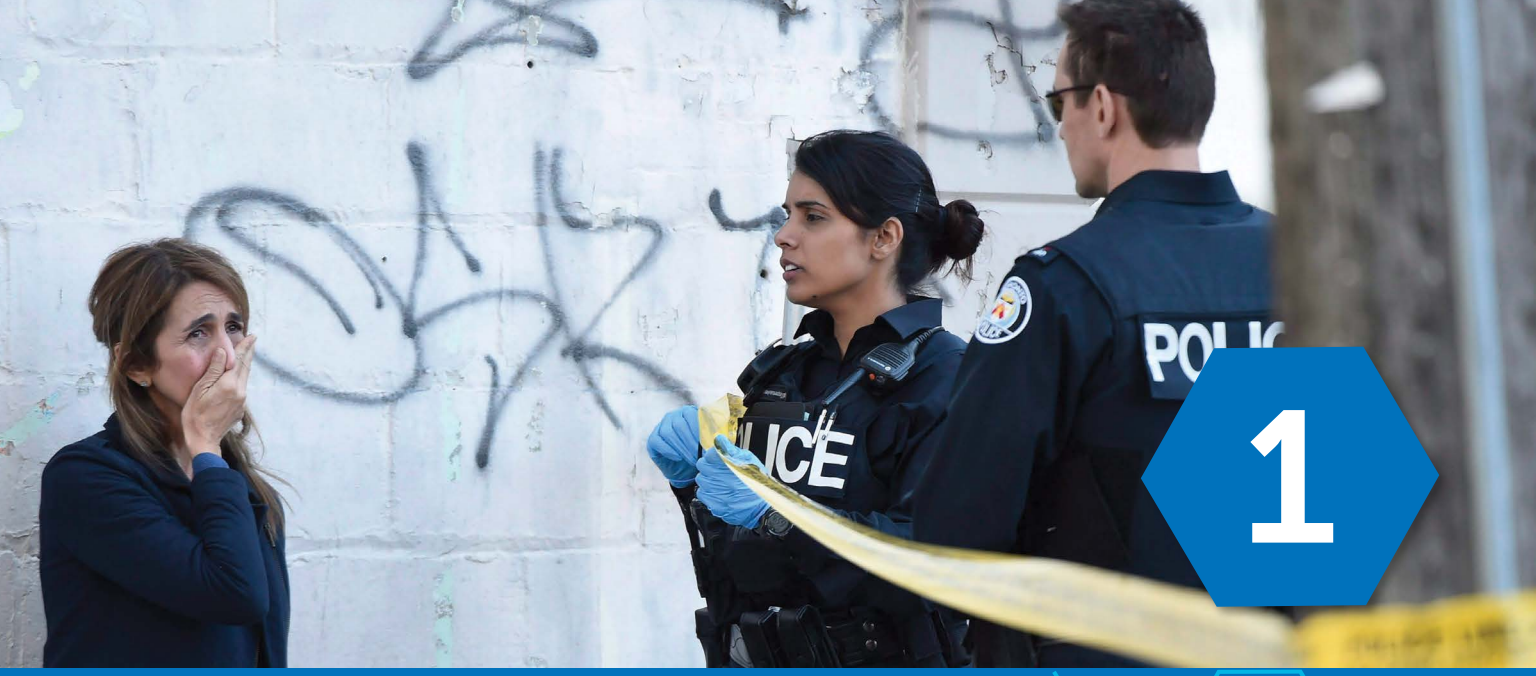

1

INTRODUCTION TO INTERVIEWING AND INVESTIGATION

LEARNING OUTCOMES

After completing this chapter, you should be able to:

- Explain what an investigation is and what sort of mindset should guide an investigator.
- Explain what a working theory of a crime is and how theories should be affected by evidence.
- Understand the responsibilities of the first officer at a crime scene.
- Describe strategies for locating witnesses.
- Outline the nature of the communication that the first officer at a crime scene should have with witnesses and the reason for this.
- Explain the differences between a witness, a confidential informant, and an agent and the different legal protections that apply to each.
- Describe the factors that affect the competence and compellability of a witness.
- Explain the difference between opinion and expert evidence and the circumstances that permit these kinds of evidence.

"A man should look for what is,
and not for what he thinks should be."

ALBERT EINSTEIN

INTRODUCTION

An investigation is a search for the truth, an attempt to accurately reconstruct the past. The word "investigate" comes from the Latin verb meaning "to search after" or "to follow a track," and that's exactly what an investigator does. An investigator searches after the truth by following a trail of evidence and making detailed, systematic observations and inquiries along the way. Although this may sound simple, it is difficult to do well because there are typically many obstacles along the path, each with the potential to knock the investigator off course.

Of all the potential obstacles that stand between an investigator and the truth, perhaps the most difficult to overcome are the investigator's own limitations as a human information processor and decision-maker. It's a point that led the late Nobel Prize–winning physicist Richard Feynman, famous for his research into the truths of how the universe works, to identify the first principle of investigative work as "not fooling yourself," because you are the easiest person to fool.[1] Over the past several decades, a major theme from research on human judgment and behaviour has been that otherwise "normal" people are (1) often inaccurate in their perceptions, memories, and judgments, and (2) typically unaware of those inaccuracies and thus overconfident in their abilities in even the most challenging professional domains. Criminal investigators are therefore far from being alone as imperfect human information processors charged with completing a difficult task. In addition to the positive attributes they bring to an investigation—things like reason, experience, and dedication—investigators also often bring their biases, preconceptions, cognitive limitations, and personal motivations. When these elements combine in a situation where the information is incomplete and subject to some degree of interpretation, and where there is pressure to "figure it all out," even the best investigators can go astray.

In the 1990s, there were a number of wrongful convictions in Ontario for various offences against children, including murder. In some of those convictions, expert evidence from the field of pediatric forensic pathology played a significant role and, as a result, a judicial inquiry was ordered into the practice of pediatric forensic pathology in Ontario.[2] The purpose of the inquiry was to determine the state of pediatric forensic pathology in the province and establish how errors of the kind that gave rise to wrongful convictions could be avoided in the future. In the report that followed the inquiry, a number of observations were made regarding the tenets that should guide forensic pathology; these tenets apply equally to all investigative work. Chief among them is that investigators

should "think truth" as opposed to "think dirty," because the latter mindset can hinder a person's ability to investigate an event objectively. "Dirty" in this context refers to a bias toward believing a suspect is guilty, especially when there is some evidence consistent with that belief, not "dirty" in the sense of corruption or intentional misconduct—an important distinction throughout this book.

This point was well stated by one of the witnesses called during the inquiry, Ontario's then newly appointed chief forensic pathologist, Dr Michael Pollanen. In discussing the need for a "search for the truth" framework in death investigations, Dr Pollanen called for investigators to adopt "an evidence-based approach that keeps one's mind open to a broad menu of possibilities, and that collects objective evidence whether it supports or negates any possible theories."[3] An investigator could receive no better advice.

CONDUCTING A CRIMINAL INVESTIGATION

Criminal investigation is demanding, often frustrating, and occasionally exhilarating work. There is an undeniable sense of satisfaction that comes with "figuring it out" and seeing your investigative work withstand vigorous scrutiny as it proceeds through the justice system. Although not all criminal investigations are of the mysterious "who done it" variety (many are simple and straightforward, and depend more for their success on the investigator following proper procedures for gathering evidence than on any highly developed problem-solving ability), in many cases an investigator will have to formulate a working theory (also known as a hypothesis or, simply, a theory) of the crime to guide their investigation. Technically, in scientific research a hypothesis is a specific prediction based on a more general theory. For example, even before humans landed on the moon, based on the more general gravitational *theory* that takes into account the moon's smaller mass, scientists *hypothesized* that an object would fall to the moon's surface more slowly than it would fall to the Earth's surface. In a criminal investigation context, however, the terms **hypothesis** and "theory" are often used interchangeably to refer to any tentative explanation for some as yet unexplained (or not fully explained) set of circumstances, such as those typically faced by investigators in the early stages of a criminal investigation.

hypothesis
a tentative idea or explanation about how something happened or about how something works that an investigator uses to help guide their inquiries; also called a "working theory" or "theory"

A hypothesis or theory about how a crime was committed is a vital tool to help focus an investigator's energy and resources, but it must not be confused with actual *knowledge* of the crime. It is simply a tool, and when the evidence gathered during an investigation contradicts it, the theory must be reformulated. Although this may sound obvious, when an investigator becomes deeply involved in a case, it can be all too easy to forget, and instead the investigator might try to reinterpret the evidence to make it fit with the theory. The danger of attempting to "fit" the evidence to one's pre-existing theory, instead of adapting one's theory to account for the evidence, was highlighted by the great fictional detective Sherlock Holmes, who said, "It is a capital mistake to theorise

investigation
the methodical process of exploring or examining through inquiry and observation

interview
a structured conversation between a witness, victim, or suspect and an investigator in which the investigator asks a series of questions in order to elicit information from the witness, victim, or suspect about something that they observed, experienced, did, or have knowledge about

witnesses
persons who have information about a crime or suspected crime and who voluntarily give that information to the police with no expectation of confidentiality or compensation

victims
persons who have been harmed by the actions of another person or persons during the commission of a crime

suspect
a person of interest (under arrest or not) suspected by the police on the basis of evidence of having committed a crime

accused
a suspect who has been formally charged with a crime

evidence
anything (e.g., testimony, document, object) presented in a legal proceeding, such as a trial, for the purpose of establishing the truth or falsity of a fact in issue

before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts."[4] Investigators must always remember that the reason they are conducting an investigation is because, in their search for the truth, they *don't* have all the answers.

THE IMPORTANCE OF INTERVIEWING AND THE SCOPE OF THIS TEXT

Investigative interviewing has been referred to as more important in most cases than forensic evidence;[5] "the most fundamental aspect of any criminal investigation";[6] and "the essence of law enforcement."[7] In *R v LF*,[8] Ontario Superior Court Justice O'Connor emphasized the importance of interviewing to the investigative process when he said, "Questioning suspects and witnesses to a crime is an essential and often the most effective investigative tool the police possess."[9] This is true even with the incredible advances, such as DNA matching, that have been made in forensic science over the last few decades.

In this text we focus on two of the most important sources of information available to criminal investigators—witnesses and suspects—and on the thought processes that investigators use to make sense of the information they collect during an **investigation**. Gathering information from people through the structured conversation process known as the **interview** is one of the most important ways in which you will interact with **witnesses** and **victims** on the one hand, and with **suspects** and **accused** persons on the other. (For simplicity's sake, we refer to these four groups using two general terms, "witnesses" and "suspects," and use more specific terminology when it is necessary to specify in order to make a particular point.) Our perspective is that the interview process is of central importance to the investigative process because, despite popular *CSI*-like portrayals of criminal investigations and the fact that physical **evidence** can be extremely important, more crimes are solved as a result of information gathered from witnesses and suspects than as a result of physical evidence.[10]

To help prepare professional investigators to conduct effective interviews and investigations, and to process the evidence gathered as a result, this text examines

- the contributions that experience and science can make to the formulation of a *best practices* approach to conducting investigative interviews;
- the practical and legal issues associated with interacting with and managing witnesses and suspects;
- a model of memory based on decades of scientific research that can guide investigators to work *with* rather than *against* the ways in which people typically remember information in an investigative interview;
- how police questioned suspects in the past, and the problems associated with traditional methods of questioning;

- various approaches to conducting interviews in use today in North America and elsewhere, and their advantages and disadvantages;
- some common approaches to detecting deception in witnesses and suspects, and the ways in which scientific research suggests investigators should use these approaches;
- some of the potential dangers associated with eyewitness identifications, and the recommended practices as determined by research; and
- the most common ways in which investigations tend to go wrong, and how investigators can avoid these mistakes in their own professional practice.

It is important to note that most of the discussion of interviewing techniques in this text assumes that interviews are being conducted with average adult subjects. Interviews with individuals who belong to special groups—such as children, elderly persons, individuals with special needs, and individuals who may have difficulty speaking or understanding English—almost always require special consideration, further training, and additional planning. These special considerations are addressed in Chapter 5, Interviewing Vulnerable Individuals.

IDENTIFYING KEY WITNESSES

ARRIVING AT THE CRIME SCENE

The primary responsibility of the first officer who arrives at the scene of a crime is, like the responsibility of any officer, the protection of life and property. Once these issues have been adequately dealt with, the officer must take all steps necessary to help preserve the scene, because its integrity will play a critical role in any subsequent criminal investigation or prosecution. A contaminated crime scene makes it extremely difficult for an investigator to reconstruct the events surrounding the crime in a manner that will yield reliable evidence that is likely to be accepted in court by the **trier of fact**.

trier of fact
the person or persons charged with making determinations of fact in a trial—namely, the jury in a jury trial or the judge in a trial by judge alone—in contrast to legal rulings that are made exclusively by a judge

The crime scene and the surrounding area are the locations most likely to contain witnesses to the criminal event and are therefore the best locations for the police to begin their search. The police officer most likely to come in contact with witnesses at the scene is the officer who arrives first. This places a responsibility on that officer not only to secure and preserve the scene and handle any emergency or life-threatening situations that they may encounter, but also to secure persons at the scene who may have witnessed all or part of the criminal event. These witnesses may include persons who actually observed the offender(s) commit the crime or perhaps just saw some suspicious people in the area around the time the crime was committed. It is the duty of the first officer or officers at the scene to gather information regarding the identity and contact information of all persons found at or near the scene, in addition to a brief

description of what they observed (including any descriptions of the offender(s) or of any suspicious person(s) in the area). This information is important because it enables the broadcasting of descriptions to other officers in the area and will, of course, be required by the officers subsequently assigned to investigate the event. It can sometimes be challenging for an officer to secure witnesses at a crime scene, as not everyone will want to remain at the scene or speak to police about what they witnessed—and police cannot force them to do so. As a result, a good deal of tact and diplomacy is often required to secure the voluntary co-operation of witnesses.

EXTENDING THE SEARCH

Witnesses can be reluctant to come forward at a crime scene for a number of reasons. Police officers often hear the excuse "I don't want to get involved," but this reluctance does not extend to every member of the public; fortunately, many people believe that it is their civic responsibility to assist the police and their fellow citizens. Experienced police officers usually find that people who remain at a crime scene to assist the injured or the police *want* to tell what they saw or heard. Their involvement at the scene often instills in them the sense that they have a bond with the scene and/or the victim.

Of course, not all witnesses to a crime will be found at or near the crime scene, and other methods will often have to be employed to locate them. The neighbourhood canvass is one way of locating additional witnesses. It involves officers going door to door and speaking to people who live or work in the area of the crime scene, asking if they noticed anything unusual around the time the crime was believed to have been committed. This time-consuming process can involve a large number of officers, many of whom will have to attend and then re-attend addresses until they are able to speak to the occupants. It is important that accurate records be kept of the canvass process to ensure that all addresses have been checked and that any witnesses who have relevant information to offer are interviewed in a timely manner.

The area to be canvassed is determined by its physical proximity to the crime scene and by the resources available. For an outdoor crime scene, the area for immediate attention can be identified by standing at the centre of the scene and taking a 360° view of the surroundings. Any visible window or building may produce a witness to the crime. The area of the canvass can be extended to bus or subway stops, schools, churches, or other public venues within a given area. It's easy to see how quickly the search area could grow, and how many resources would be required to effectively canvass such an area. For this reason, a neighbourhood canvass is normally appropriate only for serious crimes (e.g., sexual assaults, abductions, and homicides). The neighbourhood canvass is a proven but time-consuming way to identify witnesses.

When a neighbourhood canvass is conducted, officers should look for potential sources of electronic evidence—in particular, surveillance cameras. Police

services today can also draw on a variety of community resources in their search for witnesses. An effective way to get information to the residents of a specific area, or to the members of a particular group, is through community liaison officers, who can be enlisted to communicate the police service's appeal for witnesses to their different geographic, business, social, and cultural partners. Social media applications such as Twitter, Facebook, and YouTube are timely and cost-effective ways to electronically canvass for crime scene witnesses; many Canadian police services have dedicated social media officers with extensive lists of contacts, and their expertise in using this medium of public communication can be of great assistance to investigators.

Of course, the conventional news media (radio, television, Internet, newspapers) remain excellent tools for appealing to the public. Investigators should also be proactive in their search for witnesses by reviewing the media coverage of the crime they are investigating and attempting to identify any witnesses who may have been interviewed by the media regarding the event, but who have not yet come forward to police. Finally, the Crime Stoppers program, in which people can anonymously leave information that can be followed up by police, is another valuable asset that can result in information being received that may help identify witnesses as well as suspects.

Revisiting the crime scene, a technique for locating witnesses that is often used by investigators of serious hit-and-run collisions, can be potentially useful in other criminal investigations as well. Revisiting a crime scene on successive dates at about the same time that the crime was committed may help identify previously unknown witnesses who routinely travel a particular route. Motorists who travel the same route to work every day can often be identified in this way, as can people who work in service jobs in the area, such as delivery people, bus drivers, and cab drivers. Crimes committed within the confines of business premises, houses, or other enclosed buildings may have few, if any, witnesses, while those committed on the street or in other public places may have many. The greater the number of persons who could have witnessed the crime, the more extensive will be the search for witnesses who have not been identified.

MANAGING WITNESSES

FIRST CONTACT

The first contact between the police and a witness is frequently made by a uniformed officer at or near the scene of a crime. As mentioned above, the first responsibility of the police in such a situation is to ensure the person's safety and well-being, which may require moving them to a safe location and/or obtaining medical assistance if required. Once these issues have been dealt with, if the crime being responded to is of a less serious nature and the uniformed officer will be the one investigating the matter in its entirety, then the officer should be guided by the steps for conducting a witness interview discussed in Chapter 2,

contamination
exposing a witness to information after they have witnessed an event, which may affect their recollection of that event

Techniques for Interviewing Witnesses. In all cases, it is important to safeguard witnesses from **contamination** from other potential sources of information about the crime under investigation, including both other witnesses and police officers. Where one officer is investigating a crime to which there are one or two witnesses, this may simply require the officer to ensure that the two witnesses do not discuss their observations with one another prior to giving their statements to police. Where a crime scene is large and there are multiple witnesses present, managing those witnesses can be quite challenging. When interviewing a witness, officers must not discuss the details of the case with that witness, or what other witnesses may have said, because this can affect the integrity of the witness's statement. Where a crime is of a more serious nature and will likely be investigated by an officer or officers from the criminal investigation bureau, or from a specialized unit such as homicide or sex crimes, then one of the key responsibilities of the first officer(s) is to safeguard witnesses from contamination prior to their being interviewed by specialist investigators.

In the same way that physical evidence at a crime scene must be protected from contamination, witnesses must be protected from contamination that can occur as a result of being spoken to or of speaking with other people, whether those other people are police officers, other witnesses, or members of the public. In fact, Gary Wells and Elizabeth Loftus, two of the leading authorities on the issue of eyewitness evidence, argue that law enforcement and the legal system should adopt a much more scientific perspective: they should view what might reside in a person's *memory* in a way that is similar to the way they view physical evidence.[11] Their suggestion is based on the notion that, just like physical evidence, eyewitness memory for an event is prone to factors like deterioration (if not recognized, collected, and stored promptly) and contamination (e.g., if one witness speaks to another witness before police are able to interview them separately, or if an interviewer inadvertently provides a witness with information about the crime as part of the interview process). In fact, the National Research Council in the United States has recommended best practices that investigators should follow to safeguard eyewitnesses' memories of a crime. These best practices include training police to understand that an eyewitness's memory of an event can be contaminated by a wide range of factors, including interaction with police and other witnesses. It is also recommended that investigators should receive training about issues such as vision, memory, and effective use of (primarily open-ended) questions.[12] The analogy to the perspectives, policies, and procedures common to the collection and evaluation of physical evidence runs throughout this text.

The uniformed officer should obtain a witness's personal information and some preliminary information about what they have witnessed or experienced, but should not discuss the events in detail with the witness. Unnecessary conversation between the responding officer(s) and the witness can make it more difficult for an investigator to subsequently obtain a reliable account of the incident

from the witness. For example, while "chatting" with a witness, an officer may innocently disclose a particular detail (e.g., that the officer heard that the truck that fled the scene was dark blue) that the witness may subsequently incorporate into their recollection of events, thus affecting the reliability of the statement (whether the information was true or false) that the witness subsequently provides to an investigator. This *post-event* information effect is discussed in detail in Chapter 2.

In the event that the responding officer encounters multiple witnesses at a crime scene or elsewhere, insofar as possible, these individuals should be prevented from communicating with one another, preferably by physically separating them until the investigating officer(s) have had an opportunity to interview them. Interviews of children should, whenever possible, be conducted by officers with specialized training, as children's accounts are vulnerable to contamination by investigators. Best practice approaches for interviewing children are discussed in detail in Chapter 5.

DISTINCTION BETWEEN MATERIAL WITNESSES, CONFIDENTIAL INFORMANTS, AND AGENTS

Officers must clearly understand the differences between the categories of people who give information to the police. These categories are governed by different legal rules, and a failure to understand these rules and the consequences that flow from them can have a serious impact on an investigation and any subsequent prosecution.

As discussed, witnesses are people who were present at a place where they personally observed or experienced something relevant to the commission of a crime, and who voluntarily give information about what they witnessed to the police to assist in the investigation. A witness gives information freely, with no expectation of confidentiality or compensation. A witness's identity is required to be disclosed to the defence in a criminal prosecution.

An **informant** is someone who gives information to the police, typically with the expectation of receiving something in return, such as monetary compensation. A **confidential informant** (often referred to as a "CI") is an informant who has disclosed information about criminal activity to a police officer (or peace officer) *and* has been given an assurance of confidentiality by the officer (as noted in *R v Brown*).[13] A CI enjoys a near absolute legal privilege (called "informer privilege"), which dictates that their identity cannot be disclosed to anyone by the Crown, the police, or the court without the CI first "waiving," or giving up, that privilege. The Crown must not disclose any information that might directly or indirectly identify the CI, and a witness in court cannot be asked questions that might allow someone to infer the identity of the CI from the responses. The issue of informer privilege has been discussed at length by the Supreme Court.[14]

The only exception to informant privilege is a narrow one referred to as "innocence at stake," in which the informant's identity must be disclosed in order

informant
someone who provides a statement or information to the police with regard to an investigation, or someone who supplies the police with facilities to observe and gather information

confidential informant
an informant (often called a "CI") who has provided information to the police and has been given a guarantee of anonymity by a police officer; once a person has confidential informant status, their identity cannot be revealed to anyone by the Crown, the court, or the police without the confidential informant first waiving their legal privilege

to prove the innocence of an accused person (as noted in *R v Scott*).[15] In order to activate this exception, the accused must demonstrate some evidentiary basis for believing that disclosure of the informant's identity is *necessary* to prove their innocence. This can be demonstrated by showing that the informant was a material witness or an agent provocateur. A material witness, generally speaking, is someone who, because they were present at a place where something happened and saw or perceived something, can testify to *material* facts—that is, facts that are significant to the case before the court. An agent provocateur, in this context, is an agent of the police who entices another person to commit a crime in order to implicate that person in that crime. It can also be demonstrated where a CI provides information to a police officer that the officer subsequently relies on to obtain a search warrant or wiretap, and the defence seeks to challenge the ground on which the warrant was obtained. Disclosure of the informant's identity could be ordered in such a situation if the court were convinced that it was the only way in which an effective challenge to the warrant or wiretap could be achieved (as noted in *R v Leipert*, *R v Barnes*, and *R v Barros*).[16]

material witness
a witness who has observed *material* facts, or facts that are relevant to proving the elements of the offence with which an accused is charged

agent provocateur
a person who, acting on the direction of the police, induces another person to do something that they would not ordinarily do or provides that person with an opportunity to commit a crime that they would not ordinarily have committed

In contrast to an informant, an agent is someone who, acting on the direction of the police, goes to certain places and meets with certain people who are believed to be involved in the activity under investigation and then reports back to the police with information regarding that activity. Agents may also receive compensation in exchange for their involvement in a police investigation. One example of how a police agent might function would be meeting with persons believed to be involved in criminal activity while wearing a "body pack" or recording device with which to gather information for the police (see e.g., *R v Sandham*)[17] Unlike a CI's identity, an agent's identity is *not* protected by privilege. A discussion of the issue of agents, informants, and CI privilege may be found in *R v Broyles*[18] and *Barnes*.[19]

agent
an individual who acts on the direction of the police to go out and become involved in an activity under investigation by the police for the purpose of gathering information about that activity and providing it to the police

Exercise Caution in Guaranteeing Confidentiality

Granting a person confidential informer privilege can be a valuable law enforcement tool. It allows police to gain access to sources of information that they would not otherwise have access to—sources that can be of great value in the investigation of criminal enterprises such as drug trafficking and organized crime. *CI privilege*, as it is commonly referred to, protects the state's access to these unique sources of information, first by ensuring the safety of the informants themselves, and second by encouraging others to come forward knowing that their identities will also be kept confidential (as noted in *Scott*).[20]

On occasion, and unaware of the legal consequences, police officers have made promises of confidentiality to anxious witnesses in order to obtain

information from them and maintain their cooperation during an investigation. However, officers should *not* do so because this can have serious implications for the subsequent prosecution of a case. If an officer promises a witness anonymity, that witness is now considered a CI. However, if the witness is also a material witness, the defence will be able to argue that under the innocence at stake exception, the CI's privilege should be set aside and the witness's identity disclosed. In such a situation, if the witness refuses to waive their CI privilege, the Crown might be left with no option but to withdraw the charges or stay the proceedings, and the opportunity to successfully prosecute the case may be lost.

ENSURING WITNESS ATTENDANCE IN COURT

The legal authority to compel a witness to appear in court is provided by a legal document referred to as a **subpoena**, which is issued by a justice pursuant to section 698(1) of the *Criminal Code* of Canada.[21] A person who applies for a subpoena must provide some evidence that the potential witness likely has evidence that is relevant to the legal issues to be decided in the court proceeding; simply alleging or hoping that the witness will have **material evidence** to give the court is not sufficient (as noted in *R v Elliott*).[22] While agents may be compelled to testify, CIs cannot be required to attend court.

subpoena
a formal request, enforceable by the court, for a person's attendance in court to give testimony

material evidence
evidence that is relevant to proving or disproving the elements of the offence with which an accused is charged

When considering whether to issue a subpoena, a justice will generally consider a sworn statement filed in support of the application for the subpoena or listen to oral evidence given by the applicant (as noted in *R v Coote*).[23] Together, sections 698 and 700 of the *Criminal Code* require that, pursuant to the authority of a subpoena, a person (1) attend court at a time and place stated in the subpoena to give evidence and bring with them, if required, anything in their possession or control that relates to the proceedings (e.g., records), and (2) remain in attendance at court until excused by the judge. A subpoena gives legal effect to the presumption that

> [it] is not the prerogative of witnesses to criminal events to decide whether or not they will testify. They are bound to testify if called upon to do so, for it is only in this way that those guilty of crimes can be brought to justice and the public be protected.[24]

The Supreme Court of Canada has explained that a person has a general duty (with some exceptions) to both the courts and to society to testify when called on to do so, and that such a duty is integral to the proper functioning of the justice system, because "the public have the right to every person's evidence."[25] Failure to attend court in response to a subpoena may result in an arrest warrant being issued by the judge hearing the case.

Witnesses do not necessarily require a subpoena in order to be able to testify at a trial or preliminary hearing; oral notice from a Crown attorney or a police

officer may be sufficient. However, oral notice has at least one potentially damaging consequence: a witness who has been given only oral notice cannot be arrested for failing to attend court, and such a failure can jeopardize a case where the witness has important **testimony** to give.

testimony
the oral evidence of a witness in court

Note that the subpoena authority does *not* extend to compelling a witness to attend a police station for an interview; the police do not have the statutory authority to detain or arrest a witness for the sole purpose of an interview. The interview process is a voluntary one, conducted with the cooperation and consent of the witness. Witness cooperation and consent are therefore essential, and can be revoked by the witness at any time during the interview. An uncooperative witness cannot be arrested or charged with failure to cooperate with the police. In the event that a witness is uncooperative, the sole remedy available to the police is to use a subpoena to compel the witness to appear in court.

COMPETENCE AND COMPELLABILITY

We have seen that anyone who may be able to provide useful evidence can be made to attend court, but whether they will be permitted or compelled to testify is a matter determined by the rules found in the *Canada Evidence Act*.[26] Two concepts in particular—competence and compellability—are relevant to the determination of whether a court will allow or compel a witness to testify in a criminal proceeding.

competence
being legally permitted to testify

Competence refers to a person's legal capacity to provide evidence in a court of law. Someone who is incompetent cannot testify even if they wish to do so. As a general rule, every person is considered competent to give sworn testimony, although there are some exceptions. A person who is unable to interpret or communicate what they observe due to a mental condition would not be considered competent, although not all mental conditions automatically render a person incompetent. A person who suffers from delusions, for example, may be competent to testify if those delusions do not affect their ability to perceive, remember, and communicate about the events in relation to which the testimony is being sought. The key issue is whether the person's mental condition would make the testimony untrustworthy.

Historically, many factors could render a witness incompetent to testify—for example, being the accused or the accused's spouse, having a financial stake in the outcome of a trial, or having been convicted of a crime. The rationale behind these prohibitions was that the evidence of such people was "tainted," and thus unreliable. Today, such prohibitions have all but disappeared, and these issues are simply factors considered in the process of determining a witness's credibility. In the past, witnesses had to demonstrate some belief in a "supreme being" (God) and swear an oath to tell the truth in order to be considered competent—that is, there had to be fear on the part of witnesses that they would suffer divine retribution if they were to lie; if witnesses refused to take such an oath or if they were non-believers (meaning that the oath would have no effect), these witnesses

were not considered competent. Religious beliefs are no longer a requirement for competency, and witnesses may choose to testify on the basis of either an oath or an affirmation to tell the truth. What is most important is that the person about to testify understands the importance of telling the truth in court.[27] Legislation has since materially changed the legal issue of incompetence.[28]

Compellability refers to the ability of the state to require a person to give evidence in a criminal proceeding. As a general rule, unless there is a provision to the contrary (such as the right in the ***Canadian Charter of Rights and Freedoms***[29] against self-incrimination), a witness who is competent is also compellable. A witness who is compellable may be forced under the power of subpoena or other process to testify in court, and refusal to do so can result in a charge of contempt (*R v Darrach*).[30] There are a number of factors that have affected the compellability of a witness:

compellability
being without legal excuse to avoid testifying

Canadian Charter of Rights and Freedoms
the constitutional document that sets out the rights and freedoms enjoyed by all people of Canada

- A person who is charged with an offence is not compellable as a witness in a proceeding against them, pursuant to the right against self-incrimination in section 11 of the Charter.
- Under the spousal incompetence rule, subject to certain exceptions (which mainly involved sexual crimes or crimes of violence against children), legally married spouses were neither competent nor compellable witnesses for the prosecution, although they were competent to give evidence for the defence.[31] However, in 2015, with passage of the *Victims Bill of Rights Act*,[32] spouses became both competent and compellable witnesses; this change was codified in section 4(2) of the *Canada Evidence Act*. An individual can now be subpoenaed to court to testify against their spouse. However, a person cannot be compelled to disclose any communication made to them by their spouse during their marriage; this protection is known as marital privilege and is set out in section 4(3) of the *Canada Evidence Act*. Marital privilege does not extend to common law spouses (*R v Nguyen*).[33]

ADMISSIBILITY OF WITNESS TESTIMONY

The rules that govern the **admissibility** of witness testimony, as well as other forms of evidence, are something that every investigator should become familiar with. The general rule on admissibility is found in the Supreme Court case *Morris v The Queen*,[34] which states that nothing (including witness testimony) should be admitted into evidence in court unless it is **relevant** to the charge—that is, helps to prove, actually proves, or helps to disprove at least one of the facts in issue—and everything that meets this test should be admitted into evidence in court unless it is excluded by some other legal rule.[35]

admissibility
the likelihood of a piece of evidence being allowed by the judge to be presented in court

relevant
tending to prove or disprove a proposition

Generally speaking, witnesses may testify about what they themselves experienced, but they may not testify about "what someone else, who is not before

the court, said."[36] Such testimony is perhaps the most common form of what is referred to as **hearsay evidence** and is, with certain exceptions, inadmissible. The rule against hearsay has been part of the foundation of Canadian evidence law for centuries; however, it is difficult to define.[37] A working definition of the hearsay rule is:

hearsay evidence
evidence based not on a witness's own knowledge but on a statement that the witness has heard from another source

> Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements are tendered either as proof of their truth or as proof of assertions implicit therein.[38]

While such a definition is complicated, the central concern of the hearsay rule is that the person who made the statement (or communicative conduct) is not in court and thus not subject to cross-examination. The person who made the original statement was not under oath to tell the truth when they made it and thus did not face the prospect of the charge of perjury if they lied. These factors are believed to effectively assure the quality of witness statements. In their absence, it is difficult to assess the reliability of the statement, and there is the danger that the statement will be accorded more evidentiary value than it deserves.[39]

In addition, witnesses generally may not give their opinion in testimony. **Opinion evidence** is inadmissible because it calls for an inference or conclusion to be drawn from the facts, which is the job of the trier of fact, not of the witness.[40] A properly qualified person, however, may give opinion evidence to assist the trier of fact in making a judgment on a matter about which an ordinary person would likely be unable to make a correct judgment without help because of a lack of special knowledge, skill, or expertise.[41] In this case, the witness is known as an **expert witness** and the evidence is known as **expert evidence**. Professionals whom the court may deem expert witnesses include medical doctors, accountants, and scientists and may include certain police officers such as identification officers, polygraph examiners, and breathalyzer technicians. Opinion evidence is never allowed, however, in cases where the testimony concerns the mindset or intention of an accused.

opinion evidence
evidence that goes beyond a statement of fact to present an opinion or conclusion

expert witness
witness who by virtue of education, training, or experience has specialized knowledge or understanding beyond that of the average person, whose opinion may be relied on to assist a trier of fact in reaching a conclusion

expert evidence
opinion evidence presented in a legal proceeding by a qualified expert witness drawn from their particular area of expertise

In recognition of the difficulty in drawing a clear line between fact and opinion in many cases, the Supreme Court has allowed non-expert witnesses to give opinions

> with respect to matters that do not require special knowledge (such as, for example, recognizing the voice of a person with whom the witness has had frequent contact), and in circumstances where it is virtually impossible to separate facts from inferences based on those facts (for example, a person was drunk).[42]

R v Mohan[43] provides additional discussion about the admissibility of opinion evidence.

KEY TERMS

accused, 4
admissibility, 13
agent, 10
agent provocateur, 10
Canadian Charter of Rights and Freedoms, 13
compellability, 13
competence, 12
confidential informant, 9
contamination, 8
evidence, 4
expert evidence, 14
expert witness, 14
hearsay evidence, 14
hypothesis, 3
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material witness, 10
opinion evidence, 14
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suspect, 4
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trier of fact, 5
victims, 4
witnesses, 4

FURTHER READING

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REVIEW QUESTIONS

TRUE OR FALSE

1. The primary factor influencing a witness's compellability is mental capacity.
2. The immediate priority of the first officer arriving at the scene of a violent crime is to preserve any physical evidence that may be present.
3. The police do not have the authority to arrest a person for the sole purpose of conducting an interview.
4. A witness who genuinely does not want to get involved with an investigation will not be required to testify in court.
5. Failure to attend court in response to a subpoena may result in an arrest warrant being issued by the presiding judge.
6. Most crimes are solved by the gathering of physical evidence rather than through the interview process.
7. When the first officer arrives at a crime scene and encounters several witnesses, they should have the witnesses remain together to discuss what they observed in order to secure a cohesive narrative of their observations.

8. Hearsay evidence is not admitted in court under any circumstance.
9. The confidentiality privilege extends to agents acting on behalf of the police.

MULTIPLE CHOICE

1. An investigation is or should be
   - **a.** a search for the person who the investigator knows is responsible for the crime
   - **b.** a search for the truth
   - **c.** a search for evidence with which to convict the offender
   - **d.** a search for evidence that confirms the investigator's theory of the crime
2. Of all the potential obstacles that stand between an investigator and the truth, perhaps the most difficult to overcome are
   - **a.** witnesses who refuse to cooperate with police
   - **b.** a lack of investigative resources
   - **c.** the investigator's own limitations as an information processor and decision-maker
   - **d.** defence counsel
3. In the same way that physical evidence at a crime scene must be protected from contamination, witnesses must be protected from contamination that can occur as a result of
   - **a.** environmental contaminants, such as gasoline or motor oil at a vehicle crash scene, or bodily fluids, such as blood at an assault or homicide scene
   - **b.** thinking too much about what occurred
   - **c.** too much conversation with other people at a crime scene, such as police officers, other witnesses, or members of the public
   - **d.** viewing a traumatic event, such as violent crime
4. A number of leading authorities in the field of eyewitness evidence argue that law enforcement and the legal system should adopt a more scientific perspective and view what resides in a person's memory in the same way that they view physical evidence. Their suggestion is based on the notion that, just like physical evidence,
   - **a.** eyewitness memory for an event is prone to factors like deterioration and contamination
   - **b.** eyewitness memory resides in the brain, which is a physical structure
   - **c.** eyewitness memory can be difficult to locate because it is typically stored in many different areas of the brain
   - **d.** eyewitness memory can be affected by many different factors, such as mental or physical illness
5. A confidential informant is someone who
   - **a.** has disclosed information about criminal activity to a police officer and has been given an assurance of confidentiality by the officer
   - **b.** has engaged in undercover police activity, such as the wearing of a body pack, in order to gather evidence confidentially
   - **c.** has disclosed information about criminal activity to a police officer and has been given a quantity of money in exchange for that information
   - **d.** personally observed or experienced something relevant to the commission of a crime and voluntarily gave that information to police

SHORT ANSWER

1. The legal process for issuing a subpoena is found in section 698 of the *Criminal Code*; the legal authority is found in section 699. After reviewing an annotated Code, list the subsections relating to the content of the subpoena and service of the document. What does the case law on these subsections say?

2. Adopting the perspective of a criminal investigator, list some reasons, other than those provided in the text, why a witness might be uncooperative.
3. Does the *Criminal Code* allow a police officer to request a warrant for a witness in lieu of a subpoena when, on probable grounds, the officer believes the witness may ignore a subpoena and flee the country? If so, what are the statutory requirements the police must meet?
4. Trying to find witnesses by revisiting a crime scene on successive days can have some advantages. As an investigator, in which circumstances would you revisit a crime scene and what would you hope to gain?
5. How can the first officer attending a crime scene "contaminate" the potential testimony of a witness or witnesses found there?
6. Explain the legal distinctions between a witness, a confidential informant, and an agent for the police.
7. Why must a police officer not offer confidential informant status to an anxious witness in order to obtain information from that witness and/or maintain their cooperation?

CASE STUDY

On January 21, 20—, at about 2:30 a.m., the police received a call from the Never Close Convenience Store at 224 Fourth Avenue, two blocks west of Main Street. The caller stated that she was a cashier at the store and had just been robbed at knifepoint by a lone male.

Two officers, Smith and Brown, attended as soon as possible but were delayed by heavy snowfall and poor road conditions. The officers arrived at 2:45 a.m. and found a distraught clerk (Sally Little) waiting for them at the store entrance.

Sally advised the officers that she normally worked the midnight-to-eight shift at the store. At about 2:20 a.m., she had just finished serving a regular customer, Bob Black, who had purchased a package of cigarettes on his way home from work. Sally stated that Bob had been gone about 30 seconds when she noticed a middle-aged man dressed in a heavy green parka enter the store.

On entering the store, the man, who wore a black toque and gloves, stood for a moment stamping his feet on the mat to remove the snow from his boots. After looking around the store, he approached Sally, who was behind the counter, and asked for a package of Player's Light cigarettes. Sally turned to pick up the package, and when she turned back to face the man, he had a hunting knife in his hand and stated that he wanted all the money in the cash register. Sally said she did not move immediately because she was in shock. The man then repeated his demand, saying that if she did not do as she was told, he would have to cut her up.

Sally advised the officers that she then moved to the cash register and opened it. She took out all the cash and handed it to the man, who then asked for a bag. Sally gave the man a plastic bag and watched as he placed the cash into the bag. The man warned Sally not to call for help, and he fled the store. Sally advised the officers that she watched as the man fled west toward Main Street. She could not see him for very long because he disappeared around a corner. She then called the police.

While Officer Brown took a brief statement, including a full description of the robber, Officer Smith inspected the area around the store. The snow continued to fall and the streets were deserted. Smith noticed an area near the southwest corner of Fourth and Main where it was obvious that a snowplow had gone around a parked vehicle that was no longer there. Smith concluded that the vehicle had departed after the snowplow had gone by, because he noticed that its tire marks crossed the mound of snow left by the plow. When Smith looked around the area from the vantage point of the store's front door, he noticed a lighted window in an apartment building across the street from the store.

1. Where should Brown and Smith begin their search for witnesses? Explain your answer.
2. Identify potential witnesses and explain your choices.
3. Describe the evidence that each potential witness might provide.

NOTES

1. Richard P Feynman, *The Pleasure of Finding Things Out* (Cambridge, Mass: Perseus Publishing, 1999) at 212.
2. The Honourable Stephen T Goudge, Commissioner, Inquiry into Pediatric Forensic Pathology in Ontario (Toronto: Ontario Ministry of the Attorney General, Queen's Printer for Ontario, 2008), online: <http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/index.html>.
3. *Ibid* at 376.
4. Sir Arthur Conan Doyle, *The Illustrated Sherlock Holmes* (London: Peerage Books, 1990) at 12.
5. Michel St-Yves, ed, *Investigative Interviewing—The Essentials* (Toronto: Carswell, 2014) at xxxi.
6. Brent Snook et al, "Reforming Investigative Interviewing in Canada" (2010) 52:2 Can J Corr 203 at 204.
7. John Yarbrough, Hugues F Hervé & Robert Harms, "The Sins of Interviewing: Errors Made by Investigative Interviewers and Suggestions for Redress" in Barry S Cooper, Dorothee Griesel & Marguerite Ternes, eds, *Applied Issues in Investigative Interviewing, Eyewitness Memory, and Credibility Assessment* (New York: Springer, 2013) 59 at 59.
8. 2006 CanLII 4903 (Ont Sup Ct J).
9. *Ibid* at para 10.
10. *Supra* note 5.
11. Gary L Wells & Elizabeth F Loftus, "Eyewitness Memory for People and Events" in Randy K Otto, ed, *Comprehensive Handbook of Psychology, Volume 11: Forensic Psychology*, 2nd ed (New York: Wiley, 2012).
12. National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (Washington, DC: National Academies Press, 2014).
13. 1999 CanLII 14915, 74 CRR (2d) 164 (Ont Sup Ct J).
14. See e.g. *R v Leipert*, [1997] 1 SCR 281, 1997 CanLII 367; *Named Person v Vancouver Sun*, 2007 SCC 43; *R v Basi*, 2009 SCC 52; *R v Barros*, 2011 SCC 51; *R v Named Person B*, 2013 SCC 9; *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37; *R v Brassington*, 2018 SCC 37.
15. [1990] 3 SCR 979, 1990 CanLII 27.
16. See *Leipert*, *supra* note 14; *R v Barnes*, 2010 ONSC 546; *Barros*, *supra* note 14.
17. 2008 CanLII 84098 (Ont Sup Ct J).
18. [1991] 3 SCR 595, 1991 CanLII 15.
19. *Supra* note 16.
20. *Supra* note 15 at para 4.
21. RSC 1985, c C-46.
22. 2003 CanLII 24447, 181 CCC (3d) 118 (Ont CA).
23. 2009 CanLII 18219 at para 14(4) (Ont Sup Ct J).
24. *R v Neuburger*, 1995 CanLII 201, 18 CCC (3d) 348 (BC CA) at para 9.
25. *R v Spencer*, 1983 CanLII 3111, 145 DLR (3d) 344 (Ont CA) at para 35.
26. RSC 1985, c C-5.
27. Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis Canada, 2018).
28. *Canada Evidence Act*, s 16; *R v Nguyen*, 2015 ONCA 278 at para 12.
29. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 13.
30. 2000 SCC 46.
31. *Supra* note 27.
32. SC 2015, c 13.
33. *Supra* note 28.
34. [1983] 2 SCR 190, 1983 CanLII 28.
35. Lederman, Bryant & Fuerst, *supra* note 27 at § 2.44.
36. *Ibid*, § 6.3.
37. *Ibid*, § 6.1, 6.3.
38. *Ibid*, § 6.2.
39. *Ibid*, § 6.4.
40. *Ibid*, § 12.2, § 12.3.
41. *Ibid*, § 12.37, § 12.2, § 12.38.
42. *Ibid*, § 12.2, 12.3.
43. [1994] 2 SCR 9, 1994 CanLII 80.