INTRO/GENERAL PRINCIPLES

Stinchcombe → Crown duty to disclose all evidence that can reasonably assist
PV > PE (PV → some value in each for truth and justice + PE → prejudice the search for truth -- pre-judging/harm to JS or society)
Principled approach = don't just focus on exact rule but focus on what broad legal principles underlay the rules and what we are trying to achieve
Mullins-Johnson → no finding of factual innocence
Lawes → TJ entitled to comment on evidence BUT need to make clear it's opinion and not direction to jury (overarching principle of fairness)

CONTEXTS FOR DETERMINING EVIDENTIARY ISSUES

Fundamental RULE = all evidence which is relevant and material is admissible until proven otherwise → presumption of admissibility
Fundamental PRINCIPLE = if PV > PE it is admissible
Relevance = whether existence of A makes existence/non-existence of B more probable than it would be without A (*R. v. Watson*)
Materiality = relevant to a matter in issue in case
Multiple relevance = evidence may be inadmissible when tendered for one purpose but may be admissible for another
Morris → (drug trade article) everything probative should come in unless a clear ground excludes it ∴ **presumption of admissibility**
EME = evidence of an accused's misconduct
Seaboyer → Crown evidence admissible when PV exceeds PE; defence evidence admissible as long as PE doesn't substantially outweigh PV (policy RFAD)
Anderson v. Maple Ridge (stop sign placement) → evidence that is relevant and not excluded by rule of evidence is admissible (can instruct jury as to limits)
Arp → evidence of disposition is relevant to ultimate issue of guilt but often has little PV ∴ inadmissible because PE outweighs PV not because irrelevant
FFB (SA -- defence went after credibility of W b/c delay) → all **relevant evidence is admissible unless barred by a specific exclusionary rule**
- Bad character evidence admissible if:
  - It is relevant to some other issue beyond disposition/character -- here why disclosure was so late
  - The PV outweighs PE

BURDEN OF PROOF

Starr → RD falls much closer to absolute certainty than to proof on BOP (must define RD in jury charge)
W(D) → **instruction about relation of credibility to RD**
1. If you believe evidence of A, you must acquit
2. If you do not believe, but are left in RD, you must acquit
3. If you are not left in doubt by evidence of A, you must ask whether on the basis of the evidence which you do accept, you are convinced BARD of guilt of A

JHS → W(D) ≠ magical incantation HOWEVER read as a whole charge must make it clear that the jury could not have been under any misapprehension to the correct burden and standard of proof to apply
Morin → must consider the **whole of the evidence** together on BARD -- not each piece separately

TYPES OF EVIDENCE -- DIRECT/CIRCUMSTANTIAL

Direct = directly available to be used without drawing further inference (sources of error = reliability & credibility)
Circumstantial = draw inferences from certain facts that a material fact exists ∴ need to repurpose it (sources of error = credibility, reliability & drawing the wrong inference)
Munoz (informant -- $$ given to lawyer) → reasonable inference requires (1) proof of underlying facts AND (2) that the inference must logically flow
- Two ways inference drawing can become **impermissible speculation**:
  1. Primary facts not established by evidence
  2. Proposed inference not reasonably and logically drawn from established primary facts (inferential gap BUT does not mean only the most obvious inferences can be drawn)

TYPES OF EVIDENCE -- REAL

Real evidence = physical objects actually involved in the case that are presented in court → need to be relevant ∴ needs to be identified as genuine (usually needs to be tendered through witnesses and authenticated (1) call W; (2) ask W to describe E before showing; (3) Allow W to examine and identify as genuine; (4) enter object as exhibit) -- gaps in continuity not fatal but go to weight (*MacPherson*)

PHOTOS and VIDEOTAPES

Schaffner (liquor store) → video requires authentication but not necessarily be an independent witness
Nokolovski (W couldn't ID from video) → TOF can use video as sole basis to ID accused -- E establishing video not altered/changed is precondition to admissibility
Penney (seal hunt) → requirements of video depend on use -- here video fundamentally misleading ∴ PV was outweighed BUT could possibly have been used for ID
Kinkead (murder exhibits) → PV must still be weighed with PE -- defence making admissions can change the PV/PE balance

DOCUMENTARY EVIDENCE

Needs to be authenticated → call writer, witness who saw writer, compare sample of writing, testimony of experts, etc. (*s. 8 CEA -- writing comparison allowed*)

TYPES OF EVDIENCE -- DEMONSTRATIVE EVIDENCE

Demonstrative evidence = charts, models, etc. that are tools to assist TOF in understanding E (worth depends on whether accurate reps of what happened)
McDonald (CS reconstruction) → PV rests on accuracy of re-enactment of undisputed facts -- one side of a disputed set of facts will not be admissible (PE) [accuracy includes immaterial facts like lighting]
McCutcheon v. Chrysler (gait) → value of neutral presentation -- PV outweighed PE (certain factors ex/ involvement of P can go to weight)
Collins → experiment E generally admissible subject to PV/PE (relevance depends on similarity of circumstances)

EME -- BAD CHARACTER

EME = evidence lead to demonstrate that the A or W was involved in bad behaviour **unrelated** to the charge being adjudicated
PRESUMPTIVELY INADMISSIBLE → evidence of misconduct that does no more than blacken accused's character is inadmissible -- proof of general disposition is a prohibited purpose (***Handy***)
Engages two types of prejudice:
1. **Reasoning** → more weight on evidence than logic justifies
2. **Moral** → convict for being bad guy

GENERAL INADMISSIBILITY

Test for admissibility (***FFB*** // ***CUADRA***)
- **Such evidence is admissible where**:
  1. It's relevant to some other issue beyond the disposition/character of accused; AND
  2. PV outweighs PE (PV must be very high b/c of high PE)

W(L) (abuse allegations) → EME admissible b/c part of narrative as evidence of motive or animus and was relevant in assessing C's credibility
Johnson → EME related to motive ≠ automatically admissible (still need to PV/PE) -- evidence of past misconduct woven into a speculative theory of motive ought to be excluded BUT evidence with real insight into background relationship b/w A and V and which genuinely helps establish a bona fide theory of motive is highly probative
Cuadra (witness credibility) → EME of bad character may be admissible despite general rule if relevant to some other issue and PV > PE

EXCEPTIONS -- A PUTS CHARACTER IN ISSUE

Accused **puts their character in issue** it opens the door for rebuttal
Shrimpton → if rely on good character; ***McFadden*** → worships wife ∴ sexual morality in issue; ***McNamara*** → don't put character in issue by denying allegations (unless suggest you're not the type of person to do those things); ***Shortreed*** → not by denying guilt or answering introductory routine questions
P(NA) → when C's case involves providing a lot of context the accused is entitled to some latitude in giving his version of events w/o putting in issue

EXCEPTIONS -- SIMILAR ACT EVIDENCE

Two types of SFE -- general (always forbidden b/c moral prejudice) AND specific
PRESUMPTIVELY INADMISSIBLE → onus on prosecution to satisfy TJ on BOP that PV > PE
SFE may be lead to show that the accused is precisely the type of person who would commit a particular crime → improbability of coincidence
Handy (rape//collusion) → **test for admitting SFE**
STAGE 1: Determine the probative value
1. **Look to the possibility of collusion** b/w the witness and the claimant -- where evidence depends on unlikelihood of coincidence, evidence of collaboration b/w those persons will undermine entirely PV
   - Defence must show there is an air of reality to the collusion/collaboration
   - If Crown can't prove on BOP that there wasn't collusion/collaboration AND there was an air of reality = INADMISSIBLE
2. **Identify the issue in question** → the broader the issue the higher the threshold for PV
3. **The extent to which the proposed evidence supports the desired inferences** → the connectedness between the similar fact evidence and the desired inferences
   ****this is the principal driver of PV****
   - The similarities and dissimilarities between the facts charged and the similar fact evidence -- connecting factors can include -- proximity in time of the similar acts//similar in detail to the charged conduct//number of occurrences//distinctive features unifying the incidents//intervening events
4. Examine the **strength of the evidence** that the similar acts occurred -- the more believable the SFE is the more PV it has → must be reasonably capable of belief to be admitted
5. **Materiality of evidence** → need high probative value with compelling similarities

STAGE 2: Determining the prejudicial effect -- reasoning/moral
STAGE 3: Balance the two → as PV advances PE does not necessarily recede
Arp (murder/SFE identity) → SFE for ID -- preliminary issue were TJ must determine whether similar acts are likely work of one person not necessary to determine were don't by accused (leave to TOF) -- TOF should determine on BOP whether committed by same person then BARD if accused is guilty
Johnson v. Bugera (car accident/speeding) → civil case with SFE ID

HABIT

Habit = regular response to a particular type of situation with type of conduct → need distinction b/w evidence that discredits accused and conduct that will not -- discredit requires SFE rule application
Belknap v. Meakes (Dr can't remember but had routine → habit should be admissible as a substitute for present recollection
Watson (carried gun//s-d) → general nature of habit does not affect relevance of the evidence but could go to weight
Devgan (high fees) → must be enough instances to find habit
B(L) → doesn't matter if characterized as habit but whether discreditable to determine whether exclusionary rule applies

SUGGEST THIRD PARTY COMMITTED -- GOOD CHARACTER

Profit (principal SA) → good character only part of evidence considered by TOF and weight will vary on circumstances of case
Rawdah v. Evans → in civil, inadmissible unless character directly in issue
Robertson v. Edmonton → general evidence of good character rarely admissible in civil unless it amounts to SFE

POST-OFFENCE CONDUCT

POC = circumstantial evidence that arises after the incident that may give rise to a reasonable inference of guilt or intent (usually avoid detection)
White v. Queen (fled/got rid of gun) → POC must be able to draw a **reasonable inference of guilt** (cannot be speculative) in order to have PV -- not inadmissible because could be multiple inferences [Arcangioli exception no PV where accused admitted to a different crime ∴ no inference of guilt]
Peavoy (intox) → POC generally have no PV when looking at **degree of culpability** BUT may be used to rebut defences
White #2 (fled scene//immediacy of action) → POC can go to basic culpability but NOT LEVEL
SCB (SA + A voluntarily cooperated) → in some cases can bring in POC supportive of innocence -- has some PV ∴ should be admissible (doesn't include mere declarations of innocence, etc.)

BAD CHARACTER OF THE WITNESS

Go after **reliability & credibility**
s. 12 CEA → question W on prior convictions
Corbett -- when witness is A → brings in discretion with A's record b/c of possibility of propensity reasoning -- TJ can edit or axe record for accused that has testified → try to balance
- ***Corbett*** hearing will determine what offences can come in
  1. How probative are convictions to issue of credibility
  2. How potentially prejudicial are they in being used as general propensity
- Factors to consider = similarity (PE b/c propensity) // remoteness in time // credibility contest (distorted picture -- evidence of W's convictions but not A's) // type of conviction (ex/ something with inherent dishonesty)
- If comes in don't get details + jury gets limiting instruction
- If not accused → can bring it all in and get into details NOT limited to s. 12 to attack credibility

McFayden → where very distant in time, high chance of PE
Cullen → for W more freedom on cross to bring in general bad past acts

VETROVEC WITNESSES

Vetrovec → removed rule that accomplice testimony needed corroboration -- treated like other W + special instruction
Murrin (jailhouse inf) → faith in jury -- if have presumptively admissible testimony can testify (highly reluctant to exclude)
Khela (JH inf. with collusion w/ VW gf's) → corroborative evidence needs **materiality + independence**
Vetrovec witness categorization TEST: 2 part test *Khela*
1. What is the degree of problems with W's inherent trustworthiness?
- Need one or more of the following → involved in any criminal activity // unexplained delay in coming forward // lie to authorities // sought a benefit for testifying //

selectively disclosed evidence // series of inconsistent statements -- sometimes the presence of one strong factor can be determinative

2. How important is the W to the Crown's case?

- Threshold depends on how critical W's testimony is in determining guilt -- the more important the person is to the case, the fewer credibility problems you need to trigger caution

***KHELA* → 4 PARTS OF JURY INSTURUCTION OF VW**

1. **Draw attention of the jury to the evidence requiring special scrutiny** (the VW evidence)
2. Explain **why this evidence is subject to special scrutiny** (why the VW is in the VW category)
3. Caution jury that they are entitled to rely on that unconfirmed evidence on its own **to convict but it can be very dangerous to do so**
4. ****Corroborative Evidence**** should look for evidence from another source that can restore VW testimony to a level that is safe to rely on → Khela finds 2 requirements for confirmatory evidence:
   - Must go to MATERIAL part of VW evidence – defined as "important" or "not peripheral"
   - INDEPENDENT of VW – not tainted or influenced by the VW

IDENTIFICATION EVIDENCE

Gonsalves (gunpt. robbery) → ID E doesn't need to be perfect (flaw goes to weight) + requirements for a photo lineup

- Instruction about dangers of ID
- Best practices for photo lineup
  - Close to event // independent person // min 10 photos shown one at a time w/ out knowing which is last // video recorded // person administering should not know suspect
- ID is exception to prior statements → first ID more important

JUDICIAL NOTICE

Must prove all elements of offence BUT some facts can be deemed established because 'notorious or indisputable'

JN can be used:

1. When failed to call evidence
2. Was going to be disputed and would have to call lots of E

Daley (E in NB) → can take JN through two means: (1) notorious or generally accepted ∴ not debatable among reasonable people OR (2) capable of immediate and accurate information by looking at readily available sources of indisputable accuracy

OPINION EVIDENCE -- EXPERTS

Presumptively INADMISSIBLE -- need to apply to court

For ADMISSIBILITY must meet **statutory req.** (*s. 657.3 of CC -- notice req.'s and s. 7 of CEA -- # limits*) **+ CL req.**

ABBEY FRAMEWORK

STAGE 1: ***Mohan*** PRECONDITIONS that must be met

1. **Must meet the test of an expert** [TEST: has to be more knowledge than average person in the relevant area] This is not a high threshold. The opinion or methodology must be grounded in science [***McIntosh***].
2. **Does it go to a relevant issue**?
3. **Necessity**: this is the single most common area for excluding expert evidence. Necessary = **helps the trier of fact understand the issue**! Subject matter: are ordinary people unlikely to form a correct judgment about it if unassisted by persons of special knowledge
   1. **Where usurps function of jury, it is unnecessary**; ***Klymchuk***
   2. **Must be outside juries normal experience** ***Perlett*** / ***Osmar***
4. **Is it excluded by another exclusionary rule**? [ex: EME]
5. **Foundation in the evidence**

STAGE 2: GATEKEEPER: Involves weighing of PV/PE → evidence that meets ***Mohan*** can still be excluded

- Lists some potential factors → reliability issues // potential to confuse the jury // costs // expert able to articulate the evidence in a way that makes it accessible to TOF // usurp TOF // demonstrate bias // offend rule against oath helping

NOVEL SCIENTIFIC METHODS [per R v JLJ]

- Has the theory been tested, can it be?
- Has it been subject to peer review/publication?
- Is there a known potential rate of error?
- Has it become generally accepted practice?

Graat (police smelled alcohol) → W can provide opinion on something w/in common knowledge/everyday experience and does not require expert qualifications -- compendious statement of facts (inferences + facts intertwined)

Mohan (Dr SA classes of offenders) → created framework

JLJ (plethysmograph) → test for novel scientific methods -- 2 steps (satisfy *Mohan* + 4 factors)

- **Novel where no established practice for admitting evidence or using old techniques in new ways**

NECESSITY

McIntosh (no EE on ID) → EE only admitted when body of knowledge is scientifically recognized + outside of ordinary exp.

Klymchuck (EE staged scene -- inference as to WHO was for TOF) → EE usurps function of TOF becomes unnecessary

Perlett (EE memory) → must be outside jury's normal experience -- jury knew faulty memory of brief/stressful events

Osmar (EE false confessions) → shows broad understanding of common knowledge -- may be situations where SOME lack of understanding BUT it is not sufficient to make EE necessary

ULTIMATE ISSUE

Bryan (poss. cocaine for trafficking) → no prohibition on evidence going to ultimate issue -- must satisfy *Mohan* and can only be excluded on that basis

Credibility of victim → rule against 'oath helping' -- can be used for certain types of issues that do not go directly to W's credibility and are beyond scope of common knowledge (ex/ child Ws BUT evidence must be presented indirectly)

Llorenz (V's psychiatrist testified that she was credible) → evidence regarding credibility will only be admissible if it has some legitimate purpose (ex/ explaining behaviour)

FOUNDATION

Jordan (expert didn't do test for heroin himself) → take reasonable approach to scientific proof otherwise absurdities

Lavallee (batteredws) → if some foundation but some evidence missing will go to weight -- expert can rely on hearsay and inadmissible stuff and talk abut it because it's the basis of their opinion but may affect weight

Worrall (heroin test - relied on 2nd hand info) → expert may base opinion on **second hand information** -- in some circumstances will need independent proof or weight reduced

- EE obtained w/in scope of expertise = no further proof
- EE obtained from party to litigation about matter in issue = inherently suspect and requires independent proof

NEW FRAMEWORK

Abbey (gang shooting - tear drop) → new framework -- **benefits of using a hypothetical** (not actually apply to A, avoid Llorenz problem)

WITNESSES

Th/H to testify = COMPETENT + COMPELLABLE

OATHS - REQUIREMENT (*CEA - s. 13-15*)

Kalevar (ref. oath) -- Christian shouldn't be only religious oath

Weibe (Christian affirmed) -- oath and affirmation treated same

CHILD WITNESSES (*CEA - s. 16.1*)

Require promise + ability to communicate

W(R) (children SA) → child must understand the basis of the oath // confirmatory evidence is not req., significant deference to TOF finding of credibility

Levogiannis (behind screen) → children's evidence is important // jury can take instruction not to draw inference from screen

ADULT WITNESSES (*CEA s. 16*)

Parrott (DS woman) → whether complainant is able to communicate the evidence is a matter on which TJ must form opinion -- not realm for EE

I(D) (understanding of moral duties) → reads in **inability to question mentally incapable person on their understanding of nature of the promise to tell the truth into s. 16(3) of CEA** // witness must just be able to COMMUNICATE THE EVIDENCE + PROMISE TO TELL THE TRUTH

ORDER OF WITNESSES

Court can call witness when seen as nec. for interests of justice

Cook → no specific right to face your accuser -- C doesn't have to call

P(TL) → calling accused last does not necessarily diminish credibility // most witnesses will be excluded until testify but A gets RFAD

DIRECT EXAMINATION

Exam-in-chief = were W being question by party that called

LEADING QUESTIONS

Party calling W CANNOT ASK LEADING Q's

LQ = Q's that directly or indirectly:

1. Suggest to the witness an answer he is to give (ex/ y/n ans)
2. Are phrased as to assume within it the truth of some fact (ex/ when did A stop spanking the child)

Many exceptions → introductory Qs // ID // unwilling to give E // necessary in TJ discretion to refresh memory // W having difficulty communicating, etc.

Rose → LQs kicked out ∴ new trial // LQ's suggest answer

REFRESHING W'S MEMORY

Present memory revived → consult document to get recollection + testify from recollection

Past recollection recorded → refresh memory from document that was recorded reliably

PRR AND PMR are two hearsay exceptions → getting in out of court statements

TEST FOR USE OF PRR (*Wilks*)

1. The past recollection must have been recorded in some reliable way
2. At the time, it must have been sufficiently fresh and vivid to be probably accurate
3. The witness must be able to now assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he "knew it to be true at the time"
4. The original record itself must be used, if it is procurable.

REQUIREMENTS FOR FOUNDATION OF PMR (*Wilks*)

1. Witness knows the facts, but has a memory lapse on the stand
2. Witness knows his report or other writing will refresh his memory
3. Witness is given and reads the pertinent part of his report or other writing
4. Witness states his memory has now been refreshed
5. Witness now testifies what he knows, without further aid of the report or other writing

Wilks (insurer notes car accident) → PRR test // requirements for PRR / nature of aid for PMR not relevant to admissibility

B(KG) (W refreshed before trial) → can refresh memory with non-contemporaneous statements out of court -- goes to weight

Mattis (officers copied notes) → fact that notes copied + lack of specific recollection had significant impact on reliability of E

CROSS EXAMINATION

Vehicle for testing evidence

Three basic purposes:

1. Bring out additional facts -- can use LQs + put propositions to W
2. Challenge credibility
3. Challenge the reliability of their perceptions

CEA, s. 10 → CE W on previous statements -- need to call attention to it

Lyttle (TJ didn't allow CE on theory w/o E) → RFAD mandates broad right to CE but not unlimited // cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience, or intuition (good faith)

R(AJ) → as improprieties mount, the CE may cross over the line from aggressive to abusive (when line is crossed danger of miscarriage of justice is real) // entitled to vigorous cross but are limits

Duty to cross (rule in Browne v. Dunn) → proposition that if counsel is going to challenge the credibility of a W by calling contradictory evidence, the W must be given the chance to address the contradictory evidence in CE while in the box

McNeill (E never put to A) → application of rule in Browne v. Dunn -- if you want to challenge credibility MUST give chance to address it in CE // possible remedies: (1) recall (to stand) OR (2) special instruction to jury to take into account the fact that W was not questions about E

RE-EXAMINATION

Sipes → statement of law on re-examination (generally no new E) -- if JT allows new E, another opportunity for CE

- It is fundamental that the permissible scope of re-examination is linked to its purpose and the subject-matter on which the witness has been cross-examined. The purpose of re-examination is largely rehabilitative and explanatory. The witness is afforded the opportunity, under questioning by the examiner who called the witness in the first place, to explain, clarify or qualify answers given in cross-examination that are considered damaging to the examiner's case. The examiner has no right to introduce new subjects in re-examination, topics that should have been covered, if at all, in examination in-chief of the witness. A trial judge has a discretion, however, to grant leave to the party calling a witness to introduce new subjects in re-examination, but must afford the opposing party the right of further cross-examination on the new facts.

COLLATERAL FACTS / REBUTTAL EVIDENCE

Collateral facts rule = forbids the introduction of extrinsic evidence which contradicts a W's assertion about collateral facts

- If Q's regarding credibility are collateral, CE must ACCEPT THE ANSWERS AS GIVEN and cannot lead other witnesses to contradict first W on such matters

Non-collateral facts = matters relevant to a material issue // facts relevant to a testimonial fact (ex/ bias, interest) // facts that are independently provable

Krause → test for rebuttal evidence

- As a **general rule**, Crown cannot split its case and bring in new evidence -- however, rebuttal evidence can be admitted if it meets the following criteria:
  - **New significant matter** raised during the defence's case
  - **That could not have been reasonably foreseen**

- **It must relate to a principal issue of the case**, cannot be collateral (collateral evidence rule)

Cassibo → counsel entitled to CE a W called by the opposite party on collateral facts affecting credibility; but can't contradict the answers of the W wrt collateral matters

STATEMENT EVIDENCE -- PIS

Prior inconsistent statements → if W provides a statement in court that differs from a previous statement this will impact W credibility

Prior consistent statements → GENERAL RULE is not admissible because they are prejudicial, self-serving, have low PV, etc.

Need to give W notice under CEA s. 10 before taking them to statement

EXCEPTIONS TO GENERAL RULE

Rebut Allegation of Recent Fabrication

Stirling (issue of monetary movie to lie) → PCS can be admitted to disprove allegations of fabricated evidence BUT can only be used to show that evidence was not fabricated ∴ not admissible for content

Ellard → timing of PCS central to admissibility // recent = after testifying // limiting instruction almost always required (danger will bolster credibility of W)

Prior Identification

Tat → where there is an in-court ID, PCS of ID is probative/admissible // TOF to consider weight ∴ circumstances around ID are important

Part of Narrative

Dinardo → PCS may be admissible as part of the narrative -- helping the TOF understand how the complainant's story was initially disclosed // challenge is to distinguish between using narrative evidence for impermissible purpose of confirming the truthfulness of the sworn allegation and using narrative evidence for the permissible purpose of showing the fact and timing of a complaint which may then **assist the trier of fact in the assessment of truthfulness or credibility**

Curto → PCS not admissible for their truth → helps balance PV/PE (PV is only that PCS was made)

Exculpatory Arrest Statement

Edgar → **spontaneous exculpatory statements made by an accused upon or shortly after arrest** may be admitted as an exception to general rule excluding prior consistent statements for the **purpose of showing the reaction of the accused when first confronted with the accusation**, provided the accused testifies and thereby exposes himself to cross (PV is evidence of the reaction -- credibility not necessarily truth) // can't use when opportunity to think things through

STATEMENT EVIDENCE -- ATTACKING CREDIBILITY OF OWN W

May want to challenge own witness when they go completely off track → **GENERAL RULE** = can't attack own W or put LQ's to them

CEA provides two step process, where certain conditions are met, you can CE your own witness about change in their evidence

SECTION 9 PROCESS

- Try refreshing W memory with prior statements
- If unsuccessful, apply for **s. 9(2)**
  - Can CE on prior recorded (not oral) statement w/o proof W is adverse → use to lower credibility of own W
  - Statement under 9(2) not admissible for its truth
  - Components of 9(2) from ***Milgaard***:
    1. Have to find statement reduced to writing
    2. Find inconsistency on significant matters
    3. CE is limited to inconsistencies
    4. CE must be in the interests of justice and will require jury instruction
  - Unless W adopts prior statement, TJ must tell jury statement is not being used for its truth
- If W becomes adverse or hostile to party leading them, apply for **9(1)**
  - 9(1) gives ability to broadly CE and attempt to reduce W credibility to zero once they have proved to be adverse
  - Only logical to pursue when W is adverse, not if they just give you nothing
  - Prior oral statements can only fall under 9(1)

Figiola → **adverse W** = W who gives evidence unfavourable or opposed to the interest of the party that called him // **hostile W** = W that does not wish to tell the truth due to motivation to harm party that called him or to assist the opposing party, they are antagonistic // CL right to examine at large with leave of TJ if finding of hostility

S(CL) → remedy of allowing Crown to CE its own W is discretionary

Milgaard → procedure under s. 9(2) // jury should be sent out for application // CE must be in presence of jury // TJ has ultimate discretion on 9(2) application

Malik (statements about Air India bombing) → s. 9(1) (no 9(2) because nothing in writing) // not about getting witness back to their previous version but about destroying them // if witness doesn't come through nothing to destroy -- purpose is to destroy evidence giving to other side // 9(1) REQUIRES ADVERSITY + POSITIVE EVIDENCE YOU NEED TO NEUTRALIZE

HEARSAY

Definition (***Khelawon***)

1. The fact that an out of court statement is adduced to prove the truth of its contents AND
2. the absence of a contemporaneous opportunity to CE the declarant

Absent an exception, HEASAY IS PRESUMPTIVELY INADMISSIBLE -- lack of oath + absence opportunity to CE

Can be admitted on one of three bases -- go in order:

1. **According to a statutory exception**
2. **Under an existing hearsay exception** -- which include: past recollection recorded, statements contributing to the narrative, business records, declarations against interest, dying declarations, declarations in the course of duty, spontaneous declarations, state of mind, oral history in AT cases, co-conspirator exception, spousal exception and prior testimony
3. **According to the principled approach** -- which assesses reliability and necessity. "Necessity" is satisfied where it is reasonably necessary to present the hearsay in order to obtain the declarant's version of events. "Reliability" is threshold reliability, which is for the trial judge, who determines whether the hearsay statement exhibits sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the statement.

ANALYTICAL STEPS TO DETERMINE IF SOMETHING IS HEARSAY

1. **Who is declarant?** (ex/ W unavailable)
2. **What does statement assert?**
3. **What is the purpose of tendering the assertion**
   1. Does the truth matter for what you want to use if for?
4. **If it is to prove the truth of the assertion, there is a hearsay problem**
   1. Truth of its contents = not hearsay if the value of the words doesn't rest on the credibility of the out-of-court observer -- must be brought in for truth of contents (ex/ if police officer testifies that received a call there was someone driving drunk -- not hearsay for for grounds to stop car BUT would be if adduced to prove someone was drunk)
5. ******IS IT OTHERWISE ADMISSIBLE?******

Baltzer (wanted to admit E of conversations only to establish that certain things were said) → when considering whether something is hearsay, consider the use to which it is put // if relevance is in the fact that statement was made, then truth of it is of no consequence ∴ not hearsay

TRADITIONAL HEARSAY EXCEPTIONS

DECLARATIONS AGAINST INTEREST

Principled basis is necessity (declarant not available) and reliability (unlikely to make declaration adverse to own interest)

Demeter → extension of declaration to include penal interest (along with pecuniary and property) // key factor is vulnerability

- **Principles for finding declaration against penal interest**:
  1. Declaration would have to be made to a person and in circumstances that the declarant would have apprehended the vulnerability to penal consequences (ex: wouldn't be met if you said it to a friend)
  2. Vulnerability to penal consequences not be too remote (here, affecting likelihood of parole many years down the line was found to be too remote)
  3. Declaration sought to be given in evidence must be considered in its totality; if the weight is in favour of the declarant—it is not against his interest
  4. In a doubtful case, a Court might properly consider whether or not there are other circumstances connecting the declarant with the crime and whether or not there is any connection btw the declarant and the accused
  5. The declarant must be unavailable by reason of death, insanity, grave illness which prevents giving of testimony

Lucier (arson, badly burned guy said did it for A then died) → declarations with an inculpatory effect on A will not be admissible

DYING DECLARATIONS

In criminal case, DD is admissible for prosecution or defence when (*Aziga*):

- Deceased had a settled, hopeless expectation of almost immediate death [subjective]
- Statement was about the circumstances of the death
- Statement would have been admissible if the deceased had been able to testify
- The offence involved is the homicide of the deceased

Principled basis on necessity (dead) + reliability (no motive to lie)

Aziga (sex w/o disclosing HIV+, C wanted to admit DD of woman) → court satisfied that one of women had a settled hopeless expectation of death (terminal and aware death was impending)

DECLARATIONS IN THE COURSE OF DUTY

At common law, declarations either oral or written are admissible for their truth where (1) made reasonably contemporaneously (2) in the ordinary course of duty; (3) by persons having personal knowledge of the matters; (4) who are under a duty to make the record or report (5) who have no motive to misrepresent the matters recorded (***Larsen***)

Ares v Venner → hospital records made by someone having a personal knowledge of the matters being recorded and under a duty to make the entry should be received in evidence as PF proof of the facts stated therein

Larsen (pathologies died after autopsy and Crown wanted to use it) → declarations in course of duty must be contemporaneous (here deferred decision on COD for 14 months -- autopsy report was admissible; but supplementary report wasn't on the basis that it lacked contemporaneity)

SPONTANEOUS DECLARATIONS

This involves circumstances where it's unlikely to be made up because there has been no time to think through any reasons to make it up. Also, it can be sort of part of the act itself. Doesn't need to be perfectly contemporaneous with act, per R v Clark.

Bedingfield (A charged with murder; deceased came out of the house with her throat cut, said something pointing at the house) → old law requiring narrow contemporaneity // not admissible as part of res gestae because it was not part of anything done, or something said while something was done, but something said after something was done // not admissible as a dying declaration as it wasn't clear she knew she was dying

Clark (deceased made utterances when accused still present) → declaration must be sufficiently contemporaneous to preclude concoction but NOT strictly contemporaneous // must explain or form part of a physical act // basically overrules Bedingfield

STATE OF MIND; STATEMENTS OF INTEREST

Where person describes present state of mind (emotion/intent,etc.) the person's statement to that effect is admissible where (1) the state of mind is relevant and (2) the statement is made in a natural manner and (3) not under circumstances of suspicion

- Use words said to draw inferences from persons state of mind
- Needs limiting instruction

Panghali (charged with murder, wife found burned/strangled) → using diary evidence to draw a general inference she is in a worried state about her husband -- state of mind of fear

Starr (charged with shooting C and W, G was jealous gf) → statement of intention cannot be admitted to prove the intentions of someone other than the declarant, unless a hearsay exception can be established for each level of hearsay // statements of joint intention can only be used to prove declarant's intention // TJ did not make finding on PV/PE

ORAL HISTORY IN ABORIGINAL TITLE CASES

Delgamuukw → laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on equal footing with types of historical evidence courts are familiar with

THE PRINCIPLED APPROACH

Khan (child told mom Dr SA her) → more flexibility in receiving hearsay evidence of children // two questions: (1) reception of the hearsay statement necessary? AND (2) whether it is reliable (can take into account timing, demeanour, etc.)

Smith (Detroit residents, murdered in Canada) → where criteria of necessity and reliability are satisfied, lack of testing on CE goes to weight, not admissibility -- still subject to PV/PE // adopts Khan

Substitutes for reliability per KGB [consider together, not having a good substitute for any one of them could be a huge problem; but don't have to meet every substitute]:

Spectrum of Substitutes for Oath: (Best to worst) → oath was given to the person before they made the statement and they were warned against the consequences of perjury // there was no oath, but there was a PO that emphasized to the W that they need to be exactly correct in their statement and this was serious // someone just wrote out something with no instructions // causal comment made to a friend

Spectrum of Substitutes for Presence: (Best to worst) → **v**ideotape and Audio: you can see their body language, tone, etc. [benefit of demeanour] // police officer describes them // audio only // careful written out statement in witnesses own hand // someone writes out what the witness said // friend calls the police stating that last week their friend told them something

Spectrum of Substitutes for Ability to Contemporaneously Cross-Examine the Witness: (Best to worst) → **b**eing able to cross-examining the witness at trial – you have a chance to cross them // witness is dead and they cannot be crossed at trial

Principled Approach to Hearsay TEST:

1. Do you need it for its truth? If yes,
2. Is the content of the statement otherwise admissible (PV>PE)? If yes,
3. Can the party leading the evidence establish on BP that the statement is not a product of state coercion? If yes, [can get kicked out alone on this basis-under N or R or IT factors]
4. Does it fit within a statutory exception? If no,
5. Does it fit within a CL exception? If no,
6. Can the party leading the evidence establish on BOP that admitting the statement is **necessary**:
   - **i)** Evidence is otherwise unavailable
   - **ii)** Must be necessary to discovering the truth
   - **iii)** Must be necessary in enabling all relevant and reliable info to be put in front of the court

i) Inability of W to testify in court
ii) W radically changes testimony and washes hands of previous testimony

7. Can the party leading the evidence establish on BP that statement is **reliable**:
- ***KGB*** asks for closest fit to three indicia of courtroom testimony
  1. Oath or solemn affirmation
  2. Physical presence to allow observation of declarant
  3. Ability for contemporaneous cross-examination of declarant
- Similar out of court statements can be compared with each other to infer reliability (***U(FJ)***)
- If ***KGB*** criteria are not met, consider inherent trustworthiness (***Khelawon***)
  - Does the content carry with it such strong indications of truth that we think it meets threshold reliability and can go to the jury?
  - Is there any motive for W to lie? [NH this can play a huge role, ex: ***Khan***
  - Also content itself, does it seem logical
  - Also look at contemporaneity (how soon afterwards have they spoken?)
  - Were there leading questions?
  - Was there coercion [probably most likely to see here, more probable to be used as weighing rather than pure strike as judges need high std to kick out on coercion alone]
  - Is there any corroborative evidence to support the truthfulness? Ex ***Khan***
  - Does it cry out for certain questions to be asked? (relates to CE)
- The tests can be complimentary in establishing the balance to pass the threshold of reliability

8. PV versus PE must be satisfied
- At this stage, may look at the witness relating the statement and exclude in exceptional circumstances on this basis (because W is not the focus, statement is)

U(FJ) (A's prior admission in evidence, C made a similar pre-trial statement) → similar out of court statements can be compared with each other to establish reliability
Khelawon → when assessing the threshold reliability of a statement, the court can consider **inherent trustworthiness**

STATUTORY EXCEPTIONS

Statutory exceptions will trump because they tell you the parameters of inclusion so you don't need to do analysis -- sometimes statutory basis for letting in evidence

BUSINESS RECORDS

- Documents presented in evidence for truth are hearsay b/c speaking to event → BUT business records are presumed to be reliable b/c common sense that there is careful process of recording in business circumstances

CEA, s. 30 → where oral evidence would be admissible allowed when record made in ordinary course of business that contains info in respect of that matter is admissible -- if something lacking can infer it didn't happen
Wilcox (crab book -- record for personal basis within usual and ordinary business?) → start with statute, then CL, then N/R analysis // not statute b/c employees own initiation // no CL b/c no duty to record // yes for principled approach

PRIOR TESTIMONY

CC, s. 715 → where person whose evidence was given at previous trial on same charge or during investigation on the PI refuses to be sworn or is dead, insane, seriously ill so can't testify, absent from Canada -- AND where evidence taken in presence of A it MAY be admitted as evidence without further proof UNLESS A proves did not have full opportunity to CE
Potvin → judge has large discretion ∴ can exclude evidence when (1) unfairness in manner E was obtained or (2) admission would affect fairness of trial (ex/ PE > PV) HOWEVER shouldn't undermine authority of section

FORMAL ADMISSIONS

"**Formal admissions**" = a party, in consultation with the other party, agrees that certain things are conclusively proven (i.e. undisputed)
- Counsel needs specific client instruction to make admissions
- Judge cannot order admissions
- **2 good reasons to make an admission**:
  - It is in the interests of justice to do so – saves court time and resources
  - Strategic interest – can be used strategically prevent jury from hearing about prejudicial evidence

CC, s. 655: admissions at trial → where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.
Castellani → cannot force another party to admit something and cannot force someone to agree to an admission // Defence cannot make an admission if Crown is unwilling to accept it
Proctor (A charged with murder wanted to introduce SFE) → Crown can't reject an admission just to keep an issue alive artificially // Crown should not be allowed to gain entry for prejudicial evidence by refusing to accept admissions

INFORMAL ADMISSIONS

PROBATIVE VALUE

Informal admissions are admissions of the party to the proceedings made outside of the Courtroom → evidence has a high PV (the accused saying something about themselves); any circumstances regarding reliability/credibility will go to weight, not admissibility
The accused cannot lead his or her own statements (rule regarding prior consistent statements)
These types of statements can range from implied statement to confession.
Informal admissions are not hearsay evidence → this is informal statements the accused said previously, contrasted with hearsay, which is leading something a witness said prior to trial or any statement from a non-accused
Hunter ("had a gun but didn't point it" overheard, killing of police officer) → partial overheard statements are only admissible if full context is present; limited PV and high PE otherwise
- Cites case where "I killed David" was inadmissible on the basis that was all that was overheard. Extremely prejudicial + lacking context
- Only possible basis for admission could have been the admission by the accused that he had a gun

Phillips (said who did I murder, then made excuses later) → self-serving admissions after time for reflection shouldn't be admitted
Streu (said friend "ripped them off" re stolen property) → once it is established an admission is made, there is no basis for treating it differently than if it had been made in a witness box // a party making an admission may adopt a hearsay statement as his or her own for the purpose of admitting the facts therein
Hart (Mr. Big) → now presumptive inadmissible for low PV // three key features questioned: (1) pressure on vulnerable person, (2) prejudice and (3) societal prejudice (ex/ offensive tactics by state) // Crown must show PV > PE // test focuses on reliability // start with content/circumstances/pressure/hold-back evidence/versions changing over time → tell all to judge on void dire

VOLUNTARINESS RULE

While you don't have to go through the same hurdles wrt to admissions as you do with hearsay, voluntariness will be a key hurdle.
The voluntariness rule: All statements made to a person of authority must be proven to be free from fear of prejudice, hope of advantage and other factors (oppression, operating mind, trickery) → where there is a statement made to persons of authority, the Crown must prove BARD in a voir dire that the statement was voluntary or it will be inadmissible. (Recall that the accused can waive such an inquiry)
Elements: (i) Standard of proof = BRD for each statement unless waived by A, (ii) Crown must pursue through voir dire, Defence can make explicit in-court admission of voluntariness, and (iii) voluntary statement must be knowingly made to a state representative who can influence the case
If there is no evidence of voluntariness but the statement is admitted anyway, it constitutes a reversible error and will be overturned on appeal
Oickle (long interrogation)→ **establishes the test for voluntariness**
- **There are consequently a number of factors that the trial judge must assess regarding the voluntariness of confessions:**

1. Were there threats or promises? - ***"fear of prejudice or hope of advantage"****
- **Hope of advantage** -- not every inducement makes an admission involuntary
  - Quid pro quo involving legal advantage is not allowed -- threat/promise
  - Moral inducements are okay – "you will feel better", "do it for your family/ God", "take responsibility"
    (inducement offered is not in control of the police officers)
  - Be careful with inducements in the middle that may be construed as leaning toward moral becoming legal – "your life won't be over, you will still be able to do this" (may imply short prison time)
  - Can offer psychiatric help but not in exchange for anything
- **Fear of prejudice** – can be direct (talk or you'll be hurt) or indirect(if we knew more about this, we could put you in PC)

2. Was A in **oppressive environment/conditions**? [danger of making a stress-compliant confession to escape the conditions]
3. Must show A had **operating mind** = awareness (ability to control/decide to confess) → if no operating mind could be inadmissible
4. Was there any police trickery? → protect the reputation of CJS (**shock conscience of public**)

ADMISSIONS OF CO-ACCUSED

Admissions of A are only admissible against A not co-accused
Policy would create incentive to confess and blame on other person
Four options → (1) sever trials; (2) exclude confession; (3) edit out offending part; (4) limiting instruction to jury
Grewall (jury instructed to use confession for certain things but ignore others) → confession of A is not admissible against co-A + example of editing // judge has to perform careful balancing (don't want to undermine E but want to remove bad parts)

EXCLUSION OF EVIDENCE UNDER THE CHARTER

s. 24(2) → (1) was there a breach? (2) was evidence obtained through breach? (3) would admission of evidence bring administration of justice into disrepute
Grant (search of black guy on street) → 3 main factors to balance when considering whether justice is in disrepute
1.Seriousness of the charter infringing state conduct (spectrum -- ex/ good faith?)
2.Impact on Charter protected interests of the A
3.Society's interest in an adjudication on the merits (reliability heavily favours admit)
Four categories of evidence for purposes of Charter breaches → (1) statement evidence [strong presumption its out]; (2) bodily [more invasive = less admissible]; (3) non-bodily physical evidence; (4) derivative evidence [discovered as result of unlawfully obtained statement → ask (i) was there breach? (ii) discovered b/c of breach? (iii) was it otherwise discoverable?]

PRIVILEGE AGAINST SELF-INCRIMINATION

POLICE CUSTODY

Singh (engaging right to silence 18x) → s. 7 right to silence in custody issues covered under voluntariness // silence ≠ not be spoken to // don't have to mention it

OUT OF CUSTODY

CL right to silence → no general obligation to assist police -- equating silence with guilt fundamentally undermines Charter rights
Turcotte (asked for car to be dispatched to ranch) → silence in face of police questioning ≠ evidence of guilt // absent statutory exception retains right to silence
Prokofiew → give instruction where concern jury will draw conclusion from silence

WITNESSES -- 11(c) & 13

Accused not compellable & testimony can't be used against you in another trial
Riley v. Henry → s. 13 doesn't protect from CE
Nedelcu (motorcycle accident, gave different answers in civil and criminal) → scope of s. 13 // must be incriminating in sense could go to guilt // to invoke s. 13 must show gave incriminating evidence under compulsion at prior proceedings // analysis is when seek to use again -- something can become incriminating after the fact

STATUTORY OBLIGATIONS

s. 13 does not protect from statutory compulsion → do get protection under s. 7 and criminal law -- use and derivative use protection (subject to otherwise discoverable) [***Re application***]
- s. 83.28 compels to provide info where legitimate public policy angle

PRIVILEGE BASED ON CONFIDENTIAL RELATIONSHIPS ∴ INADMISSIBLE

CLASS PRIVILEGE - SOLICITOR-CLIENT

General rule → SCP base don idea that (1) making comm. w/ lawyer (2) intended to be in confidence (3) needs to be based on seeking legal advice
Descoteaux (search lawyer's offices) → lawyer is entitled to have all communications made with a view to obtaining legal advice kept confidential // rules -- (1) confidentiality can be raised when possible disclosure w/o consent; (2) resolve conflict in favour of confidentiality; (3) don't interfere except to extent absolutely necessary
Blood Tribe → zealous protection of SCP -- close to absolute as possible

OTHER CONFIDENTIAL RELATIONSHIPS

Gruenke (pastor) → **test for privilege**
1.Communication arose in confidence that would not be disclosed
2.Confidence is essential to the relationship in which it arose
3.Relationship is one that must be sedulously fostered in public good
4.Public interest served by keeping the communication secret outweighs interest at truth → most important factor WHERE BALANCING TAKES PLACE
- CL PF privilege → no against fundamental principle all relevant E is admissible
- Case-by-case privilege → apply above criteria, here not satisfied (no E of intention)

EXCEPTIONS

Inadvertent Disclosure
Airst (accidentally sent letter) → inadvertent disclosure should not override privilege // take into account how docs released and prompt attempt to retrieve
Public Safety- Future Harm
Smith v. Jones (planning to kill prostitute) → can disclose where there is a very significant public interest
- **TEST** → (1) clear risk to an identifiable person or group of persons; (2) risk of serious bodily harm or death; (3) danger is imminent

Innocence at Stake Exemption
McClure (A wanted disclosure of civil file for SA case to determine nature of allegations and assess motive to fabricate) → test for innocence at stake
- THRESHOLD QUESTION → (1) info sought from SCP communication must be unavailable from any other source; and (2) A must be otherwise unable to raise RD
- INNOCENCE AT STAKE TEST → Stage 1 = A seeking production must demonstrate an evidentiary basis to conclude that communication exists that could raise a reasonable doubt as to guilt; Stage 2 = if basis exists, TJ must examine the communication to determine whether it is likely to raise RD

Campbell and Shirose (reverse sting, police sought advice from DOJ) → clients can waive privilege // RCMP put good faith belief in issue ∴ wavied