



# Standard of Proof

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< Evidence

## General Principles

The standard of proof asks how convinced the trier of fact must be in order to make a finding. Canadian criminal law has three core standards:<sup>[1]</sup>

1. **Proof beyond a reasonable doubt** which is the standard to be met by the Crown against the accused;
2. **a balance of probabilities** or **Proof on a preponderance of the evidence** which is the burden of proof on the accused when he has to meet a presumption requiring him to establish or to prove a fact or an excuse;
3. **Evidence raising a reasonable doubt** which is what is required to overcome any other presumption of fact or of law. Once a prima facie case has been established by the evidence of the crown, there is no need to prove innocence. Rather the accused need only raise a doubt in the evidence.<sup>[2]</sup>

The US has a fourth standard known as "clear and convincing evidence" which is a middle ground between the two standards, however, this has never been officially adopted in Canada. When a proposition at issue in a case, such as an element of an offence, must be proven, the standard must be reached using the weight of the totality of evidence presented, not on each individual piece of evidence <sup>[3]</sup>.

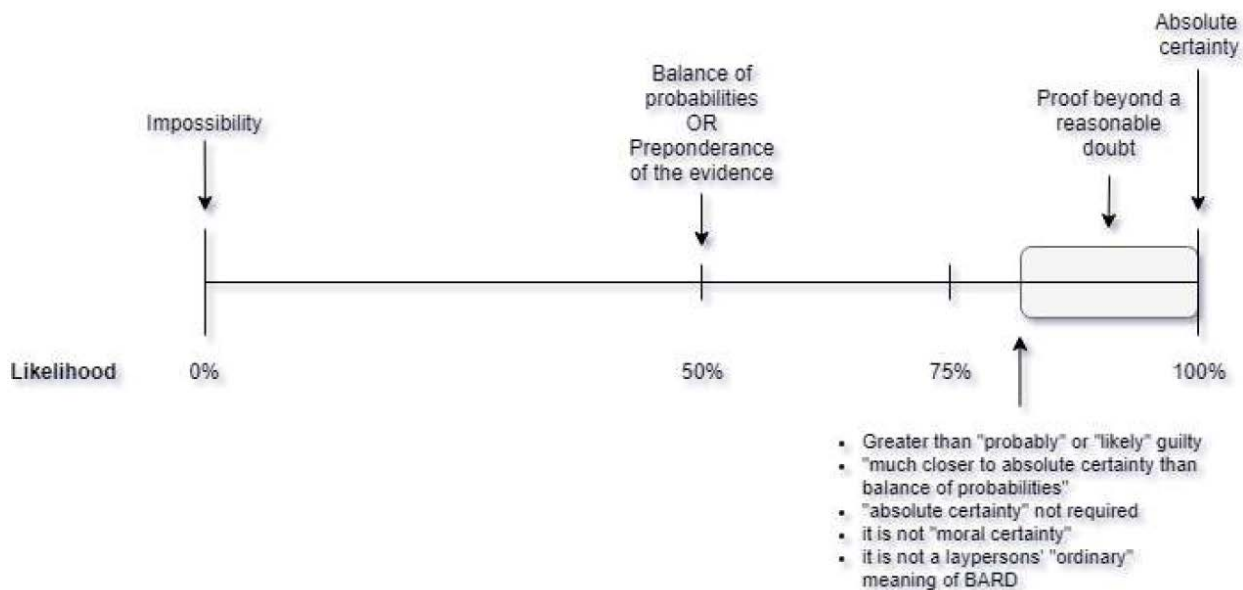
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| <ol style="list-style-type: none"> <li>1. <i>R v Proudlock</i>, 1978 CanLII 15 (SCC), [1979] 1 SCR 525, <i>per</i> Pigeon J<br/><i>FH v McDougall</i>, 2008 SCC 53 (CanLII), [2008] 3 SCR 41, <i>per</i> Rothstein J, at para 49<br/>- lists only standards of BOP and BARD</li> </ol> | <ol style="list-style-type: none"> <li>2. <i>Batary v Attorney General of Saskatchewan</i>, 1965 CanLII 102 (SCC), [1965] SCR 465, <i>per</i> Cartwright J, at p. 476</li> <li>3. <i>R v Morin</i>, 1988 CanLII 8 (SCC), [1988] 2 SCR 345, <i>per</i> Sopinka J</li> </ol> |
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## Totality Principle

When weighing evidence against any standard of proof, the general rule of totality will govern. Each piece of evidence or each fact cannot be considered in isolation to establish a fact. They must be considered in the context as a whole.<sup>[1]</sup> This principle is central to consideration of Circumstantial Evidence.<sup>[2]</sup>

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| <ol style="list-style-type: none"> <li>1. <i>R v Morin</i>, 1988 CanLII 8 (SCC), [1988] 2 SCR 345, <i>per</i> Sopinka J<br/><i>R v Mars</i>, 2006 CanLII 3460 (ON CA), 205 CCC (3d) 376, <i>per</i> Doherty JA - concerning the weight of fingerprint evidence <i>R v John</i>,</li> </ol> | 1970 CanLII 1049 (YK CA), 5 CCC 63, 11 CRNS 152 (Y.T.C.A.), <i>per</i> Davey J<br><i>R v Brinson (E.) et al.</i> , 1995 CanLII 10555 (NLSCTD), 431 APR 98, <i>per</i> Easton J, at para 12 |
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2. e.g. *Brinson*,  
~~John~~ *supra*  
~~supra~~



The standard of proof for establishing a fact in most cases will be on a balance of probabilities. However, there are "certainly rare occasions when the admission of the evidence may itself have a conclusive effect with respect to guilt" where a standard of proof beyond a reasonable doubt may be required.<sup>[1]</sup> Those exceptions that have a "conclusive effect" include confessions and hearsay evidence that satisfies the co-conspirators' exception.<sup>[2]</sup>

Generally, the standard of proof beyond a reasonable doubt will apply to essential elements of the offence, but not to any other facts.<sup>[3]</sup>

1. *R v Arp*, 1998 CanLII 769 (SCC), [1998] 3 SCR 339, *per Cory J*  
*R v Bulldog*, 2015 ABCA 251 (CanLII), 326 CCC (3d) 385, *per curiam*, at paras 38, 39
2. *Bulldog*, *ibid.*, at para 39
3. *Bulldog*, *ibid.*, at para 39 ("The basic rule is that it applies to evidence of the essential

elements of the offence, but not to the evidence of other facts, including facts necessary to establish admissibility of evidence")  
*R v Murphy*, 2011 NSCA 54 (CanLII), 274 CCC (3d) 502, *per Farrar JA*, at para 41

## "Some Evidence" and "*prima facie* case"

The standard of "some evidence" "*prima facie* case" are unique standards of proof that apply to certain evidentiary tests.<sup>[1]</sup>

These two standards are obviously *lower* than that of balance of probabilities.<sup>[2]</sup>

1. e.g. see Documentary Evidence
2. *R v Bulldog*, 2015 ABCA 251 (CanLII), 326 CCC (3d) 385, *per curiam*, at para 38

## Balance of Probabilities

The "balance of probabilities" is described as being "more probable than not", "more likely than not", or more technically, the chance of the proposition being true is more than 50%. This standard is known as the civil standard as it exclusively used in civil trial cases.<sup>[1]</sup>

Generally, where there are factual questions that are preconditions to the admissibility of evidence should be on a standard of balance of probabilities.<sup>[2]</sup> This standard should only be increased "in those certainly rare occasions when the admission of the evidence may itself have a conclusive effect with respect to guilt."<sup>[3]</sup>

### Admissibility Usually on a BOP

In most circumstances the standard of proof required for the admissibility of evidence is on a balance of probabilities.<sup>[4]</sup> Only in "rare occasions" where the admission of the evidence is determinative of guilt will the court apply a standard beyond a reasonable doubt.<sup>[5]</sup>

1. *Continental Insurance Co. v Dalton Cartage Co*, 1982 CanLII 13 (SCC), [1982] 1 SCR 164, *per Laskin CJ* - SCC rejected a variable standard, adopting only balance of probabilities  
*FH v McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41, *per Rothstein J*, at para 49
2. *R v Evans*, 1993 CanLII 86 (SCC), [1993] 3 SCR 653, *per Sopinka J*
3. *R v Arp*, 1998 CanLII 769 (SCC), [1998] 3 SCR 339, [1998] SCJ No 82, *per Cory J*, at paras 70 to 71 ("...the general rule that preliminary findings of fact may be determined on a balance of probabilities is departed from in those certainly rare occasions when admission of the evidence may itself have a conclusive effect with respect to guilt")
4. *R v Carpenter*, 2010 BCCA 27 (CanLII), 279 BCAC 287, *per Hall JA*, at para 11 ("Though usually questions of admissibility are determined on a balance of probabilities, there are exceptions where the trial judge must be satisfied of certain pre-conditions to admissibility beyond a reasonable doubt. One such exception is that the voluntariness of a statement must be proven beyond a reasonable doubt before it is placed before a jury. ")
5. *Carpenter, ibid.*, at para 11  
*Arp, supra*

### Beyond a Reasonable Doubt

- Beyond a Reasonable Doubt

## Sufficiency of Proof

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Before any evidence gets to a trier of fact there is often a requirement to discharge an evidential burden for the trier of law (i.e. the judge).

In a preliminary inquiry, the Crown must show on the whole that the evidence they will present is sufficient to potentially convict the accused. The purpose of this initial evaluation is to avoid frivolous suing being brought in that has no chance of success.

The standard of proof needed before evidence can be put to the jury is "whether the evidence is sufficient to justify him in withdrawing the case from the jury, and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilt."<sup>[1]</sup>

In a case where some of the evidence the Crown is relying upon is not directly to the issue of the case, the Crown must satisfy the judge that "the evidence, *if believed*, could reasonably support an inference of guilt."<sup>[2]</sup>

1. Template:CanLIRPC, per Ritchie J

2. *R v Arcuri*, 2001 SCC 54 (CanLII), [2001] 2 SCR 828, per McLachlin CJ

## Legal Proof

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Frequently seen standards of proof that are seen include:

1. "air of reality" / prima facie case
2. reasonable and probable grounds / reasonably-based probability
3. reasonable suspicion

### Air of Reality Test

- Defences#Air of Reality Test

### Reasonable Suspicion

### Reasonable Belief

See Reasonable and Probable Grounds

## See Also

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- Graphing Perceptions of Probability
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