CHAPTER ONE

GENERAL PRINCIPLES

I. THE NATURE OF THE TRIAL PROCESS

The Canadian trial process under the common law is known as the adversary system, and it has a thousand-year history of development and refinement in the common law of England. The theory of the adversary system is that if one pits two equal champions in a process of examination and cross-examination of witnesses who have information about a fact in issue, the truth will probably emerge. What is important to the discovery of truth is what takes place only in the courtroom—at the actual trial itself.

Under the adversary system, the investigation of a crime is entirely in the hands of the police. It is the police who decide what charges are laid against an accused, and it is the lawyers for the Crown who present the evidence against the accused in a courtroom. The judges (and the jury) play no role in the investigation. They are expected to be impartial as well as independent. They are not supposed to know anything about the case against an accused until they hear the evidence for the first time in the courtroom. Every step is taken to ensure that there is no hint of influence in favour of the Crown or the accused.

The adversary system must be contrasted with the inquisitorial justice system: the method of trial in most countries in Europe, which has also been introduced in countries that came under their colonial rule. Under the inquisitorial system, judges play a pivotal role from the very beginning of the investigative process, long before the trial begins. The investigation of a crime is usually conducted by the police, but in a serious case, a judge—called an examining magistrate, or the French "juge d'instruction"—will often be instructed by the state to take over the investigation of a crime. The examining magistrate will question witnesses and prepare a brief or dossier for the trial court. Under the inquisitorial system, the trial judges are expected to read the brief prepared by the examining magistrate and know everything about the evidence to be presented against the accused before the trial begins.

In Canada, Crown prosecutors in a criminal trial are required to make full and complete disclosure to the defence of all the evidence gathered by the police, both for and against the accused.[1] The defence has no reciprocal obligation to reveal its defence, subject to a few exceptions, such as alibi evidence.[2] The defence need not reveal anything until all the Crown's evidence has been presented to the judge and jury and tested by the defence. Moreover, the obligation of the defence to reveal its position will not arise unless the Crown has presented sufficient evidence on every essential element of proof to the extent that a judge or jury, fully instructed and acting rationally, could convict the accused. The accused has no obligation to say anything at any time, and neither the judge nor the jury are entitled to draw an adverse inference from the accused's silence. The accused has the right to remain silent until the very end of the trial and say to the Crown, "You prove your case against me." It is only when the Crown has passed the threshold of presenting sufficient evidence on all elements of the charge so that a jury properly instructed could convict the accused that the defence is required to reveal its position.[3]

To prove its case, the Crown must establish three things. The first is that the crime charged against the accused was committed—what is called the "*actus reus*." The second is that it was the accused who committed the crime—that is, the identity of the perpetrator. The third and final thing that must be established is that the accused intended to commit the crime, in the sense that it was a deliberate act or, in some cases, a result of their recklessness or gross negligence. This is what is called the "*mens rea*." However, intention should not be confused with motive. Why a person commits a crime is not something that concerns the court, although it may be relevant as a matter of circumstantial evidence to prove one of the three issues. There are also certain crimes where intention is not a relevant issue; sometimes the accused may not even have been aware that they were committing the crime. These are called "strict liability" offences and are not necessary to this discussion.

Proof of a fact in issue may be made by way of either direct evidence or circumstantial evidence. Direct evidence is evidence that directly proves a fact in issue. For example, if the issue is whether A walked across the street, evidence given by B that they saw A walk across the street is direct evidence. Circumstantial evidence, on the other hand, is evidence of surrounding circumstances from which an inference may be drawn by the judge or jury that a fact in issue has been established. For example, B may not have seen A walk across the street. But they may have observed A on one side of the street one minute and then on the other side a minute later. In such instance, testimony by B of that observation is circumstantial evidence from which an inference may be drawn by the judge or jury that A must have walked across the street. Circumstantial evidence allows the trier of fact to draw the inference that a fact occurred, provided that the inference is a reasonable one and not inconsistent with any other rational conclusion.

II. TEST OF RELEVANCY

In a criminal trial, neither the Crown nor the defence is entitled to introduce, as of right, every piece of evidence in their possession that may or may not be relevant to the case. Evidence is admissible only if it is relevant to prove one of the three issues in the case: the act, the identity, or the intent. If the trial judge decides that the evidence is relevant and should

1 *Stinchcombe*, [1991] 3 SCR 326, 1991 CanLII 45.

2 *Cleghorn*, [1995] 3 SCR 175, 1995 CanLII 63.

3 *Chaulk*, [1990] 3 SCR 1303, 1990 CanLII 34: "[T]he Crown must tender, as part of its case, evidence that will establish the existence of *all* elements of the offence with which the accused is charged" (emphasis in original).

not be excluded because it runs afoul of a specific exclusionary rule, or if a balancing of its probative value against its prejudicial effect does not warrant its exclusion, then the judge will admit it. It then becomes the responsibility of the trier of fact (whether the judge or the jury) to decide what importance or weight should be attached to the evidence.

What is relevant will be decided by logic and human experience. As Pratte J explained in *Cloutier*:[4]

> For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.[5]

Moreover, the relevance of any piece of evidence must be determined only in relation to the issues that the prosecution must establish. If the evidence is logically probative of one of the three issues that the Crown must prove, then it is said to be relevant and admissible so long as it is not contrary to one of the exclusionary rules of evidence that will be discussed in the next two sections. No minimum probative value is required for evidence to be deemed relevant. In *Corbett*,[6] La Forest J described the rule this way:

> All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy. Questions of relevancy and exclusion are, of course, matters for the trial judge, but over the years many specific exclusionary rules have been developed for the guidance of the trial judge, so much so that the law of evidence may superficially appear to consist simply of a series of exceptions to the rules of admissibility, with exceptions to the exceptions, and their subexceptions.[7]

Although evidence must be logically probative of one of the three issues to be relevant and admissible, there is no requirement that it must go directly to the proof of one of those issues. As Doherty J pointed out in *P(R)*:[8]

> Evidence may, however, be relevant even though it does not go directly to the proof of a material fact, or even alone provide the basis for an inference that the material fact exists. Evidence may be relevant by its combination with other evidence adduced in the case. Such is the essence of circumstantial evidence.[9]

This means that where evidence offered by one side is circumstantial in nature, the trial judge, in deciding whether the evidence is relevant and admissible, is required to examine that evidence in light of all the factual issues that are raised and the respective position taken by the Crown and the defence in the case.[10] Generally, relevance will depend on the ultimate issue in the case—the act, identity, or intent, or a combination of any or all of the three. However, evidence need not be directly relevant to one of those issues. It may be admissible if it is relevant to another fact that is relevant to one of those issues.

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4 [1979] 2 SCR 709, 1979 CanLII 25.

5 *Ibid* at 731, referring to Sir Rupert Cross, *Cross On Evidence*, 4th ed (London: Butterworths, 1974) at 16.

6 [1988] 1 SCR 670, 1988 CanLII 80.

7 *Ibid* at para 99.

8 (1990), 58 CCC (3d) 334 (Ont H Ct).

9 *Ibid* at 339-40.

10 *Sims*, 1994 CanLII 1298, (1994) 87 CCC (3d) 402 at 420-27 (BCCA).

Thus, the relevance of any piece of evidence requires a determination by the trial judge of whether, as a matter of human experience and logic, the existence of fact A makes the existence of fact B more or less probable than it would be without the existence of fact A. If it does, then A is relevant to B. So long as B is itself a material fact in issue or is relevant to a material fact in issue in the case, then A is relevant and *prima facie* admissible.[11]

Unfortunately, when it comes to circumstantial evidence, even the courts often have difficulty deciding what is relevant to a fact in issue. Whether evidence is considered relevant will often depend on the facts and the view of the judge hearing the case. For example, in *Cloutier*,[12] the accused was charged with importing marijuana. Marijuana had been found concealed in a dresser imported into Canada and stored at the home of the accused's mother on the accused's instructions. At trial, the judge had refused to admit certain items found by the police during a search of the accused's home. These items included a glass jar containing a green substance analyzed as marijuana, certificates of analysis of a cigarette butt made of marijuana, and traces of marijuana found on scales and pipes in the premises. The Supreme Court, in a majority decision, held that the trial judge was correct in his ruling. They said that the fact the accused used marijuana did not create a logical inference that he knew or ought to have known that the dresser contained a narcotic at the time it was imported. All it showed was that a user of a narcotic was more likely to import the substance illegally than a non-user. Nor could the evidence be used to prove motive, since it did not "disclose a sufficiently close logical connection between the facts that are to be proven as a motive and the crime committed."[13]

The minority came to the opposite conclusion. They concluded that since guilty intent cannot be established by direct evidence in such cases, it is "necessary to admit in evidence every bit of circumstantial evidence."[14] As far as they were concerned, there was a clear connection between the fact that the accused was a user of a prohibited narcotic and the presence of that narcotic concealed in the dresser. So long as there was some connection, even though it was not conclusive, the evidence had to be admitted for what it was worth. It was up to the trier to decide what weight should be attached to the evidence. If the accused was a marijuana user, then his motive in importing it was obvious.

A little over four years later, the Supreme Court came to the opposite conclusion on similar facts in a majority decision. In *Morris*,[15] the accused and several others were charged with conspiracy to import and traffic in heroin from Hong Kong. The Crown's case was based on surveillance and wiretap evidence. When the accused was arrested, a newspaper article headed, "The Heroin Trade Moves to Pakistan," which had been written two years prior to the offence, was found in the accused's apartment. This time the majority held that an inference could be drawn from the presence of the newspaper article in the accused's apartment that he had informed himself of the sources of supply of heroin, a subject of vital interest to an importer of heroin. It raised the inference that the accused had taken preparatory steps to import heroin or had contemplated it, even though the article referred to the heroin trade in Pakistan and not Hong Kong. The minority, relying on *Cloutier*, held that the sole relevancy of the evidence was to show that it was more likely that persons who are traffickers keep such information than people who are not. Since the newspaper

11 *Morris*, [1983] 2 SCR 190, 1983 CanLII 28; *R v Watson*, 1996 CanLII 4008, 30 OR (3d) 161 (CA). Expert evidence, however, also has a cost-benefit analysis to determine whether its value is worth what it costs in terms of its impact on the trial process: *Mohan*, [1994] 2 SCR 9, 1994 CanLII 80.

12 *Supra* note 4.

13 *Ibid* at 735, Pratte J.

14 *Ibid* at 746, Pigeon J.

15 *Supra* note 11.

article went only to the disposition of the accused to commit the offence, it should not have been admitted by the trial judge.

A subsequent decision of the Supreme Court in *Lepage*[16] demonstrates that relevancy often depends on the facts and the view of the judge hearing the case. *Lepage* was charged with possession of LSD for the purposes of trafficking. A plastic bag containing the drug was seized from the common area of the home that he shared with two others. One of the co-residents was allowed to testify that the drugs were not his and that *Lepage* was a drug trafficker, although he could not identify a relationship between *Lepage* and the specific drugs in issue. Sopinka J, for the majority of the Court, held that the evidence was admissible because it was relevant to show possession, "which is a key issue." He stated:

> In the circumstances of this case, there were three people living in the house and it was clear that the drugs belonged to one of the three. Surely, it is relevant to the issue of possession to have one of the three testify that the drugs were not his and, furthermore, indicate that the respondent is in the business and, therefore, it was more likely that he was the owner of the drugs.[17]

Major J, however, dissented, holding that the evidence was only evidence of propensity and nothing more. It did not provide any evidence that actually connected the accused to the drugs.

Let us assume that an accused is seen crouching down in an empty field, 30 to 40 feet off the highway. The accused then gets up and gets into their car parked on the side of the road and drives away. The area where the accused was observed is searched and a bag containing nine pounds of marijuana is found. The accused is later arrested by the police, who search the accused's car and find a small amount of cocaine and a large amount of cash. The accused is charged with possession for the purposes of trafficking of the nine pounds of marijuana found in the field. Is the evidence of the finding of cocaine in the accused's car admissible on the charge of possession of marijuana for the purposes of trafficking? The accused's defence is that it was mere coincidence that the marijuana was in the place where they had been observed.

That very issue faced the Manitoba Court of Appeal in *Caslake*.[18] Here again, the Court was divided. Lyons JA held that such evidence was admissible. As far as he was concerned, the evidence went beyond mere propensity because it largely discredited the defence's position that the accused's presence at the location of the cache of marijuana was only a coincidence and that he was a mere victim of circumstances. The other two members of the Court, however, disagreed. Helper JA, who delivered the majority judgment, felt that the evidence of the possession of cocaine was not probative of any element on the charge of possession of the marijuana for the purposes of trafficking since it had no relevance beyond mere propensity.

III. HABIT OR DISPOSITION

The common law prohibits the prosecution leading evidence in chief that the accused is a person of bad character or one who is in the habit of committing criminal acts in order to prove that they committed the particular offence charged.[19] The prohibition is not

16 [1995] 1 SCR 654, 1995 CanLII 123.

17 *Ibid* at para 36.

18 1995 CanLII 6263, 107 Man R (2d) 24 (CA), aff'd [1998] 1 SCR 51, 1998 CanLII 838.

19 *Makin v Attorney General for New South Wales*, [1894] AC 57, [1891-94] All ER Rep 24 (NSW PC) at 65 (AC); *Koufis*, [1941] SCR 481 at 487, 1941 CanLII 55.

based on irrelevance. The disposition of the accused to engage in certain kinds of conduct may be very relevant to the facts in issue. However, evidence of an accused's disposition is excluded because of its potential prejudicial effect. The common law has consistently reaffirmed that the overall fairness of the criminal trial process requires an accused to stand trial for what is specifically alleged in the indictment, not for what they may have done in the past. Propensity reasoning alone has been excluded because of the concern that it may impair the proper functioning of the criminal justice system.

Martin JA expressed the rule this way in *Scopelliti*:[20]

> The law prohibits the prosecution from introducing evidence for the purpose of showing that the accused is a person who by reason of his criminal character (disposition) is likely to have committed the crime charged, on policy grounds, not because of lack of relevance.[21]

Although evidence of an accused's disposition is generally excluded—not because of lack of relevance but because of its prejudicial effect—evidence of habit may sometimes be relevant and therefore admissible because it is a reliable predictor of conduct. For example, in *Watson*,[22] the accused (charged with murder) and two associates, H and C, visited the deceased at his place of business, which consisted of a small office and a large warehouse area behind. The deceased was shot dead by H in a confrontation at the back of the warehouse while Watson remained in the front office. C was also shot in the chest. At least two of the bullets that hit the deceased came from a different gun than the one used to shoot C. In support of its theory that the deceased was killed during a spontaneous gun battle between H and the deceased, and that the deceased's death was not planned by H, C, and Watson, the defence sought to call a witness who had given a statement to the police that the deceased was in the habit of carrying a gun. The purpose was to show that since the deceased always carried a gun, it was less likely that Watson was a party to a plan to kill or harm him. The trial judge, however, refused to allow the defence to call that evidence because there was no evidence that the deceased had a gun on the day in question, or that he fired a gun if he had one. The Court of Appeal held that the trial judge had erred. Doherty JA explained:

> The fact that a person is in the habit of doing a certain thing in a given situation suggests that on a specific occasion in which those circumstances arose the person acted in accordance with established practice. It makes the conclusion that the person acted in a particular way more likely than it would be without the evidence of habit. Evidence of habit is therefore properly viewed as circumstantial evidence that a person acted in a certain way on the occasion in issue.
>
> Evidence of habit is closely akin to, but not identical to, evidence of disposition. Evidence of habit involves an inference of conduct on a given occasion based on an established pattern of past conduct. It is an inference of conduct from conduct. Evidence of disposition involves an inference of the existence of a state of mind (disposition) from a person's conduct on one or more previous occasions and a further inference of conduct on the specific occasion based on the existence of that state of mind. Evidence of habit proceeds on the basis that repeated conduct in a given situation is a reliable predictor of conduct in that situation. Evidence of disposition is premised on the belief that a person's disposition is a reliable predictor of conduct in a given situation.[23]

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20 1981 CanLII 1787, 63 CCC (2d) 481 (Ont CA).

21 *Ibid* at 493 (CCC).

22 *Watson*, *supra* note 11.

23 *Ibid* at 325 (CCC).

Doherty JA reasoned that the evidence that the deceased always carried a gun was therefore relevant to the question whether he had a gun when he was shot. The availability of the inference from the deceased's possession of the gun to the use of it required a consideration of the rest of the evidence, which revealed that there were only two possibilities. Either C was shot by the deceased or H fired two different guns, hitting the deceased with one and C with the other. The jury, having concluded that the deceased was armed, could have inferred that C was not shot by his friend H, but by the deceased who was the target of H's assault.

Had the jury inferred that the deceased was armed and fired a weapon, those inferences could logically have influenced their conclusion as to the origins of the shooting. If the deceased was unarmed, the circumstances strongly suggested a preconceived plan to shoot the deceased. If the deceased was armed and used his weapon, then the possibility that the shooting was as a result of a spontaneous competition between H and the deceased, both of whom were armed, became a viable theory. Evidence supporting the inference that the deceased was armed and used a weapon during the confrontation made the defence position as to Watson's non-involvement in any plan to kill or do harm to the deceased more viable than it would have been if that inference was not available.

Although the Crown is not entitled to call evidence of the accused's disposition to prove its case, evidence of the accused's disposition may also be relevant where the defence blames a third party or a co-accused for the offence. For example, in *McMillan*,[24] the accused, who was charged with the murder of his infant son, denied hurting the child. The trial judge had permitted the defence to call psychiatric evidence to the effect that the accused's wife had a psychopathic personality disturbance with brain damage, that she was immature and impulsive, and that she had poor appreciation of the difference between right and wrong, in order to show that it was more likely that she had committed the offence. It was held that evidence of the wife's disposition was relevant because it went to the probability of the accused doing or not doing the act charged. At the same time, the door was opened to permit the Crown to call, *in reply*, evidence of the accused's disposition for violence.

Evidence of the victim's disposition has also been permitted where the defence raised is self-defence. For example, in *Scopelliti*,[25] the defence was that the accused killed the two deceased in self-defence when they attempted to rob him. The trial judge permitted the defence to lead evidence of previous acts of violence by the deceased, even though at the time of the killing the accused was not aware of those acts. Martin JA held that, although evidence of a person's disposition is not generally admissible, it was relevant and admissible in the circumstances to support the accused's version of the events. Again, evidence presented by the defence of the victim's disposition for violence opened the door for the Crown to call, *in reply*, evidence of the accused's disposition for violence.

In all these cases, evidence of the disposition of a third party was permitted where it was relevant to the defence raised. The Crown was not entitled to lead evidence of the accused's disposition as part of its case in chief, even though such evidence may have been relevant to the facts in issue. Policy considerations prevented the Crown from leading, in chief, evidence of the accused's disposition for violence until the issue of disposition was raised as part of the accused's defence. However, once the defence raised the disposition for violence of a third party, this opened the door for the Crown to lead disposition evidence regarding the accused.

Although an accused's propensity toward certain conduct is generally not admissible, there may be occasions where propensity reasoning will be admitted because it

24 1975 CanLII 43, 7 OR (2d) 750 (CA), aff'd [1977] 2 SCR 824, 1977 CanLII 19.

25 *Supra* note 20.

is critical to the proper functioning of the criminal trial process. For example, in *Batte*,[26] Doherty JA explained:

> The criminal law's resistance to propensity reasoning is not, however, absolute. There will be situations in which the probative force of propensity reasoning is so strong that it overcomes the potential prejudice and cannot be ignored if the truth of the allegation is to be determined. The probative force of propensity reasoning reaches that level where the evidence, if accepted, suggests a very strong disposition to do the very act alleged in the indictment. For example, if an accused is charged with assaulting his wife, evidence that the accused beat his wife on a regular basis throughout their long marriage would be admissible. Evidence of prior beatings does much more than suggest that the accused is a bad person or that the accused has a general disposition to act violently and commit assaults. The evidence suggests a strong disposition to do the very act in issue—assault his wife. In such cases, the jury is permitted to reason, assuming it accepts the evidence of prior assaults, that the accused was disposed to act violently towards his wife and that he had that disposition on the occasion in issue. The existence of the disposition is a piece of circumstantial evidence that may be considered in deciding whether the accused committed the alleged assault.[27]

Marital violence, as in the *Batte* case, usually involves issues of credibility. The defence to an allegation by a wife that she was assaulted by her husband will often be a denial that it happened. If the Crown seeks to lead evidence of previous assaults to support the wife's evidence that she was assaulted on the date in question, the issue becomes one of who is telling the truth. Evidence of previous acts of violence by the accused against his wife, if admitted, will undoubtedly be persuasive as to whether he did assault her on the occasion in question. However, the Supreme Court in *Handy*[28] warned trial judges to take care not to open the door too wide to admit propensity evidence. Since credibility is an issue that pervades most trials, accepting such evidence may amount to a decision on guilt or innocence. Similar fact evidence should not be used simply to bolster the credibility of the complainant.

IV. JUDICIAL DISCRETION TO EXCLUDE EVIDENCE

The general rule at common law was that, apart from confessions, the court was not concerned with how evidence was obtained. So long as the evidence was relevant to a fact in issue, it was admissible. It was not until *Wray*[29] in 1970 that the Supreme Court grudgingly recognized a limited judicial discretion to exclude evidence that was otherwise admissible. However, in that case the Court stressed that judicial discretion to exclude evidence existed only where that evidence had little probative value and was so gravely or highly prejudicial to the accused that it would prevent a fair trial.

Following *Wray*, Canadian courts struggled over the extent of a judge's discretion to exclude evidence otherwise admissible. Even the Supreme Court was divided on the issue. That division was summed up by La Forest J in *Potvin*:[30]

> As my colleague notes, some have interpreted Martland J's dictum [in *Wray*] as limiting the discretion solely to situations where the evidence is highly prejudicial to the accused and

26 2000 CanLII 5751, 49 OR (3d) 321 (CA).

27 *Ibid* at para 102.

28 2002 SCC 56 (CanLII). See also *K(CP)*, 2002 CanLII 23599, 62 OR (3d) 487 (CA).

29 [1971] SCR 272, 1970 CanLII 2.

30 [1989] 1 SCR 525, 68 CR (3d) 193.

> is of only modest probative value. I do not accept this restrictive approach to the discretion. ... [U]nder English law, a judge in a criminal trial always has a discretion to exclude evidence if, in the judge's opinion, its prejudicial effect substantially outweighs its probative value. ... [T]he discretion is grounded in the judge's duty to ensure a fair trial.[31]

Today, the restricted *Wray* formula has been overtaken by the formula expressed by La Forest J in *Potvin*. In *Seaboyer*,[32] the Supreme Court said that "admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission."[33] Moreover, when it comes to evidence offered by the defence, the courts have said that the discretion of a trial judge to exclude relevant evidence should be exercised only where the prejudice *substantially* outweighs the probative value.[34]

There are some instances where the right to exclude evidence that is highly prejudicial has been specifically recognized by the Supreme Court. One is where the Crown is seeking to introduce evidence under s 715(1) of the *Criminal Code*.[35] Section 715 provides that the Crown *may* read in at trial evidence given by a witness at the previous trial of the accused on the same charge, or in the investigation of the charge against the accused, or on the preliminary inquiry into the charge, where the witness refuses to be sworn or to give evidence, or is dead, insane, too ill to travel or testify, or absent from Canada. The rationale underlying s 715 is necessity—that is, the fact that the witness is unavailable to testify. At one time, the rule was that the judge had no discretion to refuse to admit the evidence where the conditions set out in s 715(1) had been met, even though the section said that the evidence *may* be admitted. However, in *Potvin*,[36] the Supreme Court decided that the word "may" does confer on the trial judge the discretion not to allow the previous testimony to be admitted in circumstances that would operate unfairly to the accused. An example of the exercise of that discretion would occur where the accused satisfies the judge that they did not have full opportunity to cross-examine the witness. In *Potvin*, Wilson J explained how that discretion should be exercised by trial judges:

> In my view there are two main types of mischief at which the discretion [to refuse to admit evidence under s 715] might be aimed. First, the discretion could be aimed at situations in which there has been unfairness in the manner in which the evidence was obtained. ... An example of unfairness in obtaining the testimony might be a case in which, although the witness was temporarily absent from Canada, the Crown could have obtained the witness's attendance at trial with a minimal degree of effort. Another example might be a case in which the Crown was aware at the time when the evidence was initially taken that the witness would not be available to testify at the trial but did not inform the accused of the fact so that he could make best use of the opportunity to cross-examine the witness at the earlier proceeding. ... A different concern at which the discretion might have been aimed is the effect of the admission of the previously-taken evidence on the fairness of the trial itself. This concern flows from the principle of the law of evidence that evidence may be excluded if it is highly prejudicial to the accused and of only modest probative value.[37]

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31 *Ibid* at 243 (CR).

32 [1991] 2 SCR 577, 7 CR (4th) 117.

33 *Ibid* at 139 (CR), quoting *Sweitzer*, [1982] 1 SCR 949, 1982 CanLII 23.

34 *Seaboyer*, *supra* note 32 at 611-12 (CR); *Watson*, *supra* note 11; *Clarke*, 1998 CanLII 14604 at para 33, 112 OAC 233.

35 RSC 1985, c C-6 [the Code].

36 *Supra* note 30.

37 *Ibid* at 237-38 (CR).

The Ontario Court of Appeal has said that it is not sufficient for the Crown to simply show that a witness is not compellable because they are out of the jurisdiction to satisfy the necessity requirement. Section 715 evidence is hearsay and requires the judge to undertake a necessity and reliability analysis before it should be admitted. This means that efforts should be made to pursue other options for presenting the evidence, such as teleconferencing or taking commission evidence, before one reaches the conclusion that admitting evidence by way of a hearsay statement is necessary.[38] The Court noted that the addition to the Code in 1999 of ss 714.2 and 714.4 requires the trial judge to consider the possibility of taking live evidence by using audio or video technology.[39] As Feldman JA put it, "It seems to me that when s. 715(1)(d) is read together with ss. 714.2 and 714.4, it is incumbent on a trial judge to include, as a consideration before making the order, the possibility of taking the evidence in a live manner via audio or video technology."[40]

Another instance where the Supreme Court has held that there is a discretion to exclude evidence that may be probative, but also gravely prejudicial, is where the Crown seeks to cross-examine the accused under s 12 of the *Canada Evidence Act*[41] on their criminal record. Section 12 permits the accused or a witness to be asked whether they have been convicted of any offence and, if they deny having convictions or refuse to answer the question, allows the criminal record of the accused or witness to be proved. In *Corbett*,[42] the Supreme Court held that the trial judge has a limited discretion to prevent cross-examination of an accused on their previous criminal record where it might unduly prejudice, mislead, or confuse the trier of fact.

Thus, there is an obligation on a trial judge to determine whether to exclude evidence that is otherwise admissible. This obligation requires an assessment of the value of the evidence, the strength of the inferences, its reliability, and whether admitting the evidence would be fair to the witnesses for the Crown and the defence. Crown evidence that impairs the ability of an accused to make full answer and defence will be more readily excluded, whereas defence evidence may be excluded as a matter of discretion "only where the prejudice *substantially* outweighs the probative value."[43]

V. CONSTITUTIONAL REQUIREMENT TO EXCLUDE EVIDENCE

The *Canadian Charter of Rights and Freedoms*[44] has substantially broadened the court's powers to exclude evidence where a right or freedom guaranteed by the Charter has been denied or infringed. Section 24 provides:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

38 *Li*, 2012 ONCA 291; *Finta*, 1992 CanLII 2783, 92 DLR (4th) 1 (Ont CA), aff'd on other grounds, [1994] 1 SCR 701, 1994 CanLII 129; *Orpin*, 2002 CanLII 23600, 165 CCC (3d) 56 (Ont CA); *O'Connor*, 2002 CanLII 3540, 62 OR (3d) 263 (CA).

39 *Li*, *supra* note 38 at para 56.

40 *Ibid*.

41 RSC 1985, c C-5.

42 *Supra* note 6.

43 *Seaboyer*, *supra* note 32 at 611-12.

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

> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence *shall* be excluded if it is established that, *having regard to all the circumstances*, the admission of it in the proceedings would bring the administration of justice into disrepute [emphasis added].

It is important to note at the outset that s 24(2) is concerned not only with the fairness of an accused's trial but also with the method by which the evidence was obtained by the prosecution. For example, in *Manninen*,[45] the accused told a police officer that he did not want to say anything until he had seen his lawyer. However, the officer continued to question the accused and obtained an incriminating answer that the trial judge relied on in convicting him. It was held that the officer's conduct was a deliberate and flagrant disregard of the accused's right to counsel as guaranteed by s 10(b) of the Charter. His conviction was quashed and a new trial ordered.

Section 24(2), however, does not say that every breach of the Charter will result in the exclusion of evidence obtained by that breach. It is only where it is established by the accused that "having regard to all the circumstances, the admission of it in the proceedings would ['susceptible' under the French version, meaning 'could'] bring the administration of justice into disrepute."

In 1987, *Collins*,[46] the first in a series of decisions by the Supreme Court interpreting s 24, decided that a trial judge should consider three factors in determining whether the administration of justice would (could) be brought into disrepute. The first is whether the admission of the evidence would affect the fairness of the trial. The Court drew a distinction between pre-existing evidence, such as a murder weapon, and evidence that was obtained purely as the result of a Charter violation, such as a coerced confession. It said that a Charter violation relating to pre-existing evidence was not as serious as one where the evidence was obtained after a violation of the Charter. The use of evidence obtained after a violation of the Charter, such as a person's confession, struck at one of the fundamental tenets of a fair trial—the right against self-incrimination. Where the evidence existed prior to the Charter violation, then the more serious the offence, the less likely the evidence will be excluded, since that would bring the administration of justice into disrepute. On the other hand, where the evidence was obtained as a result of a Charter violation, the more serious the offence, the more damaging an unfair trial would be to the system's repute; in such a case, the evidence should be excluded.

The second factor that a trial judge is required to consider is the seriousness of the violation. Was the violation committed in good faith? Was it inadvertent or of a merely technical nature? Was it motivated by urgency or to prevent the loss of evidence? Could the evidence have been obtained without a Charter violation?

The last factor is the effect that excluding the evidence would have on the administration of justice. Here, the focus again is on the fairness of the trial. Evidence is not automatically admissible—even where the breach is trivial, the charge serious, and the evidence essential to substantiate the charge—if it would result in an unfair trial.

Although *Collins* required judges to consider all three factors, the Supreme Court in 1992 began to focus its attention on the first factor: trial fairness. In *Elshaw*[47] and *Broyles*,[48] the Court said that where the tainted evidence affects the fairness of the trial, the second factor—good faith on the part of the police—could not reduce the seriousness of

45 [1987] 1 SCR 1233, 1987 CanLII 67.

46 [1987] 1 SCR 265, 1987 CanLII 84.

47 [1991] 3 SCR 24, 1991 CanLII 28.

48 [1991] 3 SCR 595, 1991 CanLII 15.

the violation. The test for the admissibility of self-incriminating evidence under s 24(2) is more stringent than the test for real evidence because the breach of the right against self-incrimination is directly related to a Charter violation and affects the presumption of innocence of an accused, as well as their right to not testify.

In 1995, the Supreme Court again dealt with the admissibility of self-incriminating evidence obtained through a violation of the s 10(b) right to counsel. In *Burlingham*,[49] the accused, who was charged with first-degree murder, had been repeatedly questioned by the police intensively and manipulatively, even though he indicated that he wished to consult with his lawyer. The police had also denigrated the integrity of his counsel. Burlingham ultimately accepted a deal to plead guilty to second-degree murder in exchange for a full confession and assisting the police with locating the murder site and the murder weapon. Although the accused complied with his end of the agreement, the deal fell through because Burlingham misunderstood that he had to plead guilty to second-degree murder. The Crown then tried him for first-degree murder and he was convicted.

At trial, the judge had refused to admit the evidence of Burlingham's confession, the disclosure of the location of the weapon and his directions and gestures to the police. He did, however, admit the finding of the gun and the testimony of the accused's girlfriend regarding statements he had made to her. Burlingham appealed his conviction to the Supreme Court, arguing that the judge had erred in admitting the evidence of the finding of the gun, and his conviction was set aside. Adopting the "but for" approach to derivative evidence, the Court held that such evidence should not have been admitted by the trial judge because it brought the administration of justice into disrepute. "But for" the unconstitutional behaviour of the police, the derivative evidence of the gun would not have been found.

L'Heureux-Dubé J expressed concern that the broad interpretation of the term "trial fairness" in the *Collins* test resulted in virtually automatic exclusion of evidence whenever there is a finding of trial unfairness. This approach is inconsistent with a court's obligation under s 24(2) to determine whether the evidence should be excluded "having regard to all of the circumstances." To do so would allow "trial fairness ... to wag the section 24(2) dog."[50] The only evidence she felt could result in an unfair trial was evidence that was not reliable by reason of some connection with state action amounting to a Charter breach.

In 1997, the Supreme Court in *Stillman*[51] finally clarified the direction it had been taking since its seminal interpretation in *Collins*. The Court said that the distinction between real and testimonial evidence was no longer relevant in a s 24(2) remedy analysis. Evidence must instead be classified as "conscriptive" or "non-conscriptive," depending on how the evidence was obtained. Evidence is "conscriptive" when an accused, in violation of their Charter rights, was compelled to incriminate themself at the behest of the state by means of a statement, the use of the body, or the production of bodily samples. "Non-conscriptive" evidence is evidence whose creation or discovery the accused was not compelled to participate in because it existed independently of the Charter breach in a form usable by the state.

If the evidence is non-conscriptive, its admission does not render the trial unfair and courts should proceed to consider the two other tests in *Collins*—the seriousness of the breach and the effect that exclusion would have on the repute of the justice system. If the evidence is conscriptive, then the Crown has to establish on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means. If the Crown fails to establish this, then admission would render the trial unfair. In such instance, it is not necessary to consider the remaining tests, since an unfair trial would automatically

49 [1995] 2 SCR 206, 1995 CanLII 88.

50 *Ibid* at para 89.

51 [1997] 1 SCR 607, 1997 CanLII 384.

bring the administration of justice into disrepute. However, if the Crown demonstrates on balance that the conscriptive evidence would have been discovered by alternative means, its admission will generally not render the trial unfair. In such instance, the trial judge should consider the second and third tests—the seriousness of the breach and the effect that exclusion would have on the repute of the justice system.

Complaints by provincial appellate courts began to surface that the Supreme Court had developed a rule of automatic or near automatic exclusion, and the Court was called on to revisit the issue.[52] In *Grant*,[53] the Supreme Court acknowledged that existing jurisprudence on the exclusion of evidence was difficult to apply and could lead to unsatisfactory results. It accepted that criteria relevant to determining when, in "all the circumstances," admission of evidence obtained by a Charter breach "would bring the administration of justice into disrepute" had to be clarified. It noted that the purpose of s 24(2) is to maintain the good repute of the administration of justice. It also noted that viewed broadly, the term "administration of justice" embraces maintaining the rule of law and upholding Charter rights in the justice system as a whole.

Bringing the administration of justice into disrepute must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. When exclusion of evidence results in an acquittal, the result may provoke immediate criticism. But s 24(2) does not focus on the immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective and asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

Moreover, the focus of s 24(2) should be not only long term, but also prospective. The fact of the Charter breach means that damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system. Its focus is also societal. It is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns.

The Supreme Court said that when faced with an application for exclusion under s 24(2), a court is required to assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to (1) the seriousness of the Charter-infringing state conduct, (2) the impact of the breach on the Charter-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits.

At the first stage, the nature of the police conduct that infringed the Charter and led to the discovery of the evidence must be considered. The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct by excluding evidence linked to that conduct in order to preserve public confidence in and ensure state adherence to the rule of law.

The second stage calls for an evaluation of the extent to which the breach actually undermines the interests protected by the infringed right. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.

At the third stage, the court should ask whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion.

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52 See generally Laskin JA in *R v Grant*, 2006 CanLII 18347, 81 OR (3d) 1 (CA), appeal allowed in part, 2009 SCC 32.

53 *Ibid* (SCC).

Factors such as the reliability of the evidence and its importance to the Crown's case should be considered at this stage.[54]

Although the Supreme Court stressed in *Grant* that a s 24(2) analysis requires a balancing of all three factors, more recently in *Le*,[55] the Court suggested that "Where the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility."[56] Some provincial appellate courts have rejected this inflexible "two strikes and the evidence is out" rule because it is a significant departure from *Grant*, although it is a "predictive observation" endorsed by the Court.[57]

VI. ADMISSIBILITY VERSUS WEIGHT

It is important to draw a distinction between the admissibility of evidence and its weight. When one side seeks to introduce evidence and the other side objects, the trial judge must rule as to its admissibility. This threshold question must be decided by the trial judge before allowing the evidence to be introduced. The decision involves a question of law that only the trial judge can decide. An example is whether a confession by the accused is voluntary. Another is whether hearsay evidence that one side seeks to introduce has satisfied the tests of necessity and reliability. If the judge rules that the evidence has passed the threshold test and is admissible, the question of what importance or weight should be attached to the evidence is a matter solely for the trier of fact, either a jury or a judge sitting without a jury.

This distinction is of particular importance when we come to Chapter 3, which deals with hearsay evidence and developments in the law of hearsay authorizing a trial judge to admit hearsay evidence that meets the twin tests of necessity and reliability. Whenever such evidence is admitted, the trial judge must remind the jury (or themself, in a judge-alone trial) of the potential unreliability of such evidence and instruct the jury that the question of the weight to be attached to such evidence is for them alone.

VII. THE RULE AGAINST COLLATERAL FACTS

A. THE RULE

The rule against introducing collateral fact evidence is meant to focus the trial on only the events that form the basis of a prosecution. It is designed to ensure that answers given by a witness during cross-examination on matters not directly related to the facts in issue are treated as final and cannot be contradicted by extrinsic evidence. Although questions considered collateral may show that the witness is not a credible person, such questions are considered too remote, may mislead the jury, and may distract the trier from the main issue in the case. There is also concern that admitting extrinsic evidence would only encourage a

54 In *Harrison*, 2009 SCC 34 at para 40, the Supreme Court stressed that Charter protections must be construed to apply to everyone, even those alleged to have committed the most serious criminal offences. See also *Blake*, 2010 ONCA 1.

55 2019 SCC 34.

56 *Ibid* at para 142; *McGuffie*, 2016 ONCA 365 at paras 62-63, Doherty JA; endorsed in *Paterson*, 2017 SCC 15 at para 56.

57 *Pawar*, 2020 BCCA 251 at para 98. See also *Garland*, 2019 ABCA 479 at paras 58-59; *Paradis*, 2020 NWTCA 2; *Reilly*, 2020 BCCA 369.

series of mini-trials on the credibility of each witness and unduly prolong the length of the trial. *McCormick on Evidence* states:

> On cross-examination, every permissible type of impeachment that may be employed during cross-examination has as one of its purposes the testing of the credibility of the witness. The use of extrinsic evidence to contradict is more restricted due to considerations of confusion of the issues, misleading the jury, undue consumption of time, and unfair prejudice raised by the introduction of so-called collateral matters. If a matter is considered collateral, the testimony of the witness on direct or cross-examination stands—the cross-examiner must take the witness' answer; extrinsic evidence, i.e., evidence offered other than through the witness himself, in contradiction is not permitted. If the matter is not collateral, extrinsic evidence may be introduced disputing the witness' testimony on direct examination or denial of truth of the facts asserted in a question propounded on cross-examination.[58]

While the rule is clear, what is a collateral matter is not always clear. Craig JA offered an explanation as to the meaning of collateral in *Krause*:[59]

> One sometimes reads, or hears, a statement that credibility is a collateral issue. This is misleading. Credibility may be a secondary issue in a particular case, the primary issue being whether the Crown is able to establish the guilt of the accused beyond a reasonable doubt, but it is always an underlying issue. Evidence of the former words and conduct of a witness which is unrelated to the circumstances in issue is inadmissible either because it is immaterial or because it is irrelevant. It is collateral in both senses of the word. To the extent, however, that the former words and conduct of a witness may bear on his credibility in the case before the court, he may be questioned about them, but his answers may not be contradicted because to permit such a contradiction would cause confusion of issues, surprise and unfair prejudice. On the other hand, a person's words and conduct in relation to the case before the court are not collateral. They are very relevant.[60]

The first question that must be asked in determining whether a question is collateral is what is the question designed to prove. If is designed to prove a fact in issue, of course it is not collateral. However, if it is designed to prove some potentially relevant fact that may not be in issue at the time, but may be later, then whether it is collateral will depend on the evidence that is later presented. If the sole relevance of the question is to test the credibility of the witness on a matter unrelated to the issues in the case, then it will be considered collateral and no evidence may be called to contradict the witness on that matter.[61] However, where the evidence of the witness is critical to the issues in the case, it is arguable that in some instances contradictory evidence should be admissible to show that the witness is not credible, even if the contradictory evidence is considered collateral.

Questions testing the veracity of a witness are particularly problematic in a sexual assault case where an accused wishes to establish that the accusation is false and that the complainant should not be believed because they have made a similar accusation against another person that was dismissed by the court. Since there are usually no witnesses to the assault—a situation known as "she said, he said" cases—the credibility of a complainant will be critical to a successful defence. If the complainant accuses another person of sexual

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58 John Willian Strong, ed, *McCormick on Evidence*, 4th ed, vol 1 (Eagan, Minn: West, 1992) at 182-83.

59 1984 CanLII 639, 12 CCC (3d) 392 (BCCA).

60 *Ibid* at para 43.

61 *Crane*, 1991 CanLII 8017 at para 22, 93 Sask R 259 (CA), Wakeling JA.

assault and the charge was dismissed, is the fact that they were not believed on another occasion relevant to the issue whether they should be believed on this occasion? In *Riley*,[62] it was held that such evidence was collateral and not admissible. The Court stated:

> To have Roswell [the acquitted accused] testify that her complaint ... was false, would only introduce a collateral issue of credibility which would be as difficult to resolve as those contained in the complaints of which the trial judge was seized. Even if we had a proper record of Roswell's trial, a not guilty verdict, standing by itself, could not establish that the prosecution was based on fabricated testimony by the complainant.[63]

Should the same reasoning apply where the defence seeks to cross-examine a police officer whose evidence was rejected by a trial judge in another case, specifically where the judge found that the police officer had lied? In other words, is the expression "once a liar always a liar" evidence of a witness's lack of credibility?

That issue arose in *Ghorvei*.[64] The issue was whether the defence was entitled to cross-examine a police officer with respect to a finding made by a judge in a prior proceeding that the officer was a "compulsive liar. I do not believe his evidence at all."[65] The accused had been convicted of trafficking in heroin and breach of recognizance. He had attempted, on appeal, to lead fresh evidence of the finding against the officer in the form of the transcript of the previous trial. In dismissing the appeal, it was held that the previous trial judge's finding was nothing more than a rejection of the officer's testimony. On the other hand, if the officer had been convicted of perjury or giving contradictory evidence, he could have been subjected to cross-examination on that conviction and on its underlying facts.

B. EXCEPTIONS TO THE RULE

There are certain exceptions to the rule against collateral evidence. The most common is the use of a prior criminal record of the witness. Although it is not permitted to lead evidence to show that a witness has not been believed in a previous proceeding,[66] a cross-examiner has the right to prove that a witness has previously been convicted of a criminal offence. Section 12 of the *Canada Evidence Act* provides for this well-known exception.

> 12(1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the *Contraventions Act*, but including such an offence where the conviction was entered after trial on an indictment.
>
> (1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

If the witness either denies the conviction or refuses to answer, the opposite party may prove the conviction by producing a certificate of the conviction and proof of identity. Although the plain language of s 12 seems to restrict the question to the particulars of the conviction and not the underlying facts, case law allows the witness to be asked about the

62 1992 CanLII 7448, 11 OR (3d) 151 (CA), leave to appeal to SCC refused, [1993] 2 SCR x.

63 *Ibid*.

64 1999 CanLII 19941, 46 OR (3d) 63 (CA).

65 *Ibid* at para 24.

66 *Ibid*.

underlying facts of a conviction, subject to the trial judge's general discretion to limit the cross-examination within the bounds of relevance and propriety.[67]

The purpose of s 12 is to permit the judge or jury to conclude that because the witness has been convicted of an offence, they are less worthy of belief.[68] Of course, not every conviction is an indication that the witness is not worthy of belief. A conviction for fraud is evidence that a person is not worthy of belief, but a conviction for assault indicates that the witness may be violent but not necessarily a liar. Yet the authorities draw no such distinction in the case of the ordinary witness. For example, in *Miller*,[69] Charron JA pointed out that such cross-examinations may be relevant to discreditable conduct and associations, unrelated to the subject matter of the testimony, as a ground for disbelieving the witness's testimony. In other words, a judge or jury is entitled to disbelieve what the witness is saying because they have been a bad person in the past. The character of the witness is a factor in deciding whether they are worthy of belief.

Where the witness is the accused, the rule is different. The Supreme Court has said that while it is permissible under s 12 to ask an accused whether they have been convicted of a criminal offence, the trial judge has the discretion to exclude evidence in situations where its probative value is substantially outweighed by its prejudicial effect.[70] In *Corbett*,[71] the Court said that the right to cross-examine an accused on a prior criminal record should not be automatic. It questioned the fairness of cross-examining an accused on a prior criminal record if it is not related in some way indicative of the accused's credibility with respect to the charge. For example, where the accused was charged with arson to collect insurance money, it was permissible to cross-examine on a prior criminal record involving fraudulent conduct. His prior criminal conduct of dishonesty could be relevant to the credibility of his evidence.[72] But what if there had been no insurance on the building that the accused was alleged to have burnt down? A conviction for arson would not necessarily be an indication of dishonesty unless the arson was committed to falsely obtain financial gain.

Once the cross-examiner is allowed to explore the details of a conviction, the risk of prejudice may be greater, depending on the nature of the details. If details of serious misconduct are allowed to emerge that are not readily apparent from the plain words of a conviction, supporters of permitting detail argue that this will permit the trier to have clearer information about the kind of person giving evidence, and of their credibility. To ensure that the details do not prejudice the fair trial of the accused, the general rule is that cross-examination of an accused on a prior criminal record should be restricted to the nature of the offence, the date and place of conviction, and the penalty imposed.[73] On the other hand, it is open for counsel for the accused to bring out in chief details of the convictions where the facts are not as serious as one would expect from the wording of the convictions.

Another exception to the general rule will arise where the accused places their character in issue. If an accused says that they are a person of good character, then it is only

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67 *Davison, DeRosie and MacArthur*, 1974 CanLII 787, 6 OR (2d) 103 (CA); *Gassyt*, 1998 CanLII 5976, 114 OAC 147; *Miller* (1998), 21 CR (5th) 178, 131 CCC (3d) 141 (Ont CA).

68 *Corbett*, *supra* note 6; *Watson*, *supra* note 11 at para 76.

69 *Supra* note 67, relying on *Davison* and *Gassyt*, *supra* note 67.

70 *Corbett*, *supra* note 6.

71 *Ibid*.

72 *Watkins*, 1992 CanLII 12750, 54 OAC 200, where the accused had 19 prior convictions under the *Unemployment Insurance Act, 1971*.

73 *Laurier* (1983), 1 OAC 128 at 131 (CA); *W(LK)*, 1999 CanLII 3791, 126 OAC 39.

fair that the Crown be allowed to cross-examine the accused on prior acts of discreditable conduct, including details of prior convictions, unless such evidence is prejudicial and this outweighs its probative value.[74] Similarly, if the accused attacks the character of a Crown witness, then it is only fair that the accused's character should be open to attack. Unless the Crown is given the right to attack the accused, the judge or jury may be left with the impression that the accused has led an exemplary life while the Crown's witness has not.[75]

Evidence that demonstrates bias or partiality by a witness is another exception to the rule against collateral evidence. Facts that establish bias or partiality on the part of a witness may be elicited on cross-examination and, if denied, independently proved. As Doherty JA explained in *Watson*:

> Because impeachment by the demonstration of bias or partiality is potentially so helpful to the trier of fact in assessing a witness's credibility, the opposing party is allowed to call evidence to contradict a witness's denial of partiality or bias.[76]

An example is *Green*.[77] At issue was whether evidence by a witness that the complainant had on two prior occasions alleged that she had been sexually assaulted by other persons, and then recanted those allegations, was relevant to the credibility of her allegation against the accused. The trial judge had refused to admit the evidence, holding that it was collateral to the issue whether the accused had sexually assaulted the complainant. It was held that the trial judge had erred. The questions were proper questions to ask the complainant on cross-examination. Moreover, evidence of the witness to whom she had recanted was relevant in assessing her general credibility and the reliability of her statement to the witness that she had just been sexually assaulted by the accused.

Evidence of a witness's reputation for untruthfulness has also been accepted as an exception to the rule against collateral evidence. It allows a party to call a witness and ask that witness whether they know the reputation of an impugned witness for veracity. If the witness says that they do, then the witness may be asked whether they would believe the impugned witness on oath.[78] This exception, an old one, has been the subject of much criticism. The concern is that there is a risk that, in some cases, the jury will simply overvalue that opinion and defer to the opinion of the character witness because that witness obviously knows the other witness and is in a much better position to assess their credibility.[79]

Medical evidence that can establish that a witness suffers from a mental disease or abnormality of the mind that may affect the reliability of the witness's evidence is another exception to the rule.[80] In such instances, evidence is not confined to a general opinion of the unreliability of the witness. Evidence may be given to show not only the foundation

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74 *McNamara (No 1)*, 1981 CanLII 3120, 56 CCC (2d) 193 (Ont CA); *Farrant*, [1983] 1 SCR 124, 1983 CanLII 118.

75 *Tremblay*, 2006 QCCA 75.

76 *Watson*, *supra* note 11 at para 77, referring to *Martin*, 1980 CanLII 2837, 53 CCC (2d) 425 at 434-36 (Ont CA); *Attorney General v Hitchcock* (1847), 1 Ex 91 at 101-3; E Ratushny, "Basic Problems in Examination and Cross-examination" (1974) 52:2 Can Bar Rev 209 at 240-41; *United States v Abel*, 105 S Ct 465 (1984) at 468-69; *McCormick on Evidence*, *supra* note 58 at 130-36.

77 2013 ONCA 74.

78 *Gonzague*, 1983 CanLII 3541, 34 CR (3d) 169 (Ont CA); *Taylor*, 1986 CanLII 2606, 57 OR (2d) 737 (CA).

79 *Clarke*, *supra* note 34.

80 *Hawke*, 1975 CanLII 672, 7 OR (2d) 145 (CA); *French*, 1977 CanLII 2117, 37 CCC (2d) 201 (Ont CA), aff'd [1980] 1 SCR 158, 1979 CanLII 49.

and reason for the diagnosis, but also the extent to which the credibility of the witness is affected.

It is open for an accused to question an expert in the behavioural, social, and emotional characteristics of sexually abused children on interview techniques used by the expert during interviews of children who allege that they have been sexually assaulted. If the defence denies the abuse and the credibility of the children is in question, the defence will be allowed to cross-examine the expert on the interview techniques they used, to attempt to prove that the children were coached or manipulated, even though the credibility of the children is a collateral matter. In *R(D),*[81] it was held that the trial judge had erred in ruling that the transcripts of the methods used in interviewing children about their complaints of sexual abuse should not be used to show that there had been coaching or manipulation because it was collateral. Major J stated:

> The credibility of the children was at the heart of the case against the appellants. The appellants would have been entitled to lead evidence on the effect of the interview techniques on the memories of the children, and, accordingly, met the test in *Hitchcock*. Any evidence that might have cast doubt on the children's credibility, or that might show that the children had been subject to coaching and manipulation, was evidence that would have been crucial to the appellants' case.[82]

81 [1996] 2 SCR 291, 1996 CanLII 207.

82 *Ibid* at para 43.