



The Ten Evidence “Rules” That Every Family Law Lawyer Needs to Know

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I put “Rules” in quotation marks above, because I once wrote an article entitled “Are There *Any* Rules of Evidence in Family Law?”¹ As I said there about the title:

I still cannot figure out if my title is facetious, or ironic, or a *cri de Coeur* of a frustrated counsel, or the evangelical call of an evidence professor, or just an accurate statement of the law. It was originally intended to be facetious, to emphasize that there are no “rules of evidence” in family law, even if we pretend there are. Or, maybe it is more ironic, to remind ourselves that there really are such “rules”, even if we say there are not. As counsel, on some days, the long ones, the title was my rant in the halls and environs of courtrooms. As an evidence professor, I believe that the evidence “rules” serve important systemic purposes, but then that is what you would expect. The more family law cases I read, I did begin to fear that my title was simply accurate. Not only accurate, by acceptably so, with no hint of wit or irony left.²

The gist of the “Any Rules” article was eventually that there *are* evidence “rules”, or more accurately now, evidence “principles”, that do have real application in family law cases.

I was asked to boil down all of evidence law to ten, count ‘em, just ten “rules” that family law lawyers need to know. This is a bit like picking the ten best Canadian albums of all time. We all know that Joni Mitchell and Neil Young will make the list. Same with evidence “rules”: “relevance” will make the list, as will “hearsay”, but there will be debate about others. Here’s my “top ten” list, for ready reference, details to follow:

- (1) Relevance
- (2) Admissibility Procedure
- (3) Opinion: Lay and Expert
- (4) Hearsay and Its Exceptions
- (5) Business Records
- (6) The Rule in *Browne v. Dunn*
- (7) Impeaching and Supporting Credibility
- (8) Illegally-Obtained Recordings, E-mails, Etc.
- (9) Privilege for Settlement Negotiations
- (10) Privilege for Confidentiality

¹ (2003), 21 Can.Fam.L.Q.245 (included in the materials for this program). In the same issue was published my companion article, “The Cheshire Cat, or Just His Smile? Evidence Law in Child Protection” (2003), 21 Can.Fam.L.Q. 319.

² “Any Rules”, *ibid.* at 245.

In what follows, I am purposely keeping the paper brief and to the point. Those who want further details can consult my two articles on the subject³ or the *Evidence in Family Law* looseleaf⁴ or, if you really want that much more, one of the three leading Canadian textbooks on evidence law.⁵ I will not cover evidence issues specific to child protection, focussing upon the issues that most frequently arise in the general range of “private” family law cases.

(1) Relevance

The cardinal principle of evidence law, to which all others are subordinate, is “relevance”: all relevant evidence is admissible, subject to specific exceptions. In evidence, there are three kinds of “relevance” at work: (a) logical relevance, (b) materiality and (c) the broader balancing of probative value against prejudicial effect (what I would call “pragmatic relevance”, explained below).⁶

(a) Logical Relevance, Exclusion of Irrelevant Evidence

Only relevant evidence is admissible and, conversely, irrelevant evidence is inadmissible. We tend not to think of “irrelevance” as a rule of exclusion, but it is the most common ground for finding evidence inadmissible.

Relevance is not really a “legal concept, but a matter of logic, experience and common sense. Does the offered item of evidence have any tendency to make the existence of any material fact more or less probable: that’s the relevance question. Invariably, the relevance question involves some generalisation about how the world works, e.g. is a parent who smokes marijuana a worse parent than one who does not. At the margins, especially in family law, these generalisations can be highly disputable, with judges thus differing about the relevance of an item of evidence.

(b) Materiality

Once upon a time “materiality” was treated as a separate ground of exclusion, to wit the old form of objection, “irrelevant, immaterial and prejudicial”. Today it is treated as a sub-category of relevance. The offered item of evidence must be relevant in proving a material fact, i.e. a fact of consequence to the determination of the proceeding. What facts are “material” are determined by the substantive law, the pleadings (such as they are), and any formal admissions or agreements by the parties.

³ Above, note 1.

⁴ Niman, ed., *Evidence in Family Law* (Canada Law Book, 2010).

⁵ Paciocco and Stuesser, *The Law of Evidence*, 6th ed. (Irwin Law, 2011); Lederman, Bryant and Fuerst, *The Law of Evidence in Canada*, 3rd ed. (LexisNexis, 2009)(still referred to as Sopinka, Lederman and Bryant by many, as John Sopinka was the lead author of the first two editions); and Delisle, Stuart, Tanovich and Dufraimont, *Evidence: Principles and Problems*, 10th ed. (Thomson-Carswell, 2012).

⁶ “Any Rules”, above, note 1 at 259-62.

(c) Probative Value vs. Prejudicial Effect: Pragmatic Relevance

Trial judges have a general discretion to exclude evidence where its probative value is outweighed by the dangers of undue prejudice, confusion of the issues, misleading the court, unfair surprise or undue consumption of time.⁷ I call this “pragmatic relevance”, where a trial judge must weigh the benefits (probative value) of the evidence against its costs (the five countervailing concerns listed above) as part of his or her management of the conduct of a trial or hearing. In effect, this discretion permits a trial judge to exclude evidence which possesses some logical relevance, but not enough to be worth the costs.

The somewhat-misleading shorthand version of this discretion is “probative value vs. prejudicial effect”. That version over-emphasises the importance of “prejudicial effect”, a much greater concern in criminal cases. In the civil sphere, “undue prejudice” is generally less important than the countervailing factors of “undue consumption of time” and “confusion of the issues”. This residual discretion creates a greater potential for different results as between judges, i.e. some judges will run a tighter trial, more ready to exclude evidence of low probative value.

(2) Admissibility Procedure

There are two steps in dealing with any specific item of evidence: (i) is it admissible, and, if it is, then (ii) what weight should it receive in making findings of fact. In a judge and jury trial, these two steps are easily distinguished because the functions are divided: the judge decides questions of admissibility as a matter of law, while the weight of the evidence is for the jury in its fact-finding mission. Once the judge rules that an item of evidence is “admissible”, it forms part of the trial record that may be considered by the jury in its deliberations.

Not so clear in judge-alone cases, where both tasks are performed by the same person, the trial judge. The admissibility step, and any *voir dire* for that purpose, is often simply lost in the shuffle. It is the responsibility of trial judges, and trial lawyers, to keep the steps distinct. It is important for the lawyers to know what forms part of the trial record, what items of evidence are or are not admissible. For two reasons: first, to know what evidence is admissible and must be countered as part of one’s own case and, second, to prepare one’s closing argument. There are some judges who prefer to avoid the admissibility stage, to let it all in and go to weight. Don’t be fooled by this gambit. If there is an objection, by you or your opponent, you are entitled to a ruling on admissibility.

First, does every question of admissibility require a *voir dire*, an actual “hearing within a hearing”? No, not when there are no “preliminary facts” which need to be proved. For example, questions of relevance only require argument. In some instances, there will be no dispute as to the preliminary facts. In others, a brief outline of the intended evidence by counsel putting forward the evidence will be enough to make the admissibility decision. A *voir dire* is required where there are preliminary facts in dispute, any facts which are the foundation for the admissibility ruling. For example, to be admissible as a business record, the proponent has to prove the requirements of ss. 50 and 52 of the *Saskatchewan Evidence Act*. Or, to admit child

⁷ E.g. *R. v. Morris*, [1983] 2 S.C.R. 190.

hearsay, the proponent has to prove necessity and threshold reliability under the principled approach. These preliminary facts must be proven on the balance of probabilities, the normal civil standard.

Second, do the “rules of evidence” apply to the evidence offered during the *voir dire* itself? The conventional answer is that, apart from the rules of privilege, the rules of evidence are *not* applicable in the *voir dire*, or at least are quite relaxed. By definition, during the *voir dire*, the judge may hear some evidence that subsequently proves to be inadmissible. The answer to this question affects the answer to the next question.

Third, what can you do with the evidence heard during the *voir dire*? The law is clear: nothing heard on the *voir dire* is admissible at trial. If the court rules that the disputed evidence is *not* admissible, then usually none of the evidence from the *voir dire* becomes part of the trial record. But, if the offered evidence *is* ruled admissible, to avoid unnecessary repetition, the parties can agree that evidence heard on the *voir dire* will be admissible and form part of the trial record. For example, just think of the child hearsay *voir dire*. More specifically, the parties may agree that only some parts of the evidence will be treated as part of the trial record, especially where there may be some inadmissible bits heard on the *voir dire*. If there is no such agreement, a court has the trial management power to make an order to that effect.⁸

(3) Opinion: Lay and Expert

Witnesses must testify as to facts of which they have personal knowledge. Their opinions are inadmissible. There are two exceptions to the general rule excluding opinions: the lay opinion exception and an exception for properly-qualified experts.⁹ Most of the case law focusses on expert opinion, but the lay opinion exception deserves some attention in family law.

(a) The Lay Opinion Exception

The lay opinion exception recognises that it is often difficult and unnatural for witnesses to testify about their observations without any element of “opinion”, especially as the line between “fact” and “opinion” is often blurred. In *R. v. Graat*, the Supreme Court of Canada recognised these realities, allowing both police officers and friends of the accused to testify about their impressions of the accused’s state of drunkenness in an impaired driving case.¹⁰ A lay witness could express some low-level opinions, said the Court, where “the facts perceived by the witness and the inferences from those facts are so closely associated that the opinion amounts to little more than a compendious statement of facts”. Remember that lay opinion must be based on the first-hand knowledge of the witness, as only experts can offer opinions based upon information from others.

Unlike expert opinion, lay opinion issues can arise with any witness, at any time, especially in family law. After all, in family law, witnesses are often describing the condition of

⁸ *R. v. Adam*, [2006] B.C.J. No. 2167, 2006 BCSC 1405.

⁹ “Any Rules”, above, note 1 at 274-81.

¹⁰ *R. v. Graat*, [1982] 2 S.C.R. 819.

persons, their emotional states, the quality of their interactions with their children, etc. Words like “tired”, “depressed”, “happy” or “close” are often used. The law prefers that lay witnesses be as specific and as concrete as possible in describing their observations, but inevitably some element of “opinion” creeps in. No *voir dire* is required for this exception, as it just affects the form of the witness’ answers, forcing them to be as factual and as specific as possible.

One last point: the lay opinion exception requires no special expertise. It is the kind of low-level opinion that any witness can offer, with or without qualifications. As Justice Dickson made clear in *Graat*, under the lay opinion exception, there is no reason to prefer police officer assessments of drunkenness over the views of other lay individuals. The lay opinion exception is not some kind of “second-best” vehicle for those who lack sufficient expertise to qualify under the expert opinion exception.

(b) Expert Opinion

For the expert opinion exception, absent consent, a *voir dire* will be required. There are two kinds of *voir dire*s that we see: first and most common, a *voir dire* to determine whether this particular witness put forward possesses the expert qualifications necessary to express an opinion in a field of accepted expertise; and, second, the full-blown *Mohan voir dire* to determine whether the field of expertise is one that the law will recognise. Once an expert and his or her expertise is accepted, then the expert can give an opinion within that field of expertise, not just based upon first-hand knowledge, but also based upon hearsay and other second-hand professional sources. And the expert’s opinion can even be given on the ultimate issue in litigation, as Justice Dickson told us in *Graat*.

In the more common “qualification” *voir dire*, the only issue will be whether this witness has the necessary skill or special knowledge to express an opinion in a particular field. In the *voir dire*, counsel will offer the expert’s curriculum vitae and ask some questions that highlight particular aspects of the expert’s education, training and experience, followed by opposing counsel’s cross-examination on those qualifications. It is the duty of the lawyer intending to ask opinion questions to specify the scope of the witness’ expertise at the start of the *voir dire*, so that the qualification issues are clear. A medical specialist who can give opinions about a child’s burns may or may not have the qualifications to state his or her opinions about the behaviour of abused children, as was the issue in *R. v. Marquard*.¹¹ At the close of the *voir dire*, the judge will rule on the witness’ ability to testify as an expert and should articulate the scope of that expertise.

By contrast, the *Mohan voir dire* is much more complicated, as the science or expertise itself is in question. As Justice Charron put it in *Olscamp*, the issue is whether *any* expert, however well-qualified, can give expert testimony in the field.¹² The content of this *voir dire* was set out by Justice Sopinka in *R. v. Mohan*, in his deceptively simple four-part test:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule; and

¹¹ *R. v. Marquard*, [1993] 4 S.C.R. 223.

¹² *R. v. Olscamp* (1994), 35 C.R. (4th) 37, 95 C.C.C. (3d) 466 (Ont.Gen.Div.).

(d) a properly qualified expert.¹³

In the subsequent case law, that first requirement of “relevance” has been read to include “reliability” considerations. At the end of the *voir dire*, the trial judge engages in “a cost benefit analysis”, weighing probative value against countervailing considerations in determining whether to admit the expert evidence.

The *Mohan* analysis has been reorganised in a most helpful way by the Ontario Court of Appeal in the 2009 *Abbey* case.¹⁴ Doherty J.A. separated out the four simple yes/no preconditions from the more complex cost-benefit balancing test. Here are his four preconditions:

- (1) the proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;
- (2) the witness must be qualified to give the opinion;
- (3) the proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule; and,
- (4) the proposed opinion must be logically relevant to a material issue.

Once these are satisfied, then the judge must weigh the benefits against the costs.

- (A) The “benefit” side of the cost-benefit evaluation requires a consideration of the probative potential of the evidence and the significance of the issue to which the evidence is directed. When one looks to potential probative value, one must consider the reliability of the evidence.
- (B) The “cost” side of the ledger addresses the various risks inherent in the admissibility of expert opinion evidence, i.e. consumption of time, prejudice and confusion. *Mohan*’s “necessity” forms part of this cost analysis.

Doherty J.A. proceeded to provide helpful guidance in articulating reliability factors to assess expert evidence and then applied his factors to admit the evidence of a sociologist with expertise in the culture and symbols of Canadian street gangs.

Abbey has been mentioned by the Saskatchewan Court of Appeal¹⁵ and applied in detail in a couple of Saskatchewan trial decisions.¹⁶

One final point: there has been a renewed debate whether bias can render expert evidence inadmissible, or just goes to weight. Increasingly, civil procedure rules and courts have emphasised the duties owed by experts to the court and the administration of justice, even if the expert has been retained by one of the parties. The issue recently split the Nova Scotia Court of

¹³ [1994] 2 S.C.R. 9. The defence sought to call a psychiatrist to testify about the kind of deviant person who could have committed the sexual assaults alleged against Dr. Mohan, namely a psychopath and pedophile. The expert evidence was properly rejected as insufficiently reliable.

¹⁴ *R. v. Abbey*, 2009 ONCA 624, 246 C.C.C. (3d) 301, 68 C.R. (6th) 201.

¹⁵ *R. v. Standingwater*, [2013] S.J. No. 438, 2013 SKCA 78 at para. 25.

¹⁶ *R. v. Pinsky*, [2011] S.J. No. 672, 2011 SKQB 371 (Scherman J.); *R. v. Wilkinson*, [2011] S.J. No. 346, 2011 SKQB 230 (Maher J.).

Appeal, with two judges holding that bias did not go to admissibility while the Chief Justice dissented that it could in “exceptional circumstances”.¹⁷

(4) Hearsay and Its Exceptions

Included in the materials is my chapter on “Hearsay and Exceptions to Hearsay Rule” from the Niman looseleaf on *Evidence in Family Law*.¹⁸ A separate session in the program will be devoted to these hearsay issues. Contrary to what you might think, the hearsay rule is enforced with some regularity in our family courts. What you might call “rank hearsay” is excluded. But there is no question that many family courts have taken a more relaxed approach towards what might be called “contestable” hearsay, especially hearsay from children.

Here I want to point out two recent and important Supreme Court of Canada decisions involving hearsay from the past year. In *R. v. Baldree*, for the first time the Court had to struggle with the actual definition of hearsay, and whether an “implied assertion” could amount to hearsay in a drug case. Answer: yes, and hearsay excluded.¹⁹ In the second, less important case, *R. v. Youvarajah*, the Court debated the idea of “threshold reliability” and ruled 5-2 that an earlier agreed statement of facts signed by the youth for his own sentencing was not reliable enough to be admitted for its truth when the youth changed his story at a subsequent adult trial of another accused.²⁰

(a) *Baldree*: What Is Hearsay?

Baldree is a critical hearsay decision, of importance similar to *Khan*²¹ and *Khelawon*.²² It posed, dramatically, an issue the Supreme Court has never resolved, despite its two decades of hearsay reform: what is hearsay? That’s actually a much harder question than the use of the categorical exceptions or even the assessment of necessity and reliability under the principled approach. Chris Baldree’s fate turned on what is called an “implied assertion”. To keep the facts simple, there were two roommates in an apartment, where the police found marijuana, cocaine and cash. The issue was not trafficking, but whose stuff this was – Baldree’s or his roommate’s. The police had seized Baldree’s cellphone and it rang during the search. A guy said he was at 327 Guy Street and was “a friend of Megan”, and asked for “Chris”, “Chris Baldree”. He wanted “one ounce of weed” and, when asked by the officer how much “Chris” usually charged, the guy said he paid \$150. The officer agreed to deliver the dope, but didn’t.

At Baldree’s trial, the caller’s statements were admitted as non-hearsay, as circumstantial evidence. Baldree was convicted. A majority of the Ontario Court of Appeal ruled the statements

¹⁷ *Abbott and Haliburton Co. Ltd. v. White Burgess Langille Inman*, [2013] N.S.J. No. 259, 2013 NSCA 66.

¹⁸ Chapter 9 in Niman, above, note 3. See also “Any Rules”, above, note 1 at 282-306.

¹⁹ *R. v. Baldree*, [2013] S.C.J. No. 35, 2013 SCC 35 (June 19, 2013).

²⁰ *R. v. Youvarajah*, [2013] S.C.J. No. 41, 2013 SCC 41 (July 25, 2013).

²¹ *R. v. Khan*, [1990] 2 S.C.R. 531.

²² *R. v. Khelawon*, [2006] 2 S.C.R. 787, 2006 SCC 57.

to be inadmissible and ordered a new trial, over the strong dissent of Watt J.A.²³ The Supreme Court dismissed the appeal, through clear and carefully-constructed reasons by Justice Fish.²⁴

Why does this decision matter? The Court had to struggle with the definition of hearsay, forcing them back to first principles:

In short, hearsay evidence is presumptively inadmissible because of the difficulties inherent in testing the reliability of the declarant's assertion. Apart from the inability of the trier of fact to assess the declarant's demeanour in making the assertion, courts and commentators have identified four specific concerns. They relate to the declarant's perception, memory, narration and sincerity.²⁵

The unknown caller in this case intended to purchase marijuana

because he believed the respondent to be a drug dealer. The relevance of the statement thus hinges on the truth of the declarant's underlying belief. Any inference that can be drawn from the statement necessarily assumes its veracity.

Had the caller stated that he wanted to buy drugs because *Mr. Baldree sells drugs*, this would have amounted to an express assertion that Mr. Baldree is a drug dealer. Thus framed, the caller's assertion would doubtless have constituted hearsay.

But the caller stated instead that he was calling because he wished to *purchase drugs from Mr. Baldree*. His assertion that Mr. Baldree is a drug dealer was no less manifest in substance, though implicit rather than explicit in form....

In my view, the hearsay nature of this evidence cannot be made to depend on how the declarant framed his request. Such a formalistic analysis disregards the purposive approach to the hearsay rule adopted by this Court.²⁶

Whether an assertion is express or implied, it will still amount to hearsay if it is offered to prove the truth of its contents.²⁷ This ruling enlarges the scope of statements to which the hearsay rule is applicable.

Once a statement is tagged as hearsay, then it will be inadmissible, unless it falls within a categorical hearsay exception or can be admitted based upon necessity and reliability. In *Baldree*, no traditional exception applied, so the Court moved on to the principled approach. No necessity had been shown, as the police never went to the Guy Street address and never made any efforts to locate the caller. Further, "the single telephone call" was not sufficiently reliable. Fish J. was careful to point out that there might have been a different outcome on both necessity

²³ 2012 ONCA 138, 109 O.R. (3d) 721.

²⁴ Moldaver J. wrote separate reasons, concurring in the result.

²⁵ Above, note 19 at para. 31.

²⁶ *Ibid.* at paras. 40-42 (emphasis in original).

²⁷ The Court left for another day the debate whether non-verbal conduct could amount to an implied assertion for hearsay purposes, e.g. captains getting on ships to prove a ship seaworthy, umbrellas viewed from a window to prove it is raining outside, and other hypotheticals much loved by evidence professors tormenting students.

and reliability if there had been “several” or “numerous” drug purchase callers.²⁸ The analysis of reliability is extremely brief, however, and adds little to the Court’s jurisprudence.

(b) *Youvarajah*: Reliable or Not?

Threshold reliability was the focus of a split Supreme Court in this case, with a five-judge majority finding the hearsay unreliable over the objections of a two-judge minority. For the majority, Karakatsanis J. found the co-accused declarant’s motive to lie too strong to overcome some of the procedural guarantees of trustworthiness. In dissent, Wagner J. was prepared to be much more “generous” in his interpretation of threshold reliability. Despite its complicated criminal fact setting, *Youvarajah* does provide some helpful guidance on the determination of threshold reliability more generally.

Youvarajah and a youth, D.S., were charged with first degree murder after a failed drug deal. D.S. was the shooter and he pleaded guilty in Youth Court to second degree murder. As part of his plea agreement, D.S. signed an agreed statement of facts (ASF) drafted by Crown counsel, with input from defence counsel. In the ASF, D.S. said he shot the deceased at the direction of *Youvarajah*, with a gun supplied by the adult accused and returned to *Youvarajah* afterwards. You can see what’s coming next at the adult trial. D.S. denies the statement, claiming that the gun was his own and he shot the deceased for his own reasons and he threw the gun in the river afterwards. And he now could not remember signing the ASF. The Crown sought to introduce the Agreed Statement of Facts for the truth of its contents. Necessity was not the issue, given the recantation.

The trial judge refused to admit the ASF and the defence motion for a directed verdict of acquittal was granted. The Crown appealed and the Ontario Court of Appeal ordered a new trial. The Supreme Court of Canada, in its 5-2 decision, allowed the appeal and restored the acquittal.

In my writing about the Court’s principled approach, I have identified the two most important factors in its analysis of threshold reliability: the motive to lie or not of the out-of-court declarant, and the form of the hearsay statement. All other factors are secondary. In *Youvarajah*, the form of the statement was way up the scale, as Wagner J. emphasised in dissent: an agreed statement of facts, signed and acknowledged in open court by D.S., and then filed with the Youth Court as part of the sentencing process.²⁹ True, the statement was not video recorded, so demeanour was lost and there was no oath or affirmation beforehand.³⁰ But I would have thought the solemn form would count for more, as well as the way it was prepared. Not so, said Justice Karakatsanis, an accomplice is treated by the criminal law as “inherently unreliable” and “motivated by self-interest” to “minimize his own conduct and maximize that of the co-accused”.³¹ Further, because of the role of counsel in drafting the ASF, any cross-examination of D.S. about the conversations between him and his counsel in the construction of the ASF would be limited by solicitor-client privilege. As a result, any reliability flowing from the form of the

²⁸ Above, note 19 at paras. 67-73.

²⁹ Above, note 20 at paras. 108-116.

³⁰ These were considerations in the Court’s leading decision on prior inconsistent statements being used for the truth in *R. v. K.G.B.*, [1993] 1 S.C.R. 740.

³¹ Above, note 20 at paras. 62-66.

hearsay statement was undermined by the motive to lie and the absence of a full opportunity to cross-examine D.S. about his prior statement.

In my view, the majority approach in *Youvarajah* has raised the threshold for “threshold reliability”, compared to some other hearsay decisions by the Court. But threshold reliability remains an elastic and elusive concept, especially after the Court’s “anything goes” or “functional” approach to admissibility in *Khelawon*. The Court has not been clear or consistent in its approach, and can easily ratchet the threshold down in the next case.

(5) Business Records

Absent consent, a *voir dire* is usually required to admit business records, whether under ss. 50 and 52 of the *Evidence Act*³² or under the common law exception. A business records *voir dire* incorporates both authentication and hearsay exception foundation requirements. The proponent of the record must prove, through its foundation witness:³³

- (1) The record was made by a “business”, broadly defined in s. 49 of the *Act* (really “regularly kept records” other than personal records);
- (2) The record is written or stored by electronic means;
- (3) The record is “of any act, transaction, occurrence or event” (which includes observation);
- (4) The record was “made in the usual and ordinary course of business (the *Act* states a “double course of business” requirement, but this is really very broadly as it is the regularity of the record-keeping which matters);
- (5) The record was made “at the time... or within a reasonable time” thereafter;
- (6) The records are complete and authentic (what we call “authentication”).

The witness testifying on the *voir dire* must give evidence on each of these points, as the party putting forward the business records must satisfy each one of these requirements on the balance of probabilities.

The Saskatchewan Court of Appeal has struggled with the business records exception, not always successfully, in three cases: *R. v. Martin* (1997),³⁴ *Metke v. Larson* (2005)³⁵ and most recently *B.L. v. Saskatchewan (Ministry of Social Services)* (2012).³⁶

On one point, the Court of Appeal has been clear: expert opinion is NOT admissible under the business records exception, only evidence of facts. That would be requirement no. (7) in the above list. In the *B.L.* case, the Court of Appeal approved a clear statement to that effect by Justice Ryan-Froslic.³⁷

³² S.S. 2006, c. E-11.2.

³³ “Any Rules”, above, note 1 at 299-303.

³⁴ [1997] 6 W.W.R. 62, 152 Sask.R. 164, [1997] S.J. No. 62 (C.A.).

³⁵ 2005 SKCA 79, [2005] S.J. No. 394, 262 Sask.R. 312.

³⁶ 2012 SKCA 38, [2012] S.J. No. 201, 393 Sask.R. 57, [2012] 12 W.W.R. 468.

³⁷ *Ibid.* at para. 24, quoting Ryan-Froslic J. in *Re S.V.*, 2002 SKQB 499, 228 Sask.R. 161.

In *Metke*, however, the Court of Appeal doubted in *obiter* that notes made by a solicitor to take instructions for a will might amount to a business record.³⁸ This is a narrow and archaic view of the business records exception, harking back to some Bob-Cratchit-like clerical notion of business records. Fortunately, its *obiter* status makes it easier to ignore.³⁹

Where the Court of Appeal has really lost its way is the admissibility of multiple hearsay within business records, notably in *Martin* and *B.L.* Consider statements made and recorded within the usual and ordinary course of a business. We can diagram a range of typical situations, found in hospital records:

statement by doctor – to nurse – noted as business record
statement by police officer – to nurse – noted as business record
statement by patient – to hospital nurse – noted as business record, or
statement by patient’s sister – to hospital doctor – noted as business record, or
statement by patient – reported by patient’s sister – to nurse – noted as business record.

It if makes it easier, assume the note-taking nurse or doctor is not available, not that it’s critical to the admissibility issue. Multiple hearsay is a regularly-recurring issue in business records law.

The leading civil case on business records identified multiple hearsay as a problem and suggested a practical and rigorous solution, in *Setak Computer Services Corp. v. Burroughs Business Machines Ltd.*⁴⁰ Business records derive their reliability from the regularity of their recording. That the nurse “under a business duty” records what is said does not assure the reliability of the statement made, only that whatever statement that was made was recorded carefully. Where the nurse records a statement made by another person working within the hospital, like the doctor, then *Setak* says that the doctor is also under a business duty, to be careful in what the doctor observes and reports for recording by the other person, the nurse, operating within the business.⁴¹ Consistent with *Setak* would also be the admissibility of a statement by a police officer about his or her observation to the nurse which is then recorded, as both are operating “under a business duty” even if the two businesses – hospital and police – are different.⁴²

So far, so good. The problems only arise when the source of the multiple hearsay is a “third party” or a “volunteer” acting outside of the business and thus under no business duty, like a patient or a patient’s relative. In these situations, the party offering the hearsay must find some other hearsay exception to justify the admissibility of any non-business multiple hearsay. This is where the Saskatchewan Court of Appeal lost its way.

In *Martin*, the Court of Appeal ruled that s. 30 of the *Canada Evidence Act* allowed the admissibility of multiple hearsay found in business records, double and even triple hearsay, with

³⁸ Above, note 35 at para. 2.

³⁹ *Kopp v. Halford*, [2013] S.J. No.212, 2013 SKQB 128 at paras. 55-57.

⁴⁰ (1977), 15 O.R. (2d) 150, 76 D.L.R. (3d) 641 (Ont.H.C.).

⁴¹ Of course, if the doctor’s statement is one of expert opinion, it is not admissible under the business records exception.

⁴² Remember that in *Setak* the two companies, Setak and Burroughs, held joint meetings of representatives to solve the computer problems, with the minutes reflecting statements by those from each business.

any frailties going to weight. Unlike in *Setak*, the Court did not distinguish the source of the hearsay in making this sweeping statement. ALL multiple hearsay was admissible, said Jackson J.A.

As I explained in my “Any Rules” article, this over-broad approach was unnecessary on the facts of *Martin*.⁴³ To put it in diagrammatic terms, remember the sequence in this prosecution of Martin for defrauding the Canadian Wheat Board by overstating the amount of grain he had stored:

farmers – to Statistics Canada – to Sask. Dept. of Agriculture statistics

The Director of Statistics from the provincial Department was called to testify to average crop yields in Martin’s area. Note that business duty applies to every stage of hearsay: farmers must be careful in reporting crop yields to Statistics Canada, and Stats Canada employees must be careful in recording and reporting the data to the Saskatchewan Department of Agriculture statisticians, and in turn to their Director who was to testify.

Unfortunately, the Court of Appeal repeated its overbroad view and extended it to the Saskatchewan *Evidence Act* in a child protection case in *B.L. v. Saskatchewan (Ministry of Social Services)*. The records in issue were police records, including their usual wide range of multiple hearsay. Ottenbreit J.A. ruled all the hearsay admissible under ss. 50 and 52, even where the maker of the statement was not under a business duty of any kind, based primarily upon an expansive reading of s. 50(2). The Court of Appeal rejected the *Setak* approach, but without responding to the practical and careful reasoning of Justice Griffiths in *Setak*. It is not enough that police routinely record all manner of hearsay. The reliability of the police recording only avoids the need to call the officer making the record (the first stage of hearsay). And it is not enough that the police might act upon the information received in the course of their work – consider a carefully-recorded call to the police from a drunken anonymous caller. The police may act upon that statement, but that doesn’t make it sufficiently reliable to use the caller’s statement for the truth of its contents.

The absurd and unwise result that flows from the Court of Appeal’s approach is wonderfully demonstrated by *Kopp v. Halford*, a family law lawyer negligence case.⁴⁴ In the end, Justice Barrington-Foote avoided the effect of *Martin/B.L.* by finding that the business record was not made sufficiently contemporaneously with the event noted. Otherwise, the Court would have been compelled to admit quadruple hearsay! The husband (Kopp) on a family file sued his former lawyer Halford. Halford sought to introduce a note made by the husband’s current lawyer of a conversation with the wife about what the husband had previously said to his wife in November 2002 about Halford no longer representing him. In diagrammatic terms, it looks like this:

Halford – to Kopp – to wife – to Hunter (Kopp’s current lawyer) – recorded by Hunter

⁴³ Above, note 1 at 301-2.

⁴⁴ Above, note 39.

In the result, even if the Court had admitted the note, Barrington-Foote J. would have given the note no weight.

Let's work through the various hearsay stages. Hunter was not testifying. The note was being offered by Halford in his defence. Ignoring *Metke*, the lawyer's note could be a business record, without Hunter testifying, providing a proper foundation was laid by other means. That's the first stage of the hearsay chain. The wife did not testify as a witness, even though she was available. She was not under any business duty, nor was she a party in the civil suit. The chain is broken here. If we could omit the wife stage, if Kopp had made the statement directly to his lawyer (ignoring privilege issues), then his statement could satisfy a hearsay exception as an "admission" against him when offered by Halford, the opposite party in the civil suit. One small problem: Kopp's statement consists mostly of what Halford in turn said to him (and Halford is trying to offer this in support of his own case, hence it's not really an admission).

Kopp demonstrates the legal and policy flaws of the Court of Appeal approach to multiple hearsay in business records. The appellate approach also seems inconsistent with the Supreme Court's principled approach to hearsay, with its concern for threshold reliability as the ticket to admissibility. That principled view animates the Court's recent decisions in *Baldree* and *Youvarajah*. The Saskatchewan Court of Appeal needs to reconsider its decisions in *Martin* and *B.L.*

(6) The Rule in *Browne v. Dunn*

The "rule" in *Browne v. Dunn* is actually a specific rule within the larger collection of rules which govern the impeaching and supporting of credibility. Named after an 1893 English case,⁴⁵ it is also a rule governing the conduct of counsel in the cross-examination of witnesses. First the rule:

If counsel intends to impeach the credibility of a witness by calling independent evidence later, the witness must first be confronted with the intended evidence during cross-examination, to give the witness a fair opportunity to explain or respond while on the witness stand.⁴⁶

Under this rule, we sometimes say that opposing counsel in this situation has a "duty to cross-examine" the witness.⁴⁷ What drives that "duty", however, is the intent to call a witness as part of one's defence or rebuttal evidence later. The lawyer must therefore know his or her own

⁴⁵ *Browne v. Dunn* (1893), 6 R. 67 (H.L.). The rule was recently reaffirmed as a "sound principle" by the Supreme Court of Canada, if not relevant to the cross-examination issues in *R. v. Lyttle*, [2004] 1 S.C.R. 193, 2004 SCC 5 at paras. 64-5 per Fish J.

⁴⁶ The Saskatchewan Court of Appeal has twice addressed this rule in the past decade, in a pair of reasons by Sherstobitoff J.A.: *Hamm v. Metz*, [2002] S.J. No. 21, 2002 SKCA 11 at paras. 18-24 and *Miazga v. Kuello Estate*, [2007] S.J. No. 247, 2007 SKCA 57 at paras. 242-44. For a recent family case that stated and applied the rule, see *Radons v. Radons*, [2008] S.J. No. 116, 2008 SKQB 85 at para. 11 per Ottenbreit J.

⁴⁷ For an excellent recent judgment on the rule, see *R. v. Gardiner*, 2010 NBCA 46, 260 C.C.C. (3d) 336, where defence counsel was found to be "incompetent" and "ineffective" in lacking knowledge of the rule and a new trial was ordered.

case clearly at the time of cross-examination. The rule in *Browne v. Dunn* is sometimes violated by lawyers who are insufficiently prepared, or by lawyers whose case is shifting under their feet.

It is one thing to state the rule, but the consequences for its breach are less clear. In the classic version of the rule, the counsel who fails to cross-examine is prohibited from calling the subsequent witness, a drastic result.⁴⁸ The “rule” has also been applied to foreclose counsel from questioning the credibility of the uncross-examined witness in closing argument.⁴⁹ To avoid that result, courts have emphasised that the “rule” is not so absolute, applicable only for matters central or significant to the outcome, to be determined by the trial judge in all the circumstances of the case.⁵⁰

Two less drastic remedies were suggested by Justice Moldaver for the Ontario Court of Appeal in *R. v. McNeill*.⁵¹ The first intermediate option would be to bring back the uncross-examined witness for further cross, provided the witness is still available, to allow counsel properly to put the competing version of events to the witness, to give the witness a fair chance to respond, deny or explain.⁵² Alternatively, the failure to cross-examine can be treated as a factor that reduces the weight of the subsequent independent evidence, but the evidence is still heard.

In some instances, during the lawyer’s cross-examination, it may become clear that the lawyer has some intention to call the competing evidence later and a judge may then clarify the intentions of the cross-examining lawyer, to encourage greater and more detailed cross-examination of a particular witness. Unfortunately, a failure to cross usually leaves the court and opposing counsel unaware of the problem until the subsequent witness is called.

(7) Impeaching and Supporting Credibility

The law of evidence says remarkably little about how to determine credibility. There is ample case law across Canada stating that demeanour should not be the sole basis for judging credibility.⁵³ Otherwise, the assessment of credibility is a matter of common sense and experience.⁵⁴

The law of credibility is almost entirely about the permissible methods of impeaching and supporting credibility. Attached as Appendix A to this paper is an outline of the basics of witness examination and the permissible methods of impeaching and supporting credibility, which might

⁴⁸ As the trial judge ruled in *Gardiner*, *ibid*.

⁴⁹ As the House of Lords pointed out in *Browne v. Dunn* itself and repeated in Bryant, Lederman and Fuerst, above, note 5 at 1161-2.

⁵⁰ *Palmer v. R.*, [1980] 1 S.C.R. 759. There the Crown had cross-examined the accused at length, but had not touched upon certain events or meetings, leading to a defence argument about the failure to cross-examine.

⁵¹ (2000), 33 C.R. (5th) 390, 144 C.C.C. (3d) 551.

⁵² If that opportunity were to be declined by the offended party, then impliedly little harm would have been caused by the failure to cross, suggested Moldaver J.A.

⁵³ E.g. *R. v. Norman* (1993), 26 C.R. (4th) 256, 87 C.C.C. (3d) 153 (Ont.C.A.).

⁵⁴ *R. v. Whyte*, [1947] S.C.R. 268.

prove useful. This topic is too large, warranting a separate paper, so I will only cover the basics here.

First, no accreditation BEFORE impeachment. No “oath-helping”, to use another phrase. The credibility of a witness is neither good nor bad until it has been impeached. Only then can the proponent of the witness support the credibility of the witness.

Second, a witness will usually be impeached in cross-examination, by attacking the content of their version of events or by attacking the character for honesty of the witness. The most common method of impeachment would be the use of prior inconsistent statements by the witness under s. 19 of the Saskatchewan *Evidence Act*. Other methods include prior criminal convictions, other seriously dishonest conduct, bias or interest, or serious testimonial defects.

There is an important evidence rule, a sub-rule of impeaching credibility, that limits the scope for cross-examining counsel to call independent evidence as part of his or her own case to rebut answers received from the witness that only go to credibility rather than the merits of the case, known as “the rule against rebuttal on collateral matters”. This “rule” can best be understood as a specific application of the broader “probative value vs. prejudicial effect” principle, in a situation where the probative value of the evidence is much reduced by reason of its relevance *only* to credibility and the countervailing concerns about consumption of time and confusion of issues weigh heavily against admissibility.

Third, once the credibility of a witness has been impeached, then there are a number of permissible methods of supporting credibility AFTER impeachment, like prior consistent statements, good character for honesty or even expert evidence, as outlined in the Appendix. Once credibility has been impeached, then evidence that supports credibility becomes relevant.

These credibility “rules” are really rules for counsel, rules that govern the examination of witnesses and the calling of evidence, whatever the subject-matter of the proceeding, with little difference between criminal and civil proceedings. Lawyers must know these rules, including the rule in *Browne v. Dunn*, without need to resort to law books.

(8) Illegally-Obtained Recordings, E-Mails, Etc.

In my “Any Rules” article, I summarised the current state of the law on parents illegally recording others:

Judges split into two camps: those who do not like the practice, want to discourage it and thus exclude the evidence; and those who do not like the practice, want to discourage it, but nonetheless admit the evidence because of its relevance to this particular child’s best interests.⁵⁵

Parents continue to record each other, and judges continue to disagree. Only now we can add hacked e-mails and text messages into the mix.

⁵⁵ “Any Rules”, above, note 1 at 312. The full topic is covered over pages 312-15.

The two judicial camps continue, but there does seem to be increasing agreement on the framework for analysis, that the case law reflects a situation-specific balancing of “probative value vs. prejudicial effect”, with the policy considerations weighing on the prejudice side of the equation. One group of judges starts from an exclusionary position, emphasising the prejudice side and looking for sufficient probative value to overcome that view. The other group starts from the probative value end, looking for sufficient prejudice to warrant exclusion.

This framework now finds approval from the Ontario Court of Appeal in *Sordi v. Sordi*, where the trial judge’s exclusion of the recorded conversations was upheld on appeal with this brief paragraph:

With respect to the taped conversations, the trial judge relied on solid principles that took into account not only the sound public policy of trying to discourage the use of secretly recorded conversations in family proceedings but also his assessment of the probative value of the tapes in relation to the issue before him.⁵⁶

Unfortunately, this one sentence does not resolve the presumptive point: do we start from exclusion or inclusion in these cases? Trial courts continue to divide on the point.

In the exclusionary camp, there is a frequently-quoted passage from the ruling of Justice Sherr of the Ontario Court of Justice in *Hameed v. Hameed*:

Surreptitious recording of telephone calls by litigants in family law matters should be strongly discouraged. There is already enough conflict and mistrust in family law cases, without the parties’ worrying about whether the other is secretly taping them. In a constructive family law case, the professionals and the courts work with the family to rebuild trust so that the parties can learn to act together in the best interests of the child. Condoning the secret taping of the other would be destructive of this process.⁵⁷

A party seeking admission of such evidence would have to show “a compelling reason” to overcome these policy considerations, said Sherr J.

The *Hameed* passage is quoted by Justice Dufour as part of his excellent review of the law in *S.C. v. J.C.*⁵⁸ The father had copied text messages from his 14-year-old daughter’s cellphone while she slept, text messages between her and her mother in which the mother touted the benefits of moving to Ontario. The text messages had some limited probative value, overcome by the prejudice to the administration of justice in family law matters. The outcome of the balancing might have been different, stated the Court, had the intercepted communications shown some risk to the child. *S.C.* was followed in another Saskatchewan case, *Ackerman v. Ackerman*, involving both text messages and telephone conversations, although the ultimate admissibility ruling was less than clear.⁵⁹

⁵⁶ [2011] O.J. No. 4681, 2011 ONCA 665, 13 R.F.L. (7th) 197 at para. 12, upholding [2010] O.J. No. 6133, 2010 ONSC 2394, 13 R.F.L. (7th) 133 (Timms J.). Unfortunately, the exclusion of the recordings is not discussed in the trial decision.

⁵⁷ [2006] O.J. No. 3109, 2006 ONCJ 274.

⁵⁸ [2009] S.J. No. 121, 2009 SKQB 87.

⁵⁹ [2013] S.J. No. 403, 2013 SKQB 247 at paras. 27-28 (citation of law) and 38 (discussion of relevance of contents).

Since my 2003 article, there is a long list of cases excluding such illegally-obtained evidence, about 12 in all, including *Sordi*, *Hameed*, *S.C.* and *Ackerman*.⁶⁰ However, there is an equally long list admitting such material over this time, although the analysis is sometimes muddled in this camp.⁶¹ In the inclusionary cases that are more carefully reasoned, the courts emphasise the probative value of the evidence.⁶²

In my view, the exclusionary approach offers the better starting point, from a policy point of view, consistent with the *Hameed* reasoning. There should be a “compelling reason”, i.e. substantial probative value, to admit illegally-obtained evidence like secret recordings or hacked e-mails or stolen diaries.

(9) Privilege for Settlement Negotiations

Given the emphasis upon settlement and consensual dispute resolution in family law, it is hardly surprising that this is the most frequent of the evidence privileges raised in family cases.⁶³ This privilege is a class or categorical privilege, with a limited list of exceptions. The party claiming the privilege must prove three foundation facts:⁶⁴

- (i) a litigious dispute is in existence or within the contemplation of the parties;
- (ii) a communication between the parties or between their counsel, and
- (iii) the communication is for the purpose of effecting a settlement, as determined by the contents of the communication.

Once these three facts are proved, then the privilege arises. The categorical privilege is justified by the strong public policy in favour of settling disputes, even stronger in the family setting.

⁶⁰ *Rawlek v. Rawlek*, [2003] B.C.J. No. 2231, 2003 BCSC 1466; *Norland v. Norland*, [2006] O.J. No. 5126 (S.C.J.); *C.L.J. v. J.M.J.*, [2006] N.S.J. No. 171, 2006 NSSC 82; *Lucknov v. Taylor*, [2008] O.J. No. 5911, 2008 ONCJ 795; *Shaw v. Shaw*, [2008] O.J. No. 1111, 2008 ONCJ 130, 62 R.F.L. (6th) 100 (husband hacking wife’s online conversations); *Anderson v. Angasuk*, [2010] N.W.T.J. No. 59, 2010 NWTSC 50; *B.D.C. v. B.J.B.*, 2012 YKSC 64 at para. 11; *Hunter v. Stewart*, [2012] O.J. No. 42, 2012 ONSC 4217 at paras. 56-59.

⁶¹ *T.L.A. v. D.A.A.*, [2004] B.C.J. No. 2533, 2004 BCSC 1610; *K.G. v. S.S.*, [2006] B.C.J. No. 1644, 2006 BCPC 338 at para. 22; *D.L.M. v. L.V.J.M.*, [2005] B.C.J. No. 1533, 2005 BCSC 995; *A.N. v. M.Z.*, [2006] O.J. No. 1543 (S.C.J.); *Bauer v. Bauer*, [2006] O.J. No. 5109 (S.C.J.); *Dunning v. Dunning*, [2006] O.J. No. 1927 (S.C.J.) (credit card records hacked, would have been ordered produced on support motion); *A.C.J. v R.C.*, [2006] B.C.J. No.1995, 2006 BCSC 1336 (surprising ruling that mother had the “right to tape” father’s conversations with children); *Mathews v. Mathews*, 2007 BCSC 1825 (father obtains mother’s diary from locked box, an old-fashioned case); *Rapoport v. Rapoport*, [2011] O.J. No. 5607, 2011 ONSC 4456 at paras. 339-58; *A.F. v. J.W.*, [2013] O.J. No. 3153, 2013 ONSC 4272; *McDermott v. McDermott*, [2013] B.C.J. No. 587, 2013 BCSC 534 (e-mails).

⁶² E.g. *Mathews*, *A.F. v. J.W.*, *ibid.*

⁶³ “Any Rules”, above, note 1 at 307-312. In particular, family law lawyers should review the succinct and comprehensive reasons of Slatter J. in *Leonardis v. Leonardis* (2003), 43 R.F.L. (5th) 144 (Alta.Q.B.).

⁶⁴ As I point out in “Any Rules”, the common statement of conditions found in Sopinka, Lederman and Bryant is incorrect in also demanding proof of an express or implied intention not to disclose by the parties, a leftover from the old approach which took a contractual approach to the privilege, rather than its current public policy approach: *ibid.* at 308-9. For an excellent review of the basics of the privilege, including the Sopinka conditions, see *Tucker-Lester v. Lester*, [2012] S.J. No. 702, 2012 SKQB 443, 410 Sask.R. 153 (Dufour J.).

A party wishing to introduce evidence of settlement negotiations then has the burden of proving an exception, one of the following list in a family law case:⁶⁵

- (i) waiver by all parties to the negotiations;
- (ii) where one party acts unlawfully, makes threats or misrepresentations, engages in dishonest dealing, or acts in bad faith in negotiations;⁶⁶
- (iii) a concluded settlement is disputed;⁶⁷
- (iv) costs after the case is over;
- (v) fact of negotiations, but not contents, to rebut allegations of delay;⁶⁸
- (vi) statements not reasonably incidental to negotiations.⁶⁹

This last “exception” might be seen as a limit on the scope of the privilege itself, i.e. was a particular statement reasonably incidental to the negotiations. But, to protect the privilege, in practice we start from the premise that any and all statements made in or around the negotiations should be privileged, unless the other party can show that the statements are not reasonably incidental to the negotiations.

In “Any Rules”, I explain why there should NOT be another exception on this list, specific to family law cases, where disclosure of negotiations would be in the best interests of the child.⁷⁰ I even have doubts about a more circumscribed common-law version, where disclosure is necessary to avoid harm or risk of harm to a child. That purpose is more than adequately accomplished by child protection reporting provisions, like that found in section 12 of the Saskatchewan *Child and Family Services Act*.⁷¹ In this sense, there should be an exception (vii) added to the above list for s. 12 CFSA.

The categorical privilege for settlement negotiations also applies to mediation and judicial settlement conferences, along with its accompanying exceptions.⁷² In Saskatchewan, there are specific statutory provisions that affirm and extend the common law privilege. For mediation, there are the provisions in the *Children’s Law Act 1997*⁷³ and the *Family*

⁶⁵ Citations are provided in “Any Rules”, *ibid.* at 310.

⁶⁶ For an excellent family law example, see *Darwich v. Awde*, [2006] O.J. No. 4228, 2006 CarswellOnt 6510 (S.C.J.)(husband in negotiations threatened he would remove \$250,000 in gold from safety deposit box, used to prove he did remove the gold).

⁶⁷ *Tether v. Tether*, [2008] S.J. No. 621, 2008 SKCA 126 (also discussing scope of s. 28.1 of *Queen’s Bench Act*); *Stanley v. Friend*, [2008] S.J. No. 233, 2008 SKCA 53.

⁶⁸ *Potash Corp. of Saskatchewan Inc. v. Barton*, [2009] S.J. No. 39, 2009 SKCA 7 (“without prejudice” correspondence admissible to defend motion to strike for want of prosecution).

⁶⁹ *Bertram v. Minister of National Revenue* (1995), 191 N.R. 218 (Fed.C.A.).

⁷⁰ Above, note 1 at 311-12.

⁷¹ S.S. 1989-90, c. C-7.2 as amended. Section 12(1) creates the duty to report and s. 12(2) would override privilege, including the privilege for settlement negotiations (only solicitor-client and Crown privilege are excepted). The definitions of “child in need of protection” are found in s. 11 of the *Act*.

⁷² I have discussed these issues at length in Thompson, “Five Vexing and Vexatious Issues in Family Law Evidence and Procedure” in Shaffer, ed., *Contemporary Issues in Family Law: Engaging with the Legacy of James G. McLeod* (Thomson-Carswell, 2007) at 20-28. As I explain there, some Ontario courts have become confused in their analysis of mediation privilege, incorrectly resorting to Wigmore’s four conditions for case-by-case privilege for confidentiality.

⁷³ S.S. 1997, c. C-8.2, s. 10(3). Note that waiver of the statutory privilege requires not only the consent of all parties, but also the consent of the mediator.

Maintenance Act 1997.⁷⁴ For judicial settlement conferences, there is s. 28.1 of the *Queen's Bench Act*.⁷⁵ There is older authority suggesting that the traditional exceptions for settlement privilege should be read into s. 28.1.⁷⁶

(10) Privilege for Confidentiality

Most privileges are categorical in nature, as they protect relevant information from disclosure to serve important legal interests internal to the administration of justice – solicitor-client privilege, privilege against self-incrimination, litigation privilege, privilege for settlement negotiations, informer privilege. Each of these privileges is easily proved, with limited exceptions, as I have just explained for settlement privilege.

The privilege for confidentiality is a flexible, case-by-case privilege, one that is applied to a wide range of confidential relationships and information.⁷⁷ Usually the claim arises from a confidential relationship with a professional, e.g. doctor, therapist, religious official, accountant, etc. It can also arise for confidential information, e.g. a diary or journal. This is a much more difficult privilege to prove, as the party claiming privilege must prove all four of the Wigmore conditions (quoted here in their original quaint language):⁷⁸

- (i) The communications must originate in a confidence that they will not be disclosed.
- (ii) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (iii) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (iv) The injury that would inure to the relation by disclosing the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

This form of privilege was first recognised in civil matters in the Supreme Court's decision in *M.(A.) v. Ryan*, which applied it to a psychiatrist's diagnostic notes of her therapy sessions with the sexually-abused plaintiff.⁷⁹

Practically, any confidentiality worth preserving will satisfy the first three conditions, with “most of the grunt work” done by the fourth balancing provision, as the Supreme Court recognised in a journalist-source privilege case.⁸⁰ A quick note about the first condition: it is not undercut by a professional stating that any information received will be kept confidential except if ordered otherwise by a court, a common statement. That was precisely what the psychiatrist

⁷⁴ S.S. 1997, c. F-6.2, s. 15(3).

⁷⁵ S.S. 1998, c. Q-1.01, s. 28.1 (added by S.S. 2002, c. 9 and amended by S.S. 2006, c. 31).

⁷⁶ *Comrie v. Roy*, [2001] S.J. No. 136, 2001 SKCA 33, 17 R.F.L. (5th) 271 (interpreting Queen's Bench Rules 191(14) and (15), the prior protections for settlement conferences).

⁷⁷ See the discussion of this privilege in my “Five Vexing Issues”, above, note 72 at 11-16.

⁷⁸ Quoted and first applied on a case-by-case basis in *R. v. Gruenke*, [1991] 3 S.C.R. 263, for the accused's statements about a murder to her pastor and counsellor, without success.

⁷⁹ [1997] 1 S.C.R. 157.

⁸⁰ *Globe and Mail v. Canada (Attorney General)*, [2010] 2 S.C.R. 592, 2010 SCC 41 at para. 58 per LeBel J.

had told A.M. in the *Ryan* case, but Justice McLachlin held this was only a recognition that any privilege was not absolute.⁸¹

Keep in mind that in *Ryan*, A.M. did not intend to call her therapist Dr. Parfitt as a witness for the plaintiff and thus opposed disclosure of her notes to the defendant. Had A.M. intended to call Dr. Parfitt as a witness, then there would not have been a sustainable claim for confidentiality privilege.⁸² This point is driven home by the recent Court of Appeal decision in *Saskatchewan (Ministry of Social Services) v. R.W.*⁸³ In a protection proceeding, the Court had ordered an assessment of the mother by a psychiatrist, on the motion of the Ministry with no opposition from the mother. The trial judge imposed restrictions upon the circulation and use of the psychiatric report, based upon privilege and *Ryan*.⁸⁴ Richards J.A. held “this line of analysis was misplaced”, given the circumstances in which the report was prepared. There was nothing private or confidential about its origins, as it was a court-ordered report to be filed with the court and prepared for use by both sides in the proceeding.⁸⁵

Once the professional in the confidential relationship becomes a witness, then a claim for confidentiality privilege will only rarely succeed. There may be limits of relevance in their materials, or there may be a claim of litigation privilege, usually limited in time, but that’s it.

Part of the confusion about the privilege for confidentiality has been caused by the Supreme Court’s excessively casual approach to the outcome in that case. Remember that the B.C. Court of Appeal had upheld the lower court orders for disclosure of the psychiatrist’s reporting letters and her notes of her discussions with A.M., but not her diagnostic notes. For the documents that were ordered disclosed, the Court of Appeal imposed four conditions: (i) inspection was confined to Ryan’s lawyers and experts, but not Ryan; (ii) none of them were to disclose the contents to anyone else; (iii) the documents were only to be used for the purposes of litigation; and (iv) only one copy of the documents was to be made by Ryan’s lawyers.⁸⁶ Many will recognise that some of these conditions reflect what we call the “implied undertaking of confidentiality” that attaches to all documents produced in the discovery stage of civil litigation, an implied undertaking that was *not* recognised by the B.C. courts at the time of *Ryan*, but is now. After an extended privilege analysis, Justice McLachlin simply upheld the Court of Appeal order, even though it was not based upon a privilege analysis.⁸⁷ Good enough, in the circumstances, even though “[a] court, in a case like this might well consider it best to inspect the records individually”.⁸⁸

⁸¹ Above, note 79 at para. 24.

⁸² There might be a claim for litigation privilege, but even that would be undercut by the dual purposes of therapy and testifying, as the latter would not be the dominant purpose of any report. See Thompson, “Five Vexing Issues”, above, note 72 at 13-4.

⁸³ [2012] S.J. No. 481, 2012 SKCA 75, 23 R.F.L. (7th) 1.

⁸⁴ *Re E.W.*, [2012] S.J. No. 5, 2012 SKQB 1.

⁸⁵ Above, note 83 at para. 36.

⁸⁶ *Ryan*, above, note 79 at para. 11.

⁸⁷ *Ibid.* at paras. 40-41.

⁸⁸ *Ibid.* at para. 40. This was one of the points upon which L’Heureux-Dube J. dissented, insisting that such an individualised inspection should take place.

Better guidance on the application of the privilege for confidentiality is found in paragraph 39 of *Ryan*. Once the privilege claim has been raised, the court should probably proceed document by document, balancing the interests at stake, although it may not be necessary in every case. Like all privilege claims, the court can proceed on a two-step procedure, first ordering production of the documents to the judge for review *in camera* by the judge, followed by any order for production to the other party, on a document-by-document basis, even with some editing as required to effect the balancing.

If a document, or a part, is found to be privileged after such balancing, then the court should *not* order production, even with conditions. If the court does order production, then conditions may be attached to preserve some lesser degree of confidentiality. In some close instances, the imposition of stringent conditions on production might be enough to tilt the balance in favour of production. But, even then, the conditions are not imposed to preserve the privilege, but to deny it. The authority for imposing those conditions flows from the broader implied undertaking of confidentiality, which is part of the inherent jurisdiction of the court to protect its process from abuse, and NOT some form of privilege analysis. Sure, the implied undertaking also responds to confidentiality concerns, as does the privilege for confidentiality, and hence the confusion.

Even when documents are ordered to be produced, there is an implied undertaking of confidentiality that attaches to such compulsory production in the course of litigation. The “book” on this subject was written by Justice Binnie for the Supreme Court in *Juman v. Doucette*.⁸⁹ *Juman* has been applied at the trial level in Saskatchewan.⁹⁰ Upon the motion of a party, a court can attach additional conditions, over and above the automatic conditions in the implied undertaking. In the *Ryan* case, the B.C. courts might still attach more restrictive conditions upon production of Dr. Parfitt’s notes, e.g. that Ryan not see the notes and that only one copy be made, as these were notes about A.M.’s sexual abuse by Dr. Ryan, her previous psychiatrist. Such conditions can properly be attached, even after the appeal ruling in *R.W.*, in appropriate circumstances.⁹¹

In family law proceedings, the privilege for confidentiality can be used to respond to the ever more intrusive demands of disclosure and discovery. Once the privilege is claimed, a court must balance the probative value of the evidence against the privacy interests of the individual. In arguing for those privacy interests, the lawyer gets to make arguments on two levels: the specific, in favour of the privacy of this individual in this case in this relationship; and the general, on behalf of the interests of all individuals in such relationships. For example, the disclosure of a therapist’s records in this case would damage the relationship this person has with this therapist, and disclosure would also damage and discourage such therapeutic relationships generally.

⁸⁹ [2008] 1 S.C.R. 157, 2008 SCC 8. His reasons cover just about every conceivable issue that can arise about the implied undertaking of confidentiality.

⁹⁰ *Automated Truck Manufacturing Inc. v. Miller*, [2011] S.J. No. 483, 2012 SKQB 300, 402 Sask.R. 23; and *Daniels Investments Saskatoon Ltd. v. Houk*, [2010] S.J. No. 406, 2010 SKQB 246, 354 Sask.R. 310.

⁹¹ *Re K.S.*, [2012] S.J. No. 211, 2012 SKQB 126, 394 Sask.R. 281. There two parental parties in a protection proceeding sought production of children’s services documents respecting a former foster child and foster sister to the child in issue, as the foster child was a proposed witness for the Ministry. Unfortunately, continuing the pattern, the Court unduly focussed upon the use of “trust conditions” to solve the privilege problem.

Successful claims of confidentiality privilege are more likely to be made where a child's records are sought in family proceedings, rather than an adult's.⁹² Unlike in other provinces, courts in Saskatchewan have shown a willingness to engage in a critical analysis of claims for an adult's counselling or therapeutic records, requiring proof of necessity or real probative value.⁹³

(11) Conclusion: The Broader Purposes of the Evidence “Rules”

There were other possible candidates for the bottom end of this “top ten” list: a number of rules governing witness examination (leading questions on direct, refreshing memory, dirty tricks of cross-examination); judicial notice; authentication of documents; character evidence in custody cases; expert evidence on credibility; child hearsay and children as witnesses; solicitor-client privilege; litigation privilege; the privilege for reconciliation of spouses. But the ten rule limit forces a kind of discipline upon the paper.

There is one “rule” that is often alleged by lawyers that deserves a quick note. There is no overarching “best evidence” rule in evidence law. The best evidence rule is very limited in its scope, a rule governing authentication of documents where the original document must be proved. It should be called the “original document” rule, and not the “best evidence” rule. Here it is: where the terms of a document are material, proof of the terms of the document must be by production of the original, unless the original is unavailable, in which case a copy may be permitted.⁹⁴

Some lawyers (and a few academics) have tried to argue that all of evidence law can be subsumed under the “probative value vs. prejudicial effect” principle. Again, that just doesn't fly, as there are other considerations at work in the law of evidence. In my “Any Rules”, I identified the following fundamental purposes of evidence law:⁹⁵

- (a) Accuracy in Fact-Finding: The Need to Admit All Relevant Evidence
- (b) The Need for Expedition, Efficiency and Finality in Litigation
- (c) Protecting the Process from Confusing, Misleading or Unduly Prejudicial Evidence
- (d) Preserving the Fairness and Legitimacy of the Process
- (e) The Protection of Social Values Extrinsic to the Fact-Finding Process.

To these general purposes of evidence law, I added a few more purposes distinctive to family law:

⁹² *Smith v. Smith*, [1997] S.J. No. 483, 32 R.F.L. (4th) 361 (wife's counselling records produced, but not child's). This case still offers an excellent analysis of the privilege, in a decision by Wilkinson J. See also *Re K.S.*, *ibid.*

⁹³ *M.J.K. v. L.J.K.*, [2012] S.J. No. 245, 2012 SKQB 154 (wife's therapeutic records, not necessary); *Krislock v. Krislock*, [1998] S.J. No. 685, 173 Sask.R.255 (no to production of wife's counselling records and no to production of husband's personnel records).

⁹⁴ Delisle, Stuart and Tanovich, *Evidence: Principles and Problems*, 9th ed. (Carswell, 2010) at 404-5.

⁹⁵ Above, note 1 at 246-250.

- (f) To Assure the Best Interests of the Child
- (g) To Reduce Conflict
- (h) To Maintain, Restructure and Encourage Family Relationships.

In applying the “rules” of evidence, whether ten or twenty or more, these are the fundamental purposes that evidence law must serve in family law cases.

Law Society of Saskatchewan

September 10-11, 2013

**APPENDIX:
EXAMINING WITNESSES,
IMPEACHING AND SUPPORTING CREDIBILITY
IN FAMILY LAW CASES**

**Law Society of Saskatchewan
September 10-11, 2013
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WITNESS EXAMINATION

1. Direct Examination

(1) Purposes of Direct Examination

- (1) create a record, proof of own case
- (2) lay foundation for exhibits

(2) Leading Questions

- (1) definition: "a question which suggests the answer the questioner desires or a question which assumes a fact in issue not yet proved from this witness"
Maves v. Grand Trunk Pacific Railway Co. (1913), 14 D.L.R. 70 (ABCA)
- (2) rationales
- (3) a rule against **improper** leading questions
exceptions:
 - (a) introductory, formal, undisputed matters
 - (b) to identify persons, things
 - (c) to contradict statements made by another witness
 - (d) to refresh the witness's memory, with permission of court
 - (e) to assist a vulnerable witness, with permission
 - (f) to assist a witness with complicated matters, with permission
- (4) judicial sanctions for leading:
- (5) R. v. Rose (2001), 42 C.R. (5th) 183, 153 C.C.C. (3d) 225 (ONCA)

(3) Refreshing Memory

- (1) present memory revived vs. past recollection recorded:
R. v. Wilks (2005), 35 C.R. (6th) 172, 201 C.C.C. (3d) 11 (MBCA)
- (2) past recollection recorded: less common
no present memory
the record is the evidence
preconditions: contemporaneous record, authorship, voucher on stand
"ancient hearsay exception"

- (3) present memory revived:
 - any writing may be used
 - right of opposing counsel to inspect document
 - production of document ordered: closer to stand, more readily available
 - document made exhibit at option of opposing party, for limited purposes

2. Cross-Examination

(1) Purposes and Scope of Cross-examination

- (1) to obtain admissions
- (2) to discredit/impeach evidence/ witness
- (3) scope: not confined to matters covered on direct

(2) "Dirty Tricks" of Cross-Examination

(1) Improper Questions and Objections:

Risks of improper ratification, unfair prejudice, unfairness to witness

- (a) irrelevant
 - i.e. irrelevant to substantive issues or credibility
 - R. v. Fields (1986), 53 C.R. (3d) 260 (ONCA)
- (b) seeking inadmissible evidence, e.g. privilege, hearsay
 - R. v. R.(A.J.) (1994), 94 C.C.C. (3d) 168 (ONCA)
- (c) misleading, inaccurate
- (d) false choice
- (e) ambiguous
- (f) compound or multiple question
- (g) argumentative, editorialising, giving evidence: R.(A.J.)
- (h) are you saying another witness is lying?
 - R. v. Brown and Murphy (1983), 21 C.C.C. (3d) 477 (SCC)
 - R. v. Kusk (1999), 22 C.R. (5th) 50 (ABCA)
- (i) badgering, asked and answered
- (j) let the witness finish the answer...

(2) Imputations of "Misconduct"

- (a) risk of improper suggestion to fact-finder
- (b) only if reasonable grounds for thinking imputation correct, or good faith basis for asking, as matter of ethics
- (d) no need to be able to prove:
 - R. v. Lyttle (2004), 17 C.R. (6th) 1, 180 C.C.C. (3d) 476 (SCC)
- (e) not if know to be false (or reckless)
 - but okay if "reasonable inference, experience or intuition"

(4) Role of Trial Judge

discretion to control cross-examination
curtail abusive or duplicative examination

- (5) Effect of Failure to Cross-examine
 - “the rule in Browne v. Dunn” (HL 1893)
 - Palmer v. R. (1979), 50 C.C.C. (2d) 193 (SCC): some flexibility when breached, ineffective assistance of counsel, new trial:
 - R. v. Gardiner (2010), 260 C.C.C. (3d) 336 (NBCA)
 - remedies: R. v. McNeill (2000), 33 C.R. (5th) 390, 144 C.C.C. (3d) 551 (ONCA)

3. Further Examination

(1) Redirect Examination

- (1) purpose: to clarify or rehabilitate
- (2) not to repeat direct, no new matters

(2) The Judge's Role

- (1) entitled to question, even by leading questions
- (2) power to call witnesses:
 - not in civil matters
 - can in criminal matters, where necessary in the interests of justice
 - maybe in family matters, in best interests of child
- (3) direct party to testify first where exclusion order

(3) Reply or Rebuttal Evidence

- (1) to contradict or clarify new matters raised in defence that could not have been reasonably anticipated
 - Stewart v. Kingsway General Insurance (2000), 14 C.P.C. (5th) 128 (OSCJ)
- (2) party may be allowed to “re-open case”, where scope of reply evidence not met: discretion of judge to permit, presumption against

IMPEACHING AND SUPPORTING CREDIBILITY

1. Earlier, Other Methods

- (1) Disqualification of witnesses: competence
- (2) Corroboration: numerical tests, most statutory requirements now gone
- (3) Warnings: children, sexual assault complainants, jailhouse informants
- (4) Exclusion of witnesses
- (5) Admissibility: screening for reliability: opinion, hearsay, character

2. Credibility Assessment

- (1) A question of fact, not law: R. v. Whyte, [1947] S.C.R. 268 at 272
- (2) Mostly left to trier of fact -- jury or trial judge
- (3) Individualised, not based on generalisations: R. v. R.D.S. (1997), 10 C.R. (5th) 1 (SCC)

- (4) Demeanour: law and science
not demeanour alone:
R. v. Norman (1993), 26 C.R. (4th) 256, 87 C.C.C. (3d) 153(ONCA),
R. v. S.(W.) (1994), 29 C.R. (4th) 143 (ONCA)
- (5) Law speaks to permissible **methods** of impeaching and supporting credibility,
not how to assess credibility itself

3. **Supporting Credibility BEFORE Impeachment**

(1) **Conventional Law:**

"the credibility of a witness is neither good nor bad, until impeached"
hence no "accreditation BEFORE impeachment"
no "oath-helping"
rule against prior consistent statements or self-corroboration, but...

(2) Limited, "unofficial" "exceptions":

- (i) Introductory background of witness, within limits
- (ii) Refreshing memory from notes and business records

4. **Impeaching Credibility of a Witness**

- (1) To "impeach" is to attack or discredit either the witness or the testimony.
- (2) Two stages: (i) cross-examination;
(ii) extrinsic evidence (latter subject to rule against rebuttal on collateral matters,
i.e. limits on "contradiction" by other witnesses)

(3) Self-Contradiction of Witness: revealed by cross-examination

(4) **Prior Inconsistent Statement of Opponent's Witness**

Remember: prior inconsistent statement of **party** is an **admission**,
always admissible for truth of contents

(a) written: s. 19 SEA

- (a) may question witness on topics of statement first, without showing statement
- (b) once inconsistency established, fairness requires that the witness be confronted with the specific statement
- (c) witness may adopt the statement, then used for truth
- (d) witness may admit making statement but deny its truth
- (e) witness may deny even making the statement
if so denied, may prove the statement (if "relative to the matter in question")
- (f) may be exhibit, only to test credibility, **not** truth of contents
(unless adopted, or admission of party, or hearsay requirements of K.G.B. met)

- (b) oral: s. 19 SEA
largely same as above
examiner may be required to prove oral statement during cross

(5) Impeaching Own Witness

may contradict one witness by evidence of other witnesses called by party

- (a) common law hostility:

"hostile in mind" demonstrated by demeanour on stand
i.e. not giving evidence fairly, out of desire not to tell truth
right to cross-examine at large

- (b) s. 19(7) SEA: if "adverse"

oral or written statements

"adverse", i.e. opposed in interest, unfavourable
voir dire

Judge may look at prior inconsistent statement to determine adversity

cross-examine only on statement: R. v. Figliola (2011), 272 C.C.C. (3d) 518
(ONCA)

(possible substantive use, if reliable hearsay: K.G.B. (1993), Hawkins (1996))

(6) Bad Character for Honesty:

impeachment by cross-examination as to character, past bad acts and associations
extrinsic evidence:

reputation evidence: Masztalar v. Wiens (1992), 2 C.P.C. (3d) 294 (BCCA)

R. v. Clarke (1998), 18 C.R. (5th) 219, 129 C.C.C. (3d) 1 (ONCA)

lay opinion? R. v. Gonzague (1983), 4 C.C.C. (3d) 505, 34 C.R. (3d) 169
(ONCA)

expert opinion (where abnormality)

past bad acts or associations generally treated as "collateral", i.e. no extrinsic evidence

(7) Previous Convictions

s. 18 WEA

may be proved if denied

what is a "conviction"? an "offence"?

proof if conviction denied

reminder: in civil trial, any witness

may be cross-examined on past misconduct and discreditable associations,
short of conviction, as well as convictions

(8) Bias, Interest, Prejudice, Corruption:

cross-examination

extrinsic evidence permitted: A.G. v. Hitchcock (1847), 154 E.R. 38 (Exch.Ct.)

R. v. Cassibo (1982), 70 C.C.C. (2d) 498 (ONCA)

(9) Defects in Perception, Memory, Narration:

cross-examination

extrinsic evidence generally prohibited, but...

physical or psychological condition, when expert opinion may be called
(see below)

and "linch-pin", "very opportunity to perceive"

e.g. R. v. Brown (1861), 21 U.C.Q.B. 330

(10) Expert Opinion:

extrinsic evidence of physical or psychological condition of "abnormality", that would seriously impair perception, memory, narration, sincerity

Toohy v. Metropolitan Police Commissioner, [1965] 1 All E.R. 506 (HL)

not as to "mere" or "normal" credibility, capable of determination by trier-of-fact possible

e.g. not re eyewitness identification:

R. v. McIntosh (1997), 117 C.C.C. (3d) 385 (ONCA)

6. Rehabilitation AFTER Impeachment

(1) General Principle:

credibility may be rehabilitated or supported **after** impeachment

but only by responding directly to the method of impeachment employed

so as to avoid going beyond rehabilitation

and into the gray area of "bolstering" or "oathhelping":

R. v. Beland (1987), 36 C.C.C. (3d) 481, 60 C.R. (3d) 1 (SCC)

(also ruled evidence of polygraph/lie detector inadmissible in Canada)

(2) Redirect Examination:

to explain or clarify new (impeachment) matters raised in cross,

including self-contradiction, defects of perception, memory, etc.

(2) Prior Consistent Statements:

available only where "recent fabrication" alleged or implied:

R. v. O'Connor (1995), 100 C.C.C. (3d) 285 (ONCA)

R. v. Stirling (2008), 54 C.R. (6th) 228, 229 C.C.C. (3d) 257 (SCC)

what constitutes "recent fabrication"?

e.g. prior inconsistent statement, failure to speak earlier

intervening influence/coaching

bias/interest/corruption

just because impeachment, not *all* prior consistent statements admissible,

only where assist in determining credibility: R. v. Hunter (2004), 182 C.C.C. (3d) 121 (ONCA)

development of "narrative" exception to rule:

R. v. Dinardo (2008), 231 C.C.C. (3d) 177, 57 C.R. (6th) 48 (SCC)

prior statements to understand how story disclosed where child abuse

use to assess truthfulness, but **not** for truth of contents of prior statements

see also R. v. Curto (2008), 230 C.C.C. (3d) 145, 54 C.R. (6th) 237 (ONCA)

(4) Evidence of Good Character of Witness:

available where character of witness impeached
by redirect examination

by extrinsic evidence: reputation evidence, lay opinion (Gonzague)

(5) Expert Opinion:

to respond to impeachment by expert opinion, or myths/stereotypes

R. v. Marquard (1993), 25 C.R. (4th) 1, 85 C.C.C. (3d) 193 (SCC):

"on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility... provided the testimony goes beyond the ordinary experience of the trier of fact"

but not opinions directly as to truthfulness, in form of personal opinion or statistics

no lie detector/polygraph evidence: Beland (SCC 1987)

7. Rule Against Rebuttal on Collateral Matters

(1) **not** a rule against cross-examination on collateral matters

(2) **is** a rule as to when can call **extrinsic evidence** to rebut answer given in cross-examination

(a) if collateral: answer is final

(b) if not collateral: may rebut

by defence, during defence in chief

by plaintiff, in reply evidence

(3) when is a fact not "collateral"?

(a) relevant to facts in issue

(b) proof of prior conviction: s. 22 OEA

(c) proof of prior inconsistent statement: ss. 20, 21 OEA

(d) to show bias, interest, corruption or fabrication

(e) expert evidence of serious impairments of perception or memory

(f) "linch-pin" evidence

(g) **not** re "pure credibility"

(h) real test: probative value outweighs consumption of time, confusion of issues, unfair surprise, undue prejudice to party