5 Issues of Proof

I. Introduction

Like in all criminal cases, the law of evidence applies in a drug case. Evidentiary rules in criminal proceedings are so detailed that they are the subject of independent textbooks. The starting point for the admissibility of any piece of evidence is relevance and materiality. Evidence is relevant and material if, as a matter of logic and common sense, it assists in determining an issue at trial.[1] Generally, any piece of evidence that is relevant and material is admissible at trial. However, common law and statutory rules have developed over time to limit the admissibility of relevant and material evidence that is prejudicial in nature and risks undermining the truth-seeking function of a trial.

This chapter focuses on common evidentiary issues that arise in a drug trial and provides practical tips on how to address those issues when they arise. Although the procedure of a drug trial is no different than a trial for an offence under the *Criminal Code*,[2] some evidentiary issues arise with more frequency in drug trials. As a result, this chapter will begin by outlining what the Crown must do to prove that the substance involved in the offence is in fact a drug—an issue that relates almost all *Controlled Drugs and Substances Act* (CDSA),[3] offences—and then address common issues related to the admissibility and use of the following types of evidence: (1) documentary evidence, (2) expert evidence, (3) character and propensity evidence, (4) circumstantial evidence, (5) hearsay evidence, and (6) *Vetrovec* witnesses.

II. Proving the Drug

If possession, trafficking, importing, exporting, or production of a substance has been established, the only thing left to do is prove that it is a controlled substance contained in Schedule I, II, or III of the CDSA. This is normally done by taking a sample of the substance and sending it to Health Canada for analysis. In order to prove the drug, the prosecutor must prove both its nature (i.e., what the substance is) and its continuity (i.e., that the substance tested and the substance found are one and the same).

Prosecutions under the *Cannabis Act* require the prosecutor to prove not only the nature of the substance (that it is cannabis) but also the quantity of the substance, since it is only the possession of certain amounts of cannabis that is prohibited.[4] Moreover, if the allegation is that the accused is in possession of "illicit" cannabis, the prosecutor will have to prove not only that the cannabis was illicit, but that the accused knew that it was. A more detailed overview of the *Cannabis Act* is contained in Chapter 10, Cannabis Act Offences.

1 *R v White*, [2011] 1 SCR 433.

2 RSC 1985, c C-46.

3 SC 1996, c 19.

4 SC 2018, c 16, s 8(1).

A. Nature of the Substance

Pursuant to section 45(2) of the CDSA, the nature of the substance can be proven by way of a Certificate of Analyst, setting out the results of the analysis performed. A sample Certificate of Analyst can be found at Appendix 5.1. Pursuant to section 51(1) of the CDSA, a Certificate of Analyst is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements set out in the certificate.

Section 51(2) of the CDSA provides that the defence may, with leave of the court, require the attendance of the analyst for the purpose of cross-examination. Leave will not be granted without the defence providing some articulable reason for the request. If cross-examination were allowed routinely, the evidentiary shortcut sanctioned by Parliament would be rendered largely nugatory.[5] Given the fact that Health Canada receives approximately 120,000 drug samples for analysis each year, there is a good reason not to require the analyst to testify in every drug case.[6]

Service of the Certificate of Analyst is no longer a prerequisite to admissibility. However, the Certificate of Analyst clearly falls under the Crown's disclosure obligation, and failure to provide it to the defence in a timely way may give rise to remedies such as an adjournment or the inability to rely on the certificate at trial.

Often, at the time an accused is charged, the police are mistaken about the nature of the substance seized. It may be a different drug from the one alleged in the information, or it may not be a drug at all. If it is a different drug, the prosecutor will seek to amend the information or indictment to reflect the results of the analysis. Provided that it is done in a timely manner, this should not be controversial. If defence counsel have a basis for believing that the substance seized may not be a drug at all, they can request that the prosecutor demand a rush analysis. This can be particularly important if the accused is in custody. A rush analysis can mean the difference between an accused remaining in custody and potentially walking free.

While a Certificate of Analyst is by far the best way to prove that the accused was in possession of a controlled substance, it is not mandatory. The nature of the substance can also be proved through circumstantial evidence, such as statements made by the accused, or the opinion of an experienced police officer.[7] Some drugs, such as cannabis, may be more easily recognizable than others. It is not advisable, however, for a prosecutor to proceed on the basis of circumstantial evidence alone because such evidence may give rise to a reasonable doubt about the nature of the substance. The best practice for a prosecutor is to always ensure that a Certificate of Analyst is disclosed and filed as an exhibit.

5 *R v Conacher*, 2004 SKPC 12 at para 14.

6 *R v Koumoutsidis*, 2017 BCSC 2129 at para 38.

7 *R v Shepherd*, 2014 BCSC 2313 at paras 36-49.

B. Continuity

To establish continuity, the prosecutor simply needs to lead evidence to show that the substance seized is the same as the substance tested. Proof of continuity is not a legal requirement. The prosecutor need not prove beyond a reasonable doubt every detail of the location and handling of the seized drug exhibits, without gaps, from the time of seizure to the time of deposit for analysis. Gaps in continuity are not fatal to the prosecutor's case unless they raise a reasonable doubt about the exhibit's integrity.[8]

Pursuant to section 53(1) of the CDSA, proof of continuity can take the form of an affidavit or solemn declaration of the person claiming to have had the item in his or her possession. An example of a continuity affidavit can be found at Appendix 5.2. As with analysts who provide a Certificate of Analyst, the court may require the affiant to appear to be cross-examined on the issue of continuity.[9]

III. Documentary Evidence

In the course of a drug trial, documentary evidence, particularly regarding the testing of the relevant drug, forms an important part of the Crown's case. Traditional common law rules created a strict procedure for the admissibility of documentary evidence. Over time, however, statutory provisions have been enacted to codify and simplify the common law rules. The CDSA statutorily permits the introduction of various forms of documentary evidence at sections 49 through 54. The Act sets out the type of documentary evidence that is admissible and the terms required for its admission. Additionally, the *Canada Evidence Act* (CEA)[10] has codified evidentiary rules in relation to documentary evidence.

In the context of a drug case, the most common documentary evidence is the certificate of the analyst who tests the substance seized and believed to be a drug. Sections 44 and 45 of the CDSA address who can be designated a drug analyst and permit the analyst to prepare a certificate or report of the drug examined. Sections 51 and 52 of the CDSA allow the admission of the certificate or report. Although earlier versions of the CDSA contained a statutory notice requirement, the current language of the Act does not. However, because of the Crown's common law disclosure obligations, the accused will still receive notice in the form of disclosure when the Crown intends to rely on this type of documentary evidence.

Another common form of documentary evidence relied on in drug cases is a continuity affidavit. Section 53 of the CDSA permits the Crown to establish the continuity of any exhibit tendered at trial by way of affidavit evidence. This provision creates a

8 *Ibid* at paras 23-25.

9 CDSA, s 53(2).

10 RSC, 1985, c C-5.

shortcut and eliminates the need for the Crown to call at the trial every witness who took possession of the exhibit in order to establish continuity. As with all affidavit evidence, the defence always has the ability to cross-examine the affiant to establish issues related to continuity.

IV. Expert Evidence

A. General Principles

Where a party intends to lead expert testimony, section 657.3(3) of the *Criminal Code* requires that notice be provided to the opposing party. Such notice must include the following information: the name of the expert, a description of the expert's expertise and qualifications, and a report or summary of the expert's proposed evidence. This provision enhances trial fairness and ensures that neither the Crown nor the defence is taken by surprise by the admissibility of the evidence. When a party fails to comply with the requirements of this provision, the most common remedy will be an adjournment. This provision does not permit the trial judge to deem the evidence inadmissible.[11]

Expert opinion evidence is presumptively inadmissible, and a two-stage analysis governs its admission at trial. At the first stage, the party attempting to introduce the evidence is required to establish the following threshold requirements of admissibility:

1. that the evidence is logically relevant,
2. that the evidence is necessary to assist the trier of fact,
3. that the evidence is not barred by an exclusionary rule, and
4. that the witness is a properly qualified expert.

At the second stage—the gatekeeper stage—the trial judge must weigh the probative value of the evidence against the potential prejudice to determine whether, on balance, the value of the evidence outweighs the potential harm.[12]

Relevance refers to the extent to which the evidence tends to logically prove a fact in issue; that is, whether the evidence is needed to advance the fact-finding process. A properly qualified expert is a witness who has acquired specialized or peculiar knowledge through study or experience in respect of the matter on which he or she proposes to testify. The reliability of the witness's opinion is a matter that may affect the trial judge's evaluation of the necessity criterion as well as the balancing at the gatekeeping stage of the inquiry. Doherty J explained in *R v Abbey*, "Reliability concerns reach not only the subject matter of the evidence, but also the methodology used by the proposed

11 *R v Horan*, 2008 ONCA 589 at para 29.

12 *R v Bingley*, 2017 SCC 12 at paras 13-17; *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23; *R v Sekhon*, [2014] 1 SCR 272; *R v D (D)*, [2000] 2 SCR 275; *R v Mohan*, [1994] 2 SCR 9; *R v Abbey*, 2009 ONCA 624.

expert in arriving at his or her opinion, the expert's expertise and the extent to which the expert is shown to be impartial and objective."[13]

With respect to drug prosecutions specifically, it is common that police officers with extensive experience in drug investigations be qualified as experts to provide general information regarding drug practices such as importing schemes, trafficking practices, and quantities of drugs. Such expert opinion evidence is generally admissible;[14] however, it is important for counsel to ensure that the expert has the appropriate experience and that the testimony does not stray outside of his or her particular expertise.[15] While there is no absolute bar on an expert providing opinion on the ultimate issue—for example, "I believe that drugs were possessed for the purpose of trafficking"—the closer the opinion gets to the ultimate issue the greater the risk that the evidence will be deemed inadmissible.[16] In this regard, it is preferable for police experts to opine on the general practice of the drug trade and not segue into providing personal anecdotal opinions on the ultimate issue, the accused's credibility, or the defence.[17]

It is also essential that these police experts remain impartial. Simply because the expert is a police officer does not mean that he or she is unable to provide an unbiased and independent opinion. However, where a police expert is not at arms length from the parties involved, or has some connection to the case, that officer will likely not be seen as being sufficiently impartial and could be disqualified for bias.[18]

B. Anecdotal Expert Evidence: R v Sekhon

The Supreme Court of Canada dealt with the admissibility of anecdotal opinion evidence in *R v Sekhon*, an importing case. Cocaine was seized inside a hidden compartment of a pickup truck that the accused attempted to drive from the United States into

13 *Mohan*, *supra* note 12 at para 27; *Abbey*, *supra* note 12 at para 87.

14 See e.g. *R v Potts*, 2018 ONCA 294 at paras 44, 48; *Lecompte v R*, 2018 NBCA 33; *R v Dominic*, 2016 ABCA 114; and *R v Robertson*, 2017 BCSC 965, where, although the expert evidence was generally admissible, the court edited the content of the expert report to avoid evidence that was unduly prejudicial.

15 For example, in *R v Vassel*, 2018 ONCA 721 at paras 95-101, the Ontario Court of Appeal held that the witness was not properly qualified to provide expert opinion evidence on whether a drug dealer would have more than one phone and whether a particular phone was used for the sale of drugs. Likewise, in *R v Holburn*, 2018 ONSC 2209, the court refused to allow an officer to provide expert opinion evidence on the issue of whether the possession of fentanyl and oxycodone were for the purpose of trafficking. The court held that the officer did not have adequate expertise and that the evidence was not sufficiently probative. See also *R v Mulaj*, 2014 ONSC 4405, where the officer was only qualified as an expert in part because his exposure to drug cases was outdated.

16 *Potts*, *supra* note 14; *R v Lucas*, 2014 ONCA 561.

17 *R v Singh*, 2014 ONCA 791; *R v Jacobs*, 2014 ABCA 172.

18 *R v McManus*, 2017 ONCA 188; *White Burgess*, *supra* note 12.

Canada. The defence's position was that the accused was a blind courier—he did not have knowledge of the drugs concealed in the truck. As part of the Crown's case, the Crown qualified a police sergeant as an expert witness. There was no question that the sergeant had extensive expertise and training in drug investigations. He provided background evidence about cocaine importation schemes, common practices related to drug couriers, etc. None of this expert opinion evidence was controversial. However, he also provided the following anecdotal opinion evidence regarding his lack of experience with blind drug couriers:

> Q: Officer, you described earlier that you've been involved in approximately 1,000 investigations involving the importation of cocaine over your 33-year career?
> A: That is correct, Your Honour, yes.
> Q: In approximately how many of those investigations were you able to determine that the person importing the cocaine did not know about the commodity that they were importing?
> A: I have never encountered it, personally.
> Q: Have you ever heard of a—the use of a blind courier or a courier who doesn't know about the commodity that he is driving?
> A: I—I've certainly heard that argument being raised on—on occasion, primarily in court, not during my investigations.[19]

The Supreme Court of Canada condemned the admission of this type of anecdotal evidence, finding that the testimony had no probative value and did not meet the *Mohan* criteria of necessity or relevance. While anecdotal evidence of this type has a "superficial attractiveness," because of its lack of relevance and probative value it does not assist with the trier of fact's task and is highly prejudicial to the accused.[20] A similar result was reached by the Ontario Court of Appeal recently in *R v Burnett*.[21]

19 *Sekhon*, *supra* note 12 at para 20.

20 *Ibid* at paras 49-50.

21 2018 ONCA 790 at paras 52-80; See also *R v Rhooms*, 2016 ONCA 738, where the Ontario Court of Appeal agreed that the expert ought not to have provided anecdotal evidence on the issue of the accused's duress defence, but refused to order a new trial on the basis that the trial judge provided a remedial instruction to the jury. Similarly, in *R v Tennant*, 2018 ONCA 264, the court agreed that the expert provided inadmissible anecdotal evidence in relation to whether the quantity of heroin possessed by the accused was indicative of trafficking. In *R v Pico*, 2016 ONSC 1470, the court held that an expert's testimony that he had never encountered a crystal meth user with a "stash," that there was no such thing as a "casual" crystal meth user, and that heavy crystal meth users could not retain employment was inadmissible.

V. Character and Propensity Evidence

A. General Principles About Character Evidence and Admissibility

It is trite law that evidence of bad character is presumptively inadmissible. While the courts acknowledge that people generally act in a manner consistent with their character, there is considerable danger in relying on an accused's bad character or disposition in determining whether he or she is guilty of the offence charged.[22] An accused cannot be convicted simply on the basis of being the type of person who would have committed the offence, or that having done it before, the accused must therefore have done it again. Although there is a superficial attractiveness to this type of reasoning, it is highly prejudicial. However, where evidence of bad character is relevant to a particular issue in the case, or where a piece of evidence has a dual purpose, bad character evidence may nonetheless be admitted. In such circumstances, a limiting instruction may be required to minimize the prejudice associated with the admission of the bad character evidence and to ensure that the jury understands the permitted purpose of the evidence.

Furthermore, bad character becomes admissible if the accused puts his or her character at issue—for example, by claiming to be a person of good character. This can be done in three ways: (1) by adducing evidence as to his or her reputation, either by cross-examining a witness called by the Crown or by eliciting evidence during examination-in-chief from a defence witness; (2) by personally testifying as to specific acts of good character; or (3) by calling expert opinion evidence as to disposition. Obviously, accused persons are not in a position to speak about their own reputation in the community. This makes good sense, since the views that people hold about themselves are often more favourable than the views of them espoused by the community. Nonetheless, accused persons put their character in issue when they testify as to specific acts of good character. In *R v McNamara (No 1)* the court held:

> Mr. Robinette also argued that character means general reputation and that the accused can only put his character in issue by adducing evidence of general reputation. With respect, we do not agree. The common law rule was that evidence of good character could only be given by evidence of reputation, and could only be rebutted by evidence of reputation and not by specific acts of bad conduct: *R. v. Rowton* (1865), Le & Ca. 520, E.R. 1497. That rule was, however, established at a time when the accused could not himself give evidence. *A long series of cases in England (two of which were cited with approval in Morris v. The Queen …) have held that an accused may put his character in issue by testifying as to his good character.* The word "character" in the *Criminal Evidence Act, 1898* has uniformly been held to mean not only reputation, but actual moral disposition: *Cross on Evidence*, 4th ed. (1974), p. 426; *Phipson on Evidence*, 12th ed. (1976), p. 218. It is true that

22 *R v Handy*, 2002 SCC 56, [2002] 2 SCR 908.

> when the accused wishes to adduce extrinsic evidence of good character by calling witnesses, such evidence is confined to evidence of general reputation, but that has no application where the accused himself gives the evidence.[23]

An accused can lead good character evidence in a variety of ways. Evidence that the accused has earned an honest living for a number of years, received professional awards, or has returned lost property to owners on multiple occasions, are all examples of specific acts of good character that can be led. Importantly, the Supreme Court recognized in *Morris v The Queen*[24] that an accused leads evidence of good character by testifying, for example, that he or she has never been arrested and projects the image of a law-abiding citizen.

Evidence of character affects the probability that the accused committed the offence charged. With respect to good character, there are two uses a trier of fact can make of the accused's good character. First, good character evidence may make it less likely that the accused committed the offence; that is, it may independently raise a reasonable doubt. Second, good character evidence is a factor that the trier of fact can use in the assessment of the credibility and the reliability of the accused's testimony. The Supreme Court of Canada in *R v Charlebois*[25] held that where evidence of good character is adduced, a good character instruction ought to follow.

However, leading good character evidence can be extremely risky. Counsel must take care to ensure that the accused is truly of good character before attempting to lead this evidence in court. Where the accused has criminal convictions—even those related to drug dealing—the Crown will surely seek and will likely be permitted to cross-examine the accused on those issues to present a balanced picture to the jury. Further, once the door to challenge the accused's character has been opened, other evidence of bad character may be led at trial, including prior occurrence reports, reputation, etc.

B. R v Corbett and Cross-Examination on Criminal Record

Section 12 of the CEA allows for the cross-examination of witnesses on their criminal record. However, in order to ensure trial fairness, the trial judge has the discretion to exclude evidence of the accused's prior convictions where the prejudicial effect outweighs the probative value of the prior convictions. In making this determination the trial judge may consider factors including:

23 1981 CanLII 3120 at para 326 (Ont CA) (emphasis added).

24 [1979] 1 SCR 405. See also *R v Bricker*, 1994 CanLII 630 at para 18 (Ont CA); *R v Dwyer*, 2017 ONCA 238.

25 2000 SCC 53, [2000] 2 SCR 674 at paras 29-30. See also *R v Tarrant*, 1981 CanLII 1635 (Ont CA); *R v Logiacco*, 1984 CanLII 3459 (Ont CA).

- the temporal proximity of the previous convictions to the present charge;
- the nature of the previous convictions (convictions for offences that relate directly to the accused's credit or integrity generally ought to be admitted; however, convictions for offences similar in nature to the offence before the court generally ought to be excluded because of their prejudicial nature);
- the fairness to the prosecution of excluding the charges;
- the seriousness of the prior convictions; and
- the length of the criminal record.[26]

The courts have held that prior drug convictions have no probative value regarding credibility, and they present a significant risk of prejudice if admitted in a trial involving drug-related allegations. However, they may become admissible depending on how the defence chooses to run its case. In some possession cases, the defence may argue that the police officers planted the drugs. In others, it may argue that the drugs belonged to a third party. Where the defence attacks the character of a Crown witness or leads a third-party suspect defence on the basis of character and propensity, the balancing will favour the admission of the accused's criminal convictions. However, there is a difference between an attack on character and an attack on the credibility of Crown witnesses, which may incidentally address character but is limited to meeting the allegations.[27] In *R v Brown* the Ontario Court of Appeal ordered a new trial after the trial judge admitted prior drug convictions because the defence alleged that the police planted drugs:

> While the cross-examination attacked both the reliability and the honesty of the police officers, it did so on the basis of matters which were directly connected with the offence and which were raised in an attempt by the defence to meet the prosecution's evidence. This is unlike Corbett where the attack on the credibility of the Crown witnesses was based on their character, especially as disclosed in the criminal record, rather than arising out of events surrounding the offence. This distinction is elucidated in *R. v. Batte* (2000), 145 C.C.C. (3d) 498 at p. 515 (Ont. C.A.).[28]

In this regard, defence counsel must consider whether their defence focuses on the honesty and reliability of the Crown or other defence witnesses or the credibility of those witnesses. If the defence attacks a third party or Crown witness on the basis

26 *R v Corbett*, [1988] 1 SCR 670.

27 *R v Brand*, 1995 CanLII 1540 at para 8 (Ont CA); *R v Brown*, 2002 CanLII 41937, [2002] OJ No 2562 (QL) at paras 20-28 (Ont CA); *R v Wilson*, 2006 CanLII 20840 (Ont CA), [2006] OJ No 2478 (QL) at paras 30-36 (CA); *R v WB*, 2000 CanLII 5750, [2000] OJ No 2186 (QL) at paras 34-51 (CA); *R v NAP*, 2002 CanLII 22359, [2002] OJ No 4829 (QL) at paras 17-29 (CA); *R v McFayden*, [2002] OJ No 190 (QL) (CA).

28 *Brown*, *supra* note 27 at para 24.

of character, it will open up the accused to cross-examination on his or her criminal record.[29]

C. Third-Party Suspects

Unlike the character of an accused person, the character of a third-party suspect is generally admissible. As long as the evidence is relevant and there is a sufficient nexus between the third party and the offence, evidence of a third-party suspect's bad character can be adduced by the defence. In this sense, evidence of a third-party suspect's disposition or propensity to commit a certain criminal act is admissible for the purpose of proving that the third party, rather than the accused, committed the offence charged. In the case of third-party suspects, the normal concerns about bad character evidence resulting in wrongful convictions are not applicable. The evidence only implicates a third party.[30] Where a third-party suspect defence is led, it is important for the trial judge to properly instruct the jury on the use that can be made of the evidence, including (1) an explanation of the legal principles relating to motive, propensity, and after-the-fact conduct of a third-party suspect; (2) a summary of the applicable evidence; and (3) guidance to the jury on how to apply the burden of proof to third-party suspect issues.

There is debate as to whether the defence is required to provide the Crown with notice before advancing a third-party suspect defence. Where the accused leads a defence of alibi—that is, that he or she was not in the location of the crime at the time of the offence—formal notice to the Crown is required. Notice is an issue of fairness; it provides the Crown with an opportunity to investigate the alibi. If no notice is provided, the Crown is deprived of this opportunity and is unable to attempt to challenge the alibi. In circumstances where no notice is given, the trier of fact will be permitted to draw an adverse inference against the alibi evidence. However, there is no requirement in law to provide advance notice to the Crown of a third-party suspect defence.[31]

Advancing a third-party suspect defence is distinct from demonstrating gaps in the Crown's case. For example, in the context of a possession case where drugs are located in a house with multiple residents, the defence may argue that the Crown has failed to meet its burden in establishing the case beyond a reasonable doubt—for example, where there are other reasonable inferences as to whom the guilty party may be. In some cases, the accused may personally know who the owner of the drugs is, or may wish to suggest a third party on the basis of that person's involvement with the drugs

29 *R v Crevier*, 2015 ONCA 619.

30 *R v MacMillan*, [1977] 2 SCR 824, [1977] SCJ No 32; *Regina v Scopelliti*, [1981] OJ No 3157 (QL) at para 33 (CA); *R v Dorfer*, [2011] 3 SCR 366; *R v Arcangioli*, [1994] 1 SCR 129 at paras 26-31; *R v Murphy*, 2012 ONCA 573 at para 21; *R v Grandinetti*, 2005 SCC 5 at paras 46-48; *R v Tehrankari*, 2012 ONCA 718 at para 35-58; *R v Tomlinson*, 2014 ONCA 158 at paras 70-78.

31 *R v Bermudez*, 2017 ONSC 7370, at paras 41-44; *Murphy*, *supra* note 30 at paras 43-44.

and propensity. The important distinction between the two approaches is that one will trigger the relevance of the accused's propensity while the other will not.

Additionally, as a practice tip, where an accused intends to call the third party as part of the defence case, it is important that the witness be properly subpoenaed to avoid self-incrimination and the use of his or her testimony in future criminal proceedings.[32]

VI. Circumstantial Evidence

Circumstantial evidence is important in almost all drug trials. In some areas, such as importing, much of the Crown's case may be proven by direct evidence—that is, that the accused was in possession of the drug and crossed the border. In other cases, such as possession cases where drugs are found in a house where multiple people live or have access to the drugs, the trier of fact must infer based on the circumstances whether an offence has been committed. Where the Crown's case is based on circumstantial evidence, the rule in *Hodge's Case*[33] applies and requires that the accused be convicted only where guilt is the only reasonable inference in the circumstances. The Supreme Court in *R v Villaroman*,[34] recently discussed the burden of proof in the context of a circumstantial case and stated that the trier of fact must negative "other plausible theories." This means that where, on the evidence, there is a reasonable basis to conclude that the accused was not involved in the offence, an acquittal will follow. That said, the trier of fact must not consider speculative or unreasonable possibilities.[35] In assessing whether the Crown has met its burden, the trier of fact must consider the entirety of the evidence as a whole, and not assess the evidence in a piecemeal fashion. It is an error of law to subject individual pieces of evidence to the standard of proof beyond a reasonable doubt, and to fail to consider the cumulative effect of the evidence as a whole.[36]

VII. Hearsay and Co-Conspirator Exception to the Hearsay Rule

A. General Principles

Hearsay statements are out-of-court statements adduced to prove the truth of their contents with an absence of contemporaneous opportunity for cross-examination. These statements are presumptively inadmissible. The rationale for the presumptive

32 *R v Nedelcu*, [2012] 3 SCR 311; *R v Henry*, [2005] 3 SCR 609; *R v Jabarianha*, [2001] 3 SCR 430, [2001] SCJ No 72 (QL).

33 (1838), 168 ER 1135.

34 2016 SCC 33 at para 37.

35 *Ibid*.

36 *R v Knezevic*, 2016 ONCA 914 at paras 30-34; *R v JMH*, 2011 SCC 45 at para 31.

inadmissibility of hearsay statements is the general inability to test their reliability. Unlike in-court testimony, a hearsay statement may not be given under oath and there is no ability to test the declarant's perception, memory, narration, and sincerity.[37]

However, hearsay evidence is admissible where it falls under one of the traditional exceptions or when the statement contains sufficient indicia of necessity and reliability pursuant to the principled approach. The onus is on the proponent of the hearsay to establish the criteria for admissibility on a balance of probabilities.[38]

The Supreme Court of Canada has outlined four steps in the determination of hearsay issues as follows:

1. Hearsay evidence is presumptively admissible, without the need for a *voir dire* if it falls into a traditional hearsay exception. This is because the traditional exceptions are inherently reliable.
2. A hearing may be held to determine whether a hearsay exception complies with the principled approach.
3. In some rare cases, it may be possible, in light of the particular circumstances of the case, that a statement that falls within a traditional exception may not meet the principled approach. In such circumstances, the evidence would be excluded. The onus rests on the party alleging that hearsay that falls within a traditional exception should nonetheless be excluded.
4. If the evidence does not fall within a traditional exception, it may still be admitted on a *voir dire* if the court is of the view that it meets the requirements of necessity and reliability.[39]

The traditional exceptions to the hearsay rule are statements that, over time, the courts have deemed sufficiently reliable to overcome the dangers of the declarant's unavailability. The traditional exceptions include: dying declarations, declarations against pecuniary or proprietary interest, declarations against penal interest, and declarations of mental and emotional state. While admissibility will ultimately depend on the specific circumstances of each case, four situations occur commonly in drug trials that affect the admissibility of hearsay evidence: (1) admissions by the accused, (2) drug purchase calls, (3) narrative, and (4) declarations in furtherance of a common design. These situations are discussed below.

The principled approach looks at two factors—whether the hearsay statement is necessary and whether it is reliable. The necessity criterion relates to the availability of the evidence. Where a declarant is dead, too ill to testify, or not within the jurisdiction

37 *R v Khelawon*, 2006 SCC 57 at paras 2, 39; *R v Bradshaw*, 2017 SCC 35 at paras 1, 19-22.

38 *Khelawon*, *supra* note 37 at para 47; *R v Blackman*, [2008] 2 SCR 298 at para 33; *R v Couture*, [2007] 2 SCR 517 at para 78.

39 *R v Mapara*, [2005] 1 SCR 358 at para 15; *Khelawon*, *supra* note 37 at para 42.

of the court, necessity will clearly be established. Further, in assessing whether the necessity criterion is met, the court will consider whether evidence of equivalent value that did not amount to hearsay could be admitted instead of the hearsay statement.

With respect to reliability, it is important to keep in mind the distinction between threshold and ultimate reliability. Threshold reliability is about admissibility. It deals with whether the statement "is sufficiently reliable to overcome the dangers arising from the difficulty of testing it." When assessing threshold reliability, the trial judge must identify the specific hearsay dangers presented by the statement and consider any means of overcoming them. The dangers relate to the difficulties of assessing the declarant's perception, memory, narration, or sincerity, and should be defined with precision to permit a realistic evaluation of whether they have been overcome. Threshold reliability can be established in two ways: first, by demonstrating procedural reliability—there are sufficient substitutes for testing the truth and accuracy of the statement. Second, by demonstrating substantive reliability—there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy. Importantly, procedural reliability and substantive reliability are not mutually exclusive and may work in tandem.[40]

Ultimate reliability, on the other hand, deals with reliance. The decision as to ultimate reliability rests with the trier of fact and deals with whether and to what degree the statement ought to be relied on to decide the issues in the case.[41]

While the inquiry into threshold reliability cannot be abandoned, it must be remembered that the trial judge may permit the relaxation of the standard of admissibility of hearsay evidence tendered by the defence in order to avoid a miscarriage of justice.[42]

B. Exception for Admissions by the Accused

Unlike many of the traditional exceptions to the hearsay rule—which are admitted because the circumstances under which they were made provide sufficient reliability of the statement—admissions made by the accused are admissible in court for the truth of their contents as part of the adversarial process.[43] That said, admissions by the accused will also meet the twin criteria of necessity and reliability. They are necessary because the accused cannot be compelled to testify as part of the Crown's case, and they are reliable because they are against the accused's interest.[44] However, where the admission by the accused is made to a "person in authority"—for example, a police officer or border services agent—the admission will only be admissible if the Crown

40 *Bradshaw*, *supra* note 37 at para 26-32; *Khelawon*, *supra* note 37 at para 49.

41 *Bradshaw*, *supra* note 37 at para 39; *Khelawon*, *supra* note 37 at para 3.

42 *R v Post*, 2007 BCCA 123, 46 CR (6th) 344 at paras 85-90; *R v Kimberley* (2001), 56 OR (3d) 18, 45 CR (5th) 273 at para 80 (CA); *R v Luke*, 1993 CanLII 14665, 85 CCC (3d) 163 at paras 39-40 (Ont CA).

43 *R v Evans*, [1993] 3 SCR 653.

44 *R v Conolloy* (2001), 226 Nfld & PEIR 87, 176 CCC (3d) 292 (Nfld CA).

has proved that the admission was voluntary beyond a reasonable doubt. Relatedly, the admissibility of admissions made while the accused is in state custody may be challenged by the defence if the accused's rights under sections 10(a) and (b) of the *Canadian Charter of Rights and Freedoms*[45] have not been complied with. These Charter issues related to the admissibility of the accused statements are addressed in Chapter 4, Charter Issues in Drug Cases.

Out-of-court statements that support the accused's innocence—meaning those that are not admissions—are generally inadmissible; however, there are some exceptions. A prior consistent statement will be admissible in the following situations: (1) where it constitutes part of the narrative, (2) to rebut an allegation of recent fabrication, (3) where the statement is relevant to the accused's state of mind, or (4) where the statement is made at the time of the arrest on being confronted with the allegation. Generally, in order for these scenarios to arise, the accused will be required to testify. For instance, for the Crown to allege that the accused's version has recently been fabricated, the accused's evidence must already be before the court. Similarly, where the accused seeks to rely on a statement made contemporaneous to arrest to show immediate denial or shock in the face of the allegations, the legal test requires that the accused testify as part of his or her defence.[46]

C. Drug Purchase Calls

In *R v Baldree*,[47] the Supreme Court addressed the issue of whether drug purchase calls intercepted by police amounted to hearsay evidence. Drug purchase calls are calls from buyers trying to purchase drugs from a trafficker. In *Baldree*, after the police had arrested the accused and taken him to the police station his phone started ringing. The police answered. At trial, the officer described the content of the call as follows:

> A. A male voice on the other end of the, of the phone advised that he was at 327 Guy Street and that he was a friend of Megan and asked for Chris. Knowing that there were two Chris[es] that I had just arrested, I asked, "Chris who?" the male advised, "Baldree" and requested one ounce of weed. I then stated that I was now running the, the show here and that Mr. Baldree was not here and I was gonna take his … .
>
> THE COURT: All right, sorry, asked for Chris.
>
> A. Yes, I'm sorry Your Honour.
>
> THE COURT: Yes.
>
> A. And I questioned him, I asked him, "Chris who?" and he answered, "Baldree."

45 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

46 *R v Edgar*, 2010 ONCA 529.

47 2013 SCC 35.

> THE COURT: Yes.
>
> A. He asked for one ounce of weed. I then asked him how much Chris charges him, he says he pays $150. I then advised him I would deliver same, 327 Guy, and that was the end of the conversation.[48]

While not going so far as to categorically exclude this type of evidence from admission, Fish J for the majority held that testimony from a police officer regarding an intercepted drug purchase call amounted to hearsay.[49] In *Baldree*, necessity was not established because the police failed to make reasonable efforts to secure the witness to testify.[50] Furthermore, the statement lacked reliability, as there was no basis to say the declarant's belief was reliable without testing the basis of that belief by way of cross-examination.[51]

Since the court refused to create a categorical exception to the hearsay rule for drug purchase calls, whether a particular intercepted drug purchase call will offend the hearsay rule will always depend on the circumstances in which it is made. Generally, where there is a single drug purchase call and no efforts are made to contact the caller, the content of the drug purchase call will be inadmissible.[52] On the other hand where there were multiple calls, and particularly from different callers, the courts have held that necessity and reliability were established.[53] This makes good sense: as the number of calls increases, the likelihood of an alternate explanation diminishes.

The same approach has also been expanded to the admissibility of drug purchase text messages.[54] This is not surprising given the reliability of drug purchase text messages will generally be greater than a phone call because there will be an accurate record of the message as opposed to relying on the recollection or notes of the police officer. Nonetheless, the key consideration remains the reliability behind the meaning of the words. In this regard, the number of text messages is the critical factor.

48 *Ibid* at para 14.

49 *Ibid* at paras 37, 70.

50 *Ibid* at para 68.

51 *Ibid* at para 69.

52 *R v Callihoo*, 2015 ABQB 191 at para 13. However, where efforts are made to contact the seller, the necessity criteria may be established and the content of the drug purchase call may be admissible. See *R v Giroux*, 2013 BCPC 275 at paras 22-24.

53 *R v Galbraith*, 2018 BCPC 192 at paras 17-18; *R v Trosky*, 2015 BCSC 1419, [2015] BCJ No 1735 (QL) at paras 25-27; *R v Malcolm-Evans*, 2016 ONCA 28 at para 7; *R v Batista*, 2015 BCSC 1088 at paras 25-26; *R v Omar*, 2018 ONCA 787 at paras 17-19.

54 *R v Gerrior*, 2014 NSCA 76 at paras 52-55; *R v Bridgman*, 2017 ONCA 940 at paras 55-63; *R v Belyk*, 2014 SKCA 24.

D. Narrative

The definition of hearsay evidence centres on the use to be made of the out-of-court statement—that is, for the truth of its contents. Where a party wishes to rely on a statement made by an out-of-court declarant for a purpose other than for its truth, the statement is not presumptively inadmissible. This often arises in the context of narrative. It is commonplace that a party may wish to lead narrative evidence at a drug trial to assist the trier of fact understand the circumstances surrounding the offence. While there is nothing improper with leading hearsay for the purpose of narrative, it is important in jury trials to ensure that the jury understands the use that can and cannot be made of this evidence. Where hearsay narrative evidence is led, the jury ought to be clearly told that the evidence cannot be relied on for its truth.

E. Co-Conspirator's Exception to the Hearsay Rule

The co-conspirator's exception is a traditional exception to the hearsay rule that was dealt with by the Supreme Court in *R v Carter*.[55] This exception often arises in drug cases where the Crown alleges that the offence took place as part of a conspiracy or larger common design. The nuances of the co-conspirator's exception are discussed in Chapter 11, which deals with conspiracy and the offences of criminal organizations.

VIII. Vetrovec

The evidence of a single witness is sufficient to support a conviction for any crime other than treason, perjury, or procuring a feigned marriage. However, in certain cases involving "unsavoury witnesses," it is unacceptable to find an accused guilty on the basis of the unsupported evidence of those witnesses. The term "unsavoury witness" encompasses all those who, because of their amoral character, criminal lifestyle, past dishonesty, or interest in the outcome, cannot be trusted to tell the truth, in spite of an oath or affirmation. Our legal system has a long history of experience with such individuals and the miscarriages of justice they often leave in their wake.[56]

In the context of a jury instruction, a trial judge is required to provide a "clear and sharp warning to attract the attention of the jurors to the risk of adopting, without more, the evidence of the witness."[57] This instruction generally consists of the following four components:

1. a focusing of the jury's attention on the testimony requiring special scrutiny;
2. an explanation of the reason why this evidence is subject to such scrutiny;

55 [1982] 1 SCR 938.

56 *R v Khela*, [2009] 1 SCR 104.

57 *Vetrovec v The Queen*, [1982] 1 SCR 811 at 831.

3. a caution that it is dangerous to convict on unsupported evidence of this sort, accompanied by an acknowledgement that the jury can do so if it is satisfied of the truth of the evidence; and
4. an exhortation to the jury that, in scrutinizing the suspect testimony, it look for independent evidence tending to show that the unsavoury witness is telling the truth as to the guilt of the accused.

While in a judge-alone trial the trial judge is presumed to know the law, the principles underlying the jury instruction, in particular the need to scrutinize the testimony by looking for independent corroboration, ought to nonetheless form part of the trial judge's analysis.[58]

Regarding the fourth component, not all evidence presented at trial is capable of confirming the evidence of a suspect witness. Two primary qualities define the kinds of evidence that can provide comfort to the trier of fact that the witness is telling the truth: materiality and independence. With respect to the attribute of independence, it is imperative that the evidence emanate from a source *other* than the impugned witness. Where evidence is "tainted" by connection to the impugned witness, it is not capable of confirming his or her testimony. In the absence of collusion or collaboration, the evidence of one unsavoury witness can confirm the testimony of another.[59]

No particular category of witness necessarily demands a "*Vetrovec*" approach. In deciding whether this approach to a witness's evidence is required, the court should have regard to the witness's credibility and his or her importance to the Crown's case. The following passage from M Rosenberg, "Developments in the Law of Evidence: The 1992-93 Term" (1994) 5 SCLR (2nd) 421, is instructive and was cited with approval in *Khela*:

> The judge should first in an objective way determine whether there is a reason to suspect the credibility of the witness according to the traditional means by which such determinations are made. This would include a review of the evidence to determine whether there are factors which have properly led the courts to be wary of accepting a witness's evidence. Factors might include involvement of criminal activities, a motive to lie by reason of connection to the crime or to the authorities, unexplained delay in coming forward with the story, providing different accounts on other occasions, lies told under oath, and similar considerations. It is not then whether the trial judge personally finds the witness trustworthy but whether there are factors which experience teaches that the witness's story be approached with caution. Second, the trial judge must assess the importance of the witness to the Crown's case. If the witness plays a relatively minor role in the proof of guilt it is probably unnecessary to burden the jury with a special caution and then review

58 *R v Sauvé,* 2004 CanLII 9054, 182 CCC (3d) 321 at paras 76, 82 (Ont CA); *R v Kehler*, [2004] 1 SCR 328 at paras 17-22; *Khela*, *supra* note 56 at paras 5, 37.

59 *Khela*, *ibid* at paras 38, 39, 52-54; *R v Pelletier*, 2012 ONCA 566 at paras 67-69.

> the confirmatory evidence. *However, the more important the witness the greater the duty on the judge to give the caution.* At some point, as where the witness plays a central role in the proof of guilt, the warning is mandatory. This, in my view, flows from the duty imposed on the trial judge in criminal cases to review the evidence and relate the evidence to the issues.[60]

It will often be a tactical decision whether or not defence counsel seeks a *Vetrovec* warning. Generally, the warning comes with a recitation of all of the potentially confirmatory evidence; this can be helpful to the Crown's case because it sets out clearly for the jury the evidence that assists them in proving the offence, and it may act to rehabilitate and reinforce the credibility and reliability of an unsavoury witness. Depending on the strength of the corroborative evidence, defence counsel may prefer not to seek the *Vetrovec* caution and instead rely on cross-examination and submissions to support that the evidence of the unsavoury witness ought not to be given weight.[61]

60 *Khela*, *supra* note 56 at paras 6, 35 (emphasis added).

61 *R v Rafferty*, 2016 ONCA 816 at paras 25-32; *R v Smith*, 2018 SKCA 42 at paras 52-63*; R v Brooks,* 2000 SCC 11, [2000] 1 SCR 237 at para 17.

Appendix 5.1 Sample Certificate of Analyst

Health Canada - Drug Analysis Service
2301 Midland Avenue
Toronto Ontario M1P 4R7

Santé Canada - Service d'analyse des drogues
2301, avenue Midland
Toronto Ontario M1P 4R7

Certificate of Analyst

Certificat d'analyste

Jane Doe

being a person on the staff of the Department of Health duly designated as an Analyst under the Controlled Drugs and Substances Act, and also duly designated as an Analyst under the Food and Drugs Act, do hereby certify:

faisant partie du personnel du ministère de la Santé, étant dûment nommé analyste en vertu de la Loi réglementant certaines drogues et autres substances, et dûment nommé analyste en vertu de la Loi sur les aliments et drogues, atteste par les présentes:

1. That at the Health Canada laboratory in Toronto
in the province of Ontario
on the 5th day of July 2012
there was delivered by Depository box
from **Toronto Police Service**

a sealed and unopened package which bore the following identification marks, initials or numbers:
ABC12345
ABCDE1234

1. Que, à Toronto dans la province d'Ontario
le 5e jour de juillet 2012
il a été livré au laboratoire de Santé Canada par boîte de dépôt
par **Toronto Police Service**

un paquet scellé et non ouvert qui portait l'estampille, les initiales ou les nombres suivants:
ABC12345
ABCDE1234

2. That I did take possession of the sealed and unopened package on the 21st day of August 2012.
3. That I did open the said package and did remove therefrom a sample for analysis.
4. That I duly analysed and examined the said sample

and I found it to contain a controlled substance within the meaning of the Controlled Drugs and Substances Act, to wit:

2. Que j'ai pris possession du paquet scellé et non ouvert le 21e jour d'août 2012.
3. Que j'ai ouvert ledit paquet et y ai enlevé un échantillon pour analyse.
4. Que j'ai dûment analysé et examiné ledit échantillon

et que j'ai constaté qu'il contenait une substance désignée aux termes de la Loi réglementant certaines drogues et autres substances, à savoir:

Cocaine (benzoylmethylecgonine)
Cocaïne (ester méthylique de la benzoylecgonine)

5. That this certificate is true to the best of my knowledge and skill.
Dated at Toronto, Ontario
This 24th day of August 2012

5. Que le présent certificat est fidèle au mieux de mes connaissances et de ma compétence.
Fait à Toronto, Ontario
en ce 24e jour d'août 2012

revision: DAS-SAD 08-2012a

Analyst - Department of Health / Analyste - Ministère de la Santé

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Appendix 5.2 Sample Continuity Affidavit

ONTARIO COURT OF JUSTICE
(Central East Region)

B E T W E E N :

HER MAJESTY THE QUEEN

- and -

ANTHONY BROWN
THOMAS WHITE
ELIZABETH BLUE

AFFIDAVIT OF JOHN BLACK
Re: Continuity of Possession, Pursuant to S.53(1) C.D.S.A.

I, John Black, of the City of Burnaby, in the Province of British Columbia MAKE OATH AND SAY:

1. I am a Peace Officer, employed by the Royal Canadian Mounted Police, currently stationed at the Forensic Identification Section, Vancouver, British Columbia. Between May 28, 2017 and October 2, 2017, I was assisting with an investigation dubbed "Project Mischief" in Bowmanville, Ontario. As such I have knowledge of the matters to which I hereinafter depose.

2. That as a Police Officer acting in execution of my duties, I participated in the continuity of possession of items which were seized as a result of this investigation.

3. At approximately 9:30 a.m. on July 23. 2017, I received an exhibit bag, number 012345C from my colleague Corporal Sheila Green. The exhibit bag contained a pink powder substance. Shortly after receiving the substance I began to process the exhibit.

Appendix 5.2 Concluded

4. I took four (4) samples of the substance and placed each sample into Health Canada envelopes numbered: H 1169223, H 1169224, H 1169225, H 1169226. I also received two Ziploc bags from Corporal Green which contained a kleenex with powder residue and the other bag contained a pink powder residue. The latter two items were placed in Health Canada envelopes H 1169227 and H1169228 respectively. I sealed each envelope and marked my initials on the flap of each the envelope.

5. At 10:34 a.m. I placed the sealed exhibit envelopes into a temporary locker to which no one else had access.

6. At 11:41 a.m. on the same day I removed the exhibits from the temporary locker and observed that the sealed exhibit envelopes were in the same condition as at 10:34 a.m. I personally delivered the sealed exhibit envelopes to Health Canada at 12:15 p.m. I kept the sealed exhibit envelopes in my personal possession until I made delivery to Health Canada.

SWORN before me at)
the City of ……., in the)
Province of …….)
this …. day of May, 2018)

_____
John Black

_____
Commissioner for the taking of Affidavits