requirement that the Crown prove an accused "exercised control, direction or influence" is not the same as saying the complainant did not consent to the sexual act. In a different case it might be alleged that the accused used violence or the threat of violence to compel the complainant to offer her sexual services, implicating the offence of sexual assault.

Lack of consent is also not necessarily an element of human trafficking. Where human trafficking is said to be made out by the accused exercising control, direction or influence for the purpose of exploitation, any consent is statutorily declared to be invalid by s. 279.01(2). Contrarily, s.276 will be engaged in human trafficking of persons under 18 because such conduct plainly engages the offence of sexual exploitation.

Section 276 is not engaged by the mere alignment of some elements of the charged offence and an enumerated offence" but requires the complete constellation of elements comprising a listed offence: *R v AM,* 2024 ONCA 661, at paras 79, 90, 92

While there is a risk of stereotypical or myth-based reasoning in sexual services and human trafficking prosecutions, the trial judge as gatekeeper has the ability to intervene, with or without objection at trial, to preclude questions from being answered on the basis of relevance or where the probative value of the evidence is substantially outweighed by its prejudicial effect. The trial judge will always have the authority and responsibility to guard against improper reasoning and the invocation of myths and stereotypes.

Existing rules of evidence already protect against the admission of irrelevant and prejudicial evidence. Even without *Seaboyer*'s extension, a trial judge is well-positioned to balance the competing interests at play as testimony unfolds by barring or placing limits on the admissibility and use of evidence of other sexual activity, intervening to stop inappropriate questioning, and directing a *voir dire* in exceptional cases if one is required. Trial judges, as are not powerless when a sex worker is questioned about unrelated sexual activity: *R v AM,* 2024 ONCA 661, at paras 111-112

xi. Reconsideration of a s.276 Ruling

A trial judge has discretion to re-consider rulings made earlier in the proceedings if there is a material change of circumstances. An order related to the conduct of trial may be varied or revoked if there is a material change of circumstances as s. 276 continues to operate even after an initial evidentiary ruling has been rendered: *R v RV,* 2019 SCC 41

xii. PROTECTIONS FOR THE ACCUSED

An accused who files evidence on a s. 276 *voir dire* does so voluntarily and his evidence is not compelled. Section. 13 of the *Charter* applies to a s. 276 *voir dire*. The protection extends to use of an accused's evidence on a s.276 voir dire as evidence of guilt at trial. However, if the accused testifies at the trial, evidence from the *voir dire* can be put to him to challenge his credibility: *R v HP,* 2022 ONCA 51, at paras 29, 50

There is the potential for unfairness if the s. 276 voir dire process were to be abused by Crown counsel. Trial judges must limit the Crown's cross-examination to what is necessary to determine the evidentiary issue on the voir dire. The purpose of the voir dire is not defence disclosure to the Crown: *R v HP,* 2022 ONCA 419, at paras 52, 56

xiii. PROCEDURAL ISSUES

At the second stage of a s.278 proceeding, the accused may be provided with a redacted copy of the records so he could make submissions to assist the trial judge in deciding what records should be produced, but only when there has been an express and effective waiver of privacy over the edited contents of the record proposed to be disclosed.

Generally, an accused's ability to assist at stage 2 is limited, but not nil. An accused may provide the court with general guidance on such matters as: how to read the records; what kinds of information should be adjudged to be relevant and probative, if it is found in the documents; what other interests they should consider; and the principles they should apply: *R v MC,* 2023 ONCA 611, at paras 61-62
The Court of Appeal has inherent jurisdiction to publish reasons involving appeals related to s.276 applications, notwithstanding s.278.95, which prohibits publication of those reasons at the trial level, subject to certain limitations. The court has a supervisory and protecting power over its own records, an could therefore exercise its discretion concerning publication based ono the same factors used by the court below: *R v NH,* 2021 ONCA 636

xiv. APPELLATE REVIEW

The determination of whether sexual activity evidence is admissible under s. 276 is a question of law that is subject to review by this court on a standard of correctness: *R v OF,* 2022 ONCA 679, at para 42

However, assuming the trial judge correctly applies the applicable legal principles, does not misapprehend material evidence, does not fail to consider relevant evidence, and does not arrive at an unreasonable result, the appellate court will defer to the trial judge's ruling: *R v CI,* 2023 ONCA 576, at para 102

The appellate court has the inherent jurisdiction proceed *in camera* on appeals that disclose the content of a 276 application: *R v OF,* 2022 ONCA 679, at para 73

SIMILAR FACT EVIDENCE

A. GENERAL PRINCIPLES

Evidence linking the accused to other discreditable acts or conduct is presumptively inadmissible. This is due to the general exclusionary rule against the reception of evidence of general propensity, disposition or bad character. The policy basis for the exclusionary rule is its potential for prejudice, distraction and time-consumption: *R v McDonald,* 2017 ONCA 568 at para 76-77; *R v MRS,* 2020 ONCA 667, at paras 59-60

Whether evidence constitutes discreditable conduct evidence triggering the similar fact evidence rule is determined by the nature of the evidence, not the use the Crown proposes for that evidence. For example, the Crown cannot rely on the fact that the evidence is being tendered only for narrative purposes in order to admit such evidence: *R v MRS,* 2020 ONCA 667, at para 72

A request by the Crown for similar fact treatment is a precondition to that treatment being given to evidence: *R v Tsigirlash,* 2019 ONCA 650, at para 27

While the absence of an application by the Crown is not fatal, it does displace the deference normally afforded to the trial judge in respect of the admission and reliance on such evidence: *R v Nolan,* 2019 ONCA 969, at paras 37-39

The onus is on the Crown to satisfy the trial judge on a balance of probabilities that the probative value of the evidence in relation to a particular issue sufficiently outweighs its potential prejudice: *R v Bent,* 2016 ONCA 651, at para 34; *R v MRS,* 2020 ONCA 667, at para 65

Evidence of extrinsic misconduct or similar acts is evidence of limited admissibility with inherent prejudice. As a result, limiting instructions are required to explain its permitted use and to inoculate jurors against its prohibited use: *R v McDonald,* 2017 ONCA 568 at para 86

In trials of multi-count indictments where there is a successful similar fact application that applies only to certain counts, the jury must be instructed that on those counts *not* part of the similar fact application: *R v AC,* 2018 ONCA 333 at para 64

In a multi-count indictment, the prohibition against relying on the evidence on one count to assist in determining the accused's guilt on another count, absent a successful similar fact evidence application, does not apply in respect of assessing the credibility and reliability of a witness. The assessment of the credibility and reliability of a witness's testimony on one count may properly inform the assessment of the credibility and reliability of that witness's evidence on any or all counts: *R v MRS,* 2020 ONCA 667, at para 64

Where similar fact evidence is allowed, the trier of fact may use the evidence from one count on which there was an acquittal to assess an accused's liability on other counts: *R v Heurta,* 2020 ONCA 59, at para 67

The trial judge's admission of similar fact evidence without a voir dire will not be found to be in error where the evidence was, in fact, admissible, and put to appropriate use: *R v CH,* 2023 ONCA 622, at paras 5-6

The test for the admissibility of similar fact evidence applies in both judge alone and jury trials: : *R v Tsigirlash,* 2019 ONCA 650, at paras 38-39

B. THE TEST

See *R v Bent,* **2017 ONCA 722** at paras 32-48, see also para 60

i. PROVATIVE VALUE

The probative value of the evidence is based on the improbability of coincidence between the similar acts and the acts at issue in the proceeding. The court must consider the degree of its relevance to the facts in issue and the strength of the inferences that can be drawn from it. Inferences sought to be drawn must accord with common sense, intuitive notions of probability and the unlikelihood of coincidence."

The threshold for probative value is very high. The connection must be so strong that "it would be an affront to common sense to suggest that the similarities were due to coincidence." However, the probative value of the evidence need not be so high that it is virtually conclusive of guilt.

The initial assessment of the similarity between the extrinsic misconduct or similar acts and the offence(s) charged must be based on the acts themselves and not on evidence of the accused's involvement in those acts: *R v McDonald,* 2017 ONCA 568 at para 81

The probative value analysis includes four inquiries:

1. First, the evidence must relate to a specific issue, so that it is plainly not adduced merely to show that the defendant is of bad character. The court must identify the issue in question and ask how the similar acts tend to prove that issue. Where the issue is actus reus rather than identification, the degree of similarity required is not necessarily higher or lower, but rather the issue is different: *R v McDonald,* 2017 ONCA 568 at para 80

2. Second, the court must determine whether the similar fact evidence is tainted by collusion, which undermines the improbability of coincidence: [see R v Clause, 2017 ONCA 859 at paras 81-95 for a full review of the factor of collusion in a jury trial]. Actual collusion and unconscious collusion ought to be treated the same way at the admissibility stage: R v Wilkinson, 2017

ONCA 756 at paras 38-40. if a complainant's allegations are shared with a purported similar act witness before that witness makes their accusation, then the similar act witness's evidence may become tainted: *R v JC,* 2021 ONCA 787, at para 46

3. The proximity in time between past act and current offence. [A long passage of time between the similar acts may serve to defeat an similar fact evidence application: *R v PMC,* 2016 ONCA 829at paras 23-26]:
   A. the extent to which the other acts are similar in detail to the charged conduct;
   B. the number of occurrences of the similar acts:
   C. the circumstances surrounding or relating to the similar acts:
   D. any distinctive features unifying the incidents
   E. any intervening events that might undermine the probative value, such as evidence of supervening physical incapacity; and
   F. any other factor that would tend to support or rebut the underlying unity of the similar acts.

1. The court must consider the strength of the evidence that the similar acts occurred. For example:
   A. have the allegations been admitted in prior proceedings?
   B. are the allegations the subject matter of outstanding charges?
   C. by what method of proof are the acts to be proved?
   D. can the trier of fact fairly assess the evidence in the context of the trial without undue distraction?
   E. will the defence be able to fairly respond to the allegations in the context of the prosecution?

b) Probative Value in identity cases

Where evidence of extrinsic misconduct or similar acts is tendered to prove identity, that is to say, that it was the accused who committed the offence(s) charged, a high degree of similarity between the extrinsic misconduct or similar acts and the offence(s) charged is required before the evidence will be admitted. The similarity may be a unique feature, akin to a signature, or an accumulation of significant similarities. Where the evidence is adduced to establish identity, the jury is asked to infer from the degree of distinctiveness or uniqueness that exists between the crime charged and the evidence of extrinsic misconduct or similar acts that the accused is the very person who committed the offence(s) charged.

This inference becomes available only if the high degree of similarity between the acts renders the likelihood of coincidence objectively improbable: *R v McDonald,* 2017 ONCA 568 at para 79

The bar for similarity in the identity context is often referred to as a "high degree of similarity" or "strikingly similar": *R v Atwima,* 2022 ONCA 268, at para 39

The reason for a heightened bar for similarity relates to the driver of cogency when it comes to the similar act evidence being used to establish identity: the improbability that two persons would display the same configuration of matching characteristics in committing a crime: *R v Vu,* 2025 ONCA 242, at para 38

There exist occasions where acts are so strikingly similar that they will constitute the offender's signature or trademark. In those situations where signatures or trademarks do not exist, striking similarities can still arise from an "accumulation of commonalities" that, when considered together, are sufficient to reveal an improbability of coincidence that two or more people would display these matching characteristics: *R v Vu,* 2025 ONCA 242, at para 39

Although dissimilarities may negate the degree of similarity required to justify admission, they should not be exaggerated. At microscopic levels of detail, dissimilarities can always be exaggerated and multiplied which can result in a distortion of the broader picture: *R v Vu,* 2025 ONCA 242, at para 48

In the usual course where evidence of similar acts is proposed for admission in proof of a perpetrator's identity, the trial judge should review the *manner* in which the similar acts were committed, that is to say, whether the allegedly similar acts involve a unique trademark or reveal a number of significant similarities. This review enables the trial judge to determine whether the alleged similar acts were likely all committed by the same person. This analysis is confined to a consideration of the *manner* in which the acts were committed and *not* the evidence relating to the involvement of the accused in those acts. The result of this analysis establishes the likelihood of a common actor

For evidence of similar acts to be admissible on the issue of identification, it is not sufficient that the evidence reveal a common actor. Somehow those acts must be linked to the accused. In other words, there must be some evidence of a linkage or nexus between the similar acts and the accused as their author. There must be some evidence, something beyond mere opportunity or possibility, that provides this nexus: *R v Durant,* 2019 ONCA 74 at paras 90-91

At the first stage of the similar act analysis involving questions of identity, the similarity stage, the court looks to the acts and asks how similar they are. From time-to-time, acts will contain signatures or trademarks, such that their similarity will be striking. More frequently, though, the requisite degree of similarity will result from an accumulation of commonalities, none of which will be sufficiently significant to constitute a signature or trademark.

In assessing whether the evidence has that cumulative effect, the following list of helpful considerations: (a) the "proximity in time of the similar acts"; (b) the "extent to which the acts are similar in detail"; (c) the number of occurrences involved; (d) the "circumstances surrounding or relating to the similar acts"; (e) the distinctive features involved in those acts; (f) whether there were any intervening events; and (g) "any other factor which would tend to support or rebut the underlying unity of the similar acts."

Where the evidence of similarity points towards the acts having been likely committed by the same person, the trial judge must go on to the second stage and consider whether there is evidence linking the accused to the similar acts. There need only be "some evidence" linking the accused to those acts. The "some evidence" threshold requires more than mere opportunity or possibility but does not demand more than "some evidence" upon which it can be said that the acts were in fact the acts of the accused. This has been characterized as a "low evidentiary threshold" at the admissibility stage: *R v Atwima,* 2022 ONCA 268, at paras 40-42; *R v Vu,* 2025 ONCA 242, at para 41

Crimes committed by groups can present special challenges in the context of similar act evidence applications aimed at proving the identity of an individual accused. To use group similar act evidence to establish individual identity (as opposed to group identity), the Crown must first establish that it is "highly improbable" that more than one group "employing the same *modus operandi* committed the crimes at issue": *Perrier,* at para. 26. The same factors outlined in *Handy,* at para. 82, will be used to determine that degree of improbability: *R v Atwima,* 2022 ONCA 268, at para 45

Once the requisite degree of improbability has been established, then the Crown must go on to establish a link between the individual and the crimes of the group. This is because it is individuals, not groups, who ultimately bear the responsibility for crimes. Therefore, even where it is highly improbable that

different groups committed the crimes, the signature of the offence is the signature of the group only.

Accordingly, where group similar act evidence will be used to identify a particular accused, linkage evidence remains critical to the admissibility analysis. The means by which to identify that link, though, will fluctuate depending on whether the group's membership remains static across the acts or whether the group's membership rotates across the acts: *R v Atwima,* 2022 ONCA 268, at paras 46-47

If the Crown can prove that membership in the gang never changed and that all members were present and participating in all offences, then the signature of the group will be the signature of the accused such that a similar fact instruction will likely be justified (provided that the overall probative value of the evidence outweighs its prejudice).

If the Crown can prove that group membership never changed, that the gang always remained intact and never committed the criminal acts unless all were present, and that the accused was a member of the group, and present, at the relevant time, that will be sufficient to connect the individual to the crimes of the group, and the evidence will usually have sufficient probative value to be admitted as similar fact.

However, where group membership was not constant, the fact that an individual may have been a member of the gang on one occasion proves nothing more than a mere possibility that he was a member on another occasion. In this case the evidence of group activity must be accompanied by evidence linking the individual to each of the group's offences for which he has been charged, either by virtue of the distinctiveness of his role or by other independent evidence.

Where membership in the group is not constant then an additional "link or "connection" must be made in order to use evidence of group activity against a particular accused. This additional requirement will be satisfied where (a) the accused's role was sufficiently distinctive that no other member of the group or person could have performed it; thus he necessarily must have participated in all offences; or (b) there is independent evidence linking the accused to each crime: *R. v. Perrier*, 2004 SCC 56, at paras 25-32

c) Probative value in non-identity cases

In certain cases where the probative value of the SFE relates to the actus reus, the evidence connecting the accused to the acts may nonetheless inform the analysis of similarity. The rule against considering both evidence of the manner in which allegedly similar acts were committed and evidence of an accused's involvement in the acts and determining whether the similarity requirement has been met is a general prohibition, not an unyielding or invariable rule that brooks no exception. Sometimes, it is difficult to draw a bright line between similarities in the manner in which an act is committed and an accused's involvement in that act. To apply a test of whether the objective improbability that an accused's involvement in the alleged acts is the product of coincidence without any regard to the evidence connecting the accused and the acts seems unduly antiseptic: *R v SC,* 2018 ONCA 454 at para 22;

In cases of sexual assault, the similarities or dissimilarities between the sexual acts that are alleged are, of course, relevant, but often not as compelling as the circumstances surrounding the incidents: *SC* at para 23

Where similar act evidence is proffered to establish the *actus reus* of an offence, it is not necessary for the trial judge to first find the acts to be strikingly similar in nature: *R v Norris,* 2020 ONCA 847, at paras 9-18

In sexual assault cases, similar circumstances are often more compelling than similarities or dissimilarities in conduct: *R v JW,* 2022 ONCA 306, at para 25

In *Cole,* the Court of Appeal held that "using falsified documents to obtain substantial sums of money to satisfy greed is a ubiquitous kind of crime, not a *modus operandi*" sufficient to be admissible as similar fact evidence: *R v Cole,* 2022 ONCA 759, at para 97

ii. PREJUDICIAL EFFECT

Prejudice takes two forms:

1. Moral prejudice, which may cause the jury to convict the accused on the basis that he is a bad person who deserves to be punished; or

2. Reasoning prejudice, which diverts the jury from its task and risks the jury giving the evidence more weight than it deserves: *R v McDonald,* 2017 ONCA 568 at paras 83-84

Finally, the court must assess whether the probative value of the similar fact evidence outweighs its prejudicial effect.

Trial judges should assess the prejudicial effect from three perspectives: moral prejudice, reasoning prejudice, and the presence of any factors that might reduce the impact of prejudice in the specific circumstances of the case: *R v JW,* 2022 ONCA 306, at para 30

There is less moral prejudice when the similar acts in question are other counts on the indictment, and therefore, more moral prejudice where the discreditable conduct is outside of the facts in the case: *R v JW,* 2022 ONCA 306, at para 32

Reasoning prejudice focuses both on the emotional form of reasoning provoked by the discreditable conduct, and also on the distraction from the facts in issue in the case that trying the issue of discreditable conduct might encourage: *R v JW,* 2022 ONCA 306, at para 33

There is less risk of moral and reasoning prejudice in a judge-alone trial than in a jury trial: R v JH, 2018 ONCA 245 at paras 23-24; *R v Norris,* 2021 ONCA 847, at para 24; *R v Jevane Fuller,* 2021 ONCA 888, at para 51

The concern over moral prejudice requires a trial judge in a judge-alone trial to self-instruct against the tendency to infer guilt based upon what *Handy* called the "forbidden chain of reasoning…from general disposition or propensity". However, self-instruction by judges can reduce, but will not eliminate, the risk of moral prejudice. Since the extent to which restricted admissibility doctrines can prevent moral prejudice is limited, courts must maintain a high awareness of the potential prejudicial effect of admitting similar fact evidence, particularly where the similar fact conduct is reprehensible: *R v JW,* 2022 ONCA 306, at para 31

Even judges can struggle to overcome the tainting effect of discreditable information and may give it undue focus during a trial". This observation is true to experience. Judges can by training and experience steel themselves against moral and reasoning prejudice, but only if they actively advert to the very point in the moment of decision: *R v JW,* 2022 ONCA 306, at para 34

Further, admitting the discreditable conduct evidence might effectively force the accused to testify in a case where doing so might be inadvisable for other reasons: *R v JW,* 2022 ONCA 306, at para 35

The interests of both society and the accused in a fair trial process require that the dangers of propensity evidence be taken extremely seriously; the criminal justice system "should not (and does not) take lightly the dangers of misapplied propensity evidence: *R v JW,* 2022 ONCA 306, at para 36

Where the similarities are merely generic and not material, the evidence increase the risk that the improper inference from "bad character" will be drawn: *R v JW,* 2022 ONCA 306, at para 41

C. SIMILAR FACT AND SEVERANCE

Where the similar acts are alleged as part of a multi-count indictment and the accused seeks severance of the counts, consideration of the admissibility of evidence of similar acts across counts is an important factor in the severance analysis. A ruling permitting across counts use of evidence of similar acts favours a joint trial since the evidence on all counts will be adduced in any event. The timing of the motion is left to the sound discretion of the trial judge.

A ruling made at one point in a criminal trial may be revisited later in the proceedings should circumstances change and warrant a reconsideration: *R v Lo,* 2020 ONCA 622, at paras 118-119

D. LIMITATIONS ON USE

For more on limitations on use and limiting instructions, see Jury Law: Jury Charge: Limiting Instructions: Prejudicial Reasoning

E. STANDARD OF REVIEW

Absent an error in principle, substantial deference should be given to the trial judge's balancing of probative value versus prejudicial effect. This deference recognizes that the trial judge is best equipped to assess the impact of the evidence on the jury, in the context of the issues and evidence at trial: *R v McDonald,* 2017 ONCA 568 at para 85; *R v Durant,* 2019 ONCA 74, at para 92

THIRD PARTY SUSPECT

A. UNKNOWN THIRD PARTY SUSPECT

i. TEST FOR ADMISSIBILITY

Third party suspect evidence must have a sufficient connection to the case to be admissible. The sufficient connection test is a threshold admissibility test that is to be conducted on the premise that the evidence is true, and without close examination of the ultimate probative value of the evidence. Where this standard is met, the significant connection test is spent, the third party suspect evidence is admissible, and it must be considered along with other evidence in determining whether the Crown has proved its case beyond a reasonable doubt: *R v Rudder,* 2023 ONCA 864, at para 67

First, the applicability of the presumption of innocence means that defence-led evidence can only be excluded if the prejudice occasioned by its admission substantially outweighs its probative value.

Second, in order for the trial judge to put the defence to the jury, the accused must point to evidence on the record that gives the defence an air of reality. Third, these principles are distinct but interrelated. For example, while the degree of similarity

may be logically relevant to whether the same person committed the offence, it will not relate to a fact in issue at trial unless the defence has an air of reality.

Fourth, an accused must prove that there is a connection between the unknown third party suspect and the crime for which the accused is charged. Unlike in the test for admitting evidence of a known third party suspect, an accused can establish this connection without adducing evidence that the alleged unknown third person suspect had the motive, the means, or the propensity to commit the crime charged.

Fifth, the sufficient connection generally arises from similarities between the crime charged and another crime that the accused could not possibly have committed. The focus on similarities is to ensure that the evidence tendered is logically relevant.

Sixth, once the relevancy threshold is met, in the sense that a sufficient connection between the crimes exists, the trial judge must still be satisfied that the probative value of the evidence adduced outweighs its prejudicial effect: *R v Grant,* 2015 SCC 9; *R v Tremble,* 2017 ONCA 671 at paras 60-64

Like other air of reality inquiries, the threshold admissibility determination is to be made by assuming that the evidence most favourable to the accused is true. The trial judge does not perform the function of the trier of fact when assessing admissibility. Therefore, where there is direct evidence supporting a third party suspect's possible perpetration, that will be enough; the sufficient connection test is met and it will be up to the trier of fact to determine whether that direct evidence raises a reasonable doubt. Where the evidence relied upon to show the sufficient connection is circumstantial, the trial judge must inquire whether the inferences being relied upon are reasonable inferences that arise from the evidence, and not simply from speculation or conjecture. If the evidence could support a reasonable inference that someone other than the accused may have committed the crime, the evidence has the probative value required to satisfy the sufficient connection test. The evidence to establish an air of reality may be presented by the defence or arise on the record presented by the Crown: *R v Rudder,* 2023 ONCA 864, at paras 59, 61, 67

In cases where the Crown relies upon proof of control by the accused to establish that they are the one who had constructive possession, evidence that others also had control over the relevant place is inherently material at the trial. In the result,

there is no need for an accused person to raise the third party suspect law and meet the sufficient connection test in such cases.

Indeed, in a constructive possession case, evidence of control over the place where the contraband is found is invariably important circumstantial evidence linking that person and the offence charged, namely, the possession of contraband that was found in that place: *R v Rudder,* 2023 ONCA 864, at paras 65, 69

A trier of fact should not examine the probative value of the other suspect's evidence in isolation before considering whether the Crown established the accused's guilt beyond a reasonable doubt, as this piecemeal analysis undermines the correct approach to assessing reasonable doubt and the burden of proof: *R v Rudder,* 2023 ONCA 864, at para 71

VIDEO EVIDENCE

A. STANDARD OF REVIEW

Whether the video recordings were of sufficient quality is a question of fact for the trier of fact. If an appellate court, upon a review of the tape, is satisfied that it is of sufficient clarity and quality that it would be reasonable for the trier of fact to identify the accused as the person in the tape beyond any reasonable doubt then that decision should not be disturbed. Similarly, a judge sitting alone can identify the accused as the person depicted in the videotape: *R v Brouillard,* 2016 ONCA 342 at para 10

VOICE IDENTIFICATION EVIDENCE

It is particularly important to caution juries about the frailties of voice identification evidence where there is no pre-existing relationship between the person speaking and the person purporting to identify their voice: *R v Edwards,* 2022 ONCA 78, at para 28

WITNESSES

A. ORDER OF DEFENCE WITNESSES

The court has no authority to direct an accused person to call witnesses in any particular order or to give evidence before any other witness. It is also inappropriate to suggest that an adverse inference will be drawn from the failure of the accused to testify first: *R v Sabir,* 2018 ONCA 912, at para 39; see *R v Hudson,* 2021 ONCA 772, at para 159

B. ACCUSED AS A WITNESS

For an overview of the right to silence and inferences that can be drawn from the failure to testify, see Charter: Section 7: Right to Silence

The common sense proposition that a witness's interest in the proceedings may have an impact on the witness's credibility applies equally to an accused who testifies in his or her own defence. In many cases, however, an accused's interest in not being convicted is simply an unhelpful factor for the trier of fact to consider in its assessment of the evidence. But not always. Whether it is appropriate for a trier of fact to consider and thus a jury to be instructed that it is entitled to consider that an accused may have a motive to lie because of his or her interest in the trial will depend on the evidence adduced and the issues raised at trial: *R v Vassel,* 2018 ONCA 721, at para 159

In most cases the interest of an accused in the outcome of proceedings is unhelpful as a factor in assessing their credibility as a witness. As a general rule, triers of fact should avoid this path of reasoning and counsel should not invite them to follow it. Otherwise, the trier of fact may err by making the impermissible assumption that the accused will lie to achieve an acquittal: *R v Chacon-Perez,* 2022 ONCA 3, at para 117

C. ADVERSE WITNESSES

Section 9(2) of the Canada Evidence Act

Cross-examination under s. 9(2) may occur in re-examination

Cross-examination under s. 9(2) can extend to questions about the circumstances in which the witness changed his or her earlier version of events when testifying about those same events at trial: *R v Grizzle,* 2016 ONCA 190 at para 9

D. CHILD WITNESSES

The credibility of an adult witness testifying about childhood events should be assessed according to criteria applicable to adult witnesses, but "the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events": *R v Bartholemow,* 2019 ONCA 377, at para 32

It would be an error of law to suggest presumptions about a child's timing and manner of disclosure. A child's sense of timing may be different from that of adults. However, it is also the case that the credibility and reliability of a child's evidence, like that of any witness, still require careful assessment and scrutiny by the trier of fact. To suggest otherwise would undermine the presumption of innocence and the requirement that guilt be proven beyond a reasonable doubt: *R v RP,* 2020 ONCA 637, at para 22

E. CO-ACCUSED

A court must exercise caution in accepting the evidence of a separately charged co-accused who is awaiting trial or sentencing. Nevertheless, a co-accused or accomplice's evidence is admissible, and the trier of fact must employ care to

determine the weight to be assigned to such evidence: *R v La,* 2018 ONCA 830, at para 55

For a review of considerations in admitting and considering the guilty plea of a co-accused, see Hearsay: Guilty Pleas

F. COURT WITNESSES

The discretion of a trial judge to call evidence is undoubtedly a broad discretion. That said, there is nothing inherently unfair about requiring a party to tender the evidence on which that party wishes to rely. A trial judge should not exercise his or her discretionary authority to call witnesses in order to maintain or to provide a party with a tactical advantage: *R v MGT,* 2017 ONCA 736 at para 58

G. BROWN AND DUNN RULE

The rule in *Browne v. Dunn* is a rule of fairness, not a fixed or invariable rule. The rule does not require every detail of anticipated conflicting evidence be put to a witness, but that where the conflicting evidence is material, failure to do so may have a negative impact on the accused's credibility: *R v Martin,* 2017 ONCA 322 at para 8; see also *R v Schoer,* 2019 ONCA 105, at para 52

In some cases, it is apparent that the cross-examining counsel does not accept the witness's version of events. Where the confrontation is general, known to the witness and the witness's view on the contradictory matter is apparent, there is no need for confrontation and no unfairness to the witness in any failure to do so

Where the subjects not touched in cross examination but later contradicted are of little significance in the conduct of the case and resolution of critical issues of fact, the failure to cross examine is likely to be of little significance to an accused's credibility

The decision as to whether there was a breach of the rule, and if so what the remedy should be, depends on the circumstances of each case and attracts substantial deference: *R v Zvolensky,* 2017 ONCA 273 at para 135; *R v Vassel,* 2018 ONCA 721, at para 120

Factors to consider in determining whether the rule has been breached include: whether anyone was taken by surprise by a document or other evidence, where the accused position was unknown, where the witness would have provided a different or further explanation or response had the impugned issues been specifically asked in cross-examination, whether the witness had a full opportunity to explain their version of events, including on all the points on which the accused later led contradictory evidence, whether it is possible that the witness would have changed or amplified their evidence if the accused's counsel had specifically put to her the points in question: see *R v BB,* 2025 ONCA 788, at paras 11-12

The trial judge has discretion to determine the extent of the applicability of the rule in any given case. Where the rule in Browne and Dunn has been breached, the trial judge has substantial discretion to determine the appropriate remedy: *R v Grizzle,* 2016 ONCA 190 at paras 13-14

The remedy for a violation of the rule in BROWNE V. DUNN, if any, depends on many factors, including:

- The seriousness of the breach;
- The context of the breach;
- The timing of the objection;
- The position of the offending party;
- Any request to permit recall of a witness;
- The availability of the impugned witness for recall; and
- The adequacy of an instruction to explain the relevance of failure to cross examine.

The trial judge may choose to allow the opposing party to recall a witness or to include a limiting instruction in his/her jury charge: *R v Vorobiov,* 2018 ONCA 448 at para 50

Where the Crown cross-examines the accused about his lawyer's failure to cross-examine a witness on certain matters, fairness requires the trial judge to instruct the jury that the accused should not be held responsible for the conduct of his counsel: *R v Lambert,* 2024 ONCA 391, at para 19

H. POLICE OFFICERS

When notes are used to refresh an officer's memory at trial, it is vital that the notes used record the officer's own independent recollection of the events in question: *R v. Thompson*, 2015 ONCA 800

A police officer's notes are more than an aide memoire and a potential source of fruitful cross-examination; they are a source against which to check the Crown's disclosure: *Thompson*

The purpose of central notes is to enable the officers engaged in a real time police exercise to be able to concentrate on the task at hand without having to worry about noting down times, observations and actions during their involvement…At the end of the surveillance, the information in the central note-taker's handwritten notes are canvassed with each officer and the observations are confirmed to reflect each officer's recollection. The central notetaker then types up his notes: *Thompson*

When central notes are relied upon it is important that every officer involved in the investigation review them as soon as possible after the event to ensure that the observations or actions attributed to them have been accurately recorded: *Thompson*

Where the handwritten central notes have gone missing, the fact that the additions or deletions on the handwritten notes are not shown on the typed copy does not mean that the quality and adequacy of the central notes is lacking. *Thompson*

I. VETROVEC CAUTIONS

i. WHEN TO GIVE A VETROVEC CAUTION

The law requires a clear and sharp warning to the jury regarding the dangers of convicting based on the unconfirmed testimony of an "unsavoury" witness: *R v Riley,* 2017 ONCA 650, at para 240

A *Vetrovec* caution is to be given only for unsavoury witnesses who testify for the Crown and whose evidence is tendered in proof of guilt. These cautions are not to be given in relation to defence witnesses who give evidence favourable to the defence. Although, as a general rule, a trial judge must not give a *Vetrovec* warning in connection with defence witnesses, there are some

instances in which a caution may be required in connection with an accused's testimony. For example, in a joint trial involving cutthroat defences or where the accused introduces disposition evidence against a co-accused: *R v Vassel,* 2018 ONCA 721, at paras 156, 157; *R v Riley,* 2020 SCC 31, aff'ing dissent in 2019 NSCA94

A *Vetrovec* caution will often be appropriate in respect of the testimony of a mixed witness. However, the specifics of that caution and the format of the instruction are left very much in the discretion of the trial judge: *R v Granados-Arana,* 2025 ONCA 193, at para 49

A *Vetrovec* caution is not made mandatory simply because the complainants' evidence was essential to the Crown's case: R *v Boone,* 2016 ONCA 227, at para 53

The hallmarks of classic *Vetrovec* witnesses: jailhouse informants, accomplices, people who stand to benefit in from their testimony: *Boone* at para 50

The trial judge has discretion in determining whether a witness is a vetrovec witness requiring a full *Vetrovec* caution: *R v Savage,* 2023 ONCA 240, at para 22

A *Vetrovec* caution is not mandatory in judge-alone trials: *R v Ajoku,* 2024 ONCA 722, at para 6

There is no need to import the requirement of a *Vetrovec* caution, which is designed to alert juries to the danger of relying on the evidence of certain witnesses, into a trial judge's reasons for judgment: judges know the risks inherent in relying on such witnesses. The court may look to the reasons that suggest that the trial judge was alive to the need to treat such a witness' evidence with caution: *R v Shi,* 2025 ONCA 119, at para 41

ii. The Nature of the *Vetrovec* Instruction

Four features are characteristic of a *Vetrovec* caution

i. *identification* of the witness(es) whose evidence is subject to the caution;

ii. the *reasons* for the caution;

iii. the *caution*, noting that it would be dangerous to convict on unconfirmed evidence of this sort; and

iv. the advisability, characteristics and illustrations of *confirmatory evidence*: *R v Vassel,* 2018 ONCA 721, at para 155

A *Vetrovec* caution will generally be adequate if it does the following: (1) identify for the jury the testimonial evidence requiring special scrutiny; (2) explain why it is subject to special scrutiny; (3) caution the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied the evidence is true; and (4) explain that the jury, in determining the veracity of the suspect evidence, should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused: *Riley* at para 240

In deciding whether to believe some, none or all of a *Vetrovec* witness' it is necessary to see if the balance of the evidence provides "some independent confirmation." The evidence must confirm "material aspects" of the evidence of the *Vetrovec* witness. This evidence need not directly implicate the accused in the offences; it need only be capable of restoring the trial judge's faith in the relevant aspects of the witness' account: *R v MacIsaac,* 2017 ONCA 172, at paras 37-38; *Riley* at para 241; *R v Mohamad,* 2018 ONCA 966, at para 153

Relevance is not to be equated with disputed. Independent confirmatory evidence can be relevant even if not disputed, and independent confirmatory evidence is not necessarily relevant just because it goes to a disputed issue: *R v McFarlane,* 2020 ONCA 548, at paras 72-73

In looking to confirmatory evidence, the trial judge cannot rely upon neutral evidence - this neither confirms nor discredits the vetrovec witness' testimony: *MacIsaac* at para 37; *Mohamad,* at para 154

A trial judge need not evaluate each item of evidence for its potential confirmatory value; instead, confirmatory evidence can be identified in a review of the evidence as a whole: *MacIsaac* at para 41

The extent to which a trial judge illustrates potentially confirmatory evidence is left largely to the discretion of the presiding judge. Sometimes more illustrations are provided. And it is the cumulative effect of the potentially confirmatory evidence that jurors are to consider: *Mohamad,* at para 152

Importantly, the instruction to search for independent confirmation does not apply to the exculpatory portions of a *Vetrovec* witness' evidence. However, the trial judge has considerable discretion in crafting an appropriate instruction for *Vetrovec* witnesses; failure to give a specific "mixed" charge in relation to a "mixed" *Vetrovec* witness will not always be fatal on appeal: *Riley* at paras 276-277

iii. Confirmatory Evidence of a Vetrovec witness

The evidence of one "*Vetrovec*" witness can sometimes confirm the evidence of another "*Vetrovec*" witness. However, to be confirmatory, the evidence must be independent of the evidence that it seeks to confirm.

The presence of tainting does not automatically disqualify a witness's evidence from being confirmatory of the evidence of another witness. The taint is a factor, albeit an important factor, to be considered by the trier of fact when assessing whether one witness' evidence can play any role in restoring the trier of fact's faith in the veracity of the evidence given by a "*Vetrovec*" witness. That assessment is situation-specific. It is the trier of fact, as the arbiter of the credibility of witnesses and the reliability of evidence, who must ultimately decide whether the evidence of one witness restores the trier's confidence in the reliability of the evidence of another.

It is not enough that the unsavoury witnesses are tainted by allegations of collusion; the evidence they provide and that is potentially confirmatory of each other's evidence must be so tainted by collusion that it loses its required independence and cannot reasonably be used as confirmation.

Tainting may render one part of a witness' evidence insufficiently independent from the evidence of the "*Vetrovec*" witness to provide confirmation of that part of the witness' testimony. However, that taint may not have the same effect on another part of the witness' evidence. Similarly, there may be other factors relevant to the assessment of a witness' credibility and reliability that sufficiently counteract the tainting and lead the trier of fact to conclude that despite the tainting, some part of that witness' evidence does confirm a material part of the testimony of the "*Vetrovec*" witness: *R v Spence,* 2018 ONCA 427 at paras 32, 48-50

iv. THE *PERCIBALLI* RULE

The *Perciballi* rule is that in a joint trial, out-of-court statements made by one co-accused cannot be used as confirmatory evidence of a Vetrovec witness' testimony against the other co-accused. The rule is animated by fairness concerns: the accused cannot cross-examine his or her co-accused on his or her out of court statements, which would not usually be admissible were the accused tried separately: *Riley* at para 243

Notwithstanding the *Perciballi* rule, it is permissible for the jury's assessment of the overall credibility of the *Vetrovec* witness to be influenced in some way by the totality of the evidence that they have heard, including evidence relating solely to one co-accused. The jury is not required to discount the fact that a witness's overall credibility may have been bolstered by the evidence concerning a co-accused's out of-court hearsay statements. The issue is whether the jury understood that the hearsay statements were only admissible against the declarant co-accused: *R v Atkins,* 2017 ONCA 650, at paras 243-244

v. APPELLATE REVIEW

A trial judge has a discretion whether to give Vetrovec warning and as to the nature and extent of the warning. The exercise of that discretion is entitled to substantial deference on appeal: *Boone* at para 51; *R v Van Every,* 2016 ONCA 87 at para 73; *Riley* at para 242

Where the trial judge gives a *Vetrovec* caution, appellate intervention will be warranted only where the warning given "clearly failed to convey to the jury the appropriate degree of caution required" to meet the particular circumstances of the case: *R v Granados-Arana,* 2018 ONCA 826, at para 21

There is no magic formulation to crafting a *Vetrovec* caution. What is appropriate will depend on the circumstances. The content of this warning is discretionary, and the exercise of that discretion is entitled to deference: *R v Le,* 2023 ONCA 79, at para 49

Similarly, when engaging in the "independent confirmation" analysis, trial judges are afforded considerable latitude. The extent to which a trial judge illustrates potentially confirmatory evidence in connection with a Vetrovec witness is largely a matter of judicial discretion: *MacIsaac* at para 39

While not determinative, the failure of trial counsel to object to the content of a *Vetrovec* instruction in a jury charge is an important consideration, suggesting that, in the context of the trial, the instruction that was given was considered adequate: *Van Every,* at para 76; *Boone* at para 53

Where an appellant claims that a *Vetrovec* caution is deficient because a trial judge failed to provide an exhaustive catalogue of the reasons for the caution, the appellate court should consider whether the characteristics omitted were latent or self-evident: *R v Noureddine,* 2022 ONCA 91, at para 28

J. FAILURE TO CALL A WITNESS

Sometimes, a judge may instruct the jury about its authority to draw an adverse inference from the failure of the party to call a witness or produce other evidence. Although an adverse inference may be drawn against a party for failure to call a witness reasonably assumed to be favourably disposed to that party, or one who has exclusive control over the witness, an adverse inference should only be drawn with the greatest of caution: *R v Lo,* 2020 ONCA 622, at paras 156, 162, 163

An adverse inference includes both an inference that the evidence would be contrary to the party's position and an inference that the evidence would not be helpful to the party's position: *R v Millard,* 2023 ONCA 426, at para 79

K. TRIAL JUDGE QUESTIONING A WITNESS

There may be circumstances in which a trial judge goes too far in asking questions of witnesses, thereby usurping the role of counsel in the adversarial context. However, trial judges are entitled to ask questions of witnesses, for example for the purpose of seeking clarifications or following up on questions asked by counsel Ultimately, the issue is "would a reasonably minded person who had been present

throughout the trial consider that the accused had not had a fair trial?: *R v Burton,* 2023 ONCA 44, at para 7