**Decision to Call Evidence**

* Swain: can’t force a person to lead certain evidence or raise a defence. Personal autonomy: their choice. May be forced to raise a defence if accused puts certain things in issue, like have to argue insanity if they put their mental processes in issue.
* Judge cannot become too involved in evidentiary decisions.

**Disclosure**

* Crown must turn over investigative file even if it doesn’t relate to admissible evidence and regardless of whether it might hurt or help the accused.
* If there’s a reasonable possibility that that evidence could help the accused in making full answer or defence, it must be disclosed to them.
* Stuff that is clearly irrelevant need not be disclosed, if it doesn’t relate to anything in case.
* Crown also cannot disclose privileged material, even it if meets the test of reasonable possibility
* Crown has discretion to delay disclosure of certain materials, particularly if related to another investigation or there are issues of witness safety. General rule is broad, timely disclosure.
* If the Crown withholds or delays, they must provide a list of things they aren’t disclosing (no details, just a general explanation of what they’re not handing over). Defence can argue with the Crown or bring the list to the trial judge and argue the importance of an item on it.
* Crown can allow defence counsel to see some of the material it’s not disclosing on undertakings. They can’t discuss it with anybody, not even their client. Then, if they find something useful, they bring it to judge in closed courtroom without accused present and have argument.
* Whatever is disclosed to defence counsel can only be used for that person’s defence in that case, not to be used for other litigation without court’s permission.
* Disclosure is generally one way. Defence need not disclose to the Crown other than if it wants to call an expert witness or run an alibi defence. Also, if you put forward evidence that Crown has no notice to check out, may get an adjournment.
* In civil, disclosure runs both ways.

**Remedies for no Disclosure**

* If early on, defence files letter, gets a judicial order for immediate disclosure.
* If Crown discloses close to the trial, defence can get adjournment to go through it.
* If it’s late in the trial, it’ll be a mistrial.
* If it comes out after the trial, court can order a new trial, but only if defence shows they could have used that disclosure directly or indirectly and that there’s a reasonable possibility that the verdict would have been different as a result.
* No remedy if the defence could have reasonably been aware of the material they didn’t have; also, how diligent was the defence in pursuing disclosure and did they act in a way consistent with the evidence being important (like asking Crown for them)?

**Extrinsic Misconduct Evidence**

* Generally prejudicial over probative as it leads to propensity reasoning, lowers the burden of proof, and may lead to accused being convicted for offences other than what he’s charged with.
* B(FF): it can be admitted where it has probative value towards an issue that the defence raised. For instance, if defence raises lateness of complaint, then prior offences of accused become relevant: they were scared. This must be accompanied with a limiting instruction: jury can’t use it to see general propensity or that they are to be punished for that.
* Cuadra: does it have probative value for and pertain to another issue beyond general propensity? If so, weigh probative/prejudicial balance – how helpful is the extrinsic evidence with respect to this other issue? This is then accompanied by a judicial instruction that this evidence is only to be used for that purpose, not the accused’s guilt.
* In Cuadra, extrinsic evidence went to the issue of a witness’ credibility: why they kept changing their story. Or maybe can justify police’s singling himi out if defence argues police were incompetent for never looking into alternative suspects.

**Seaboyer Standard**

* Burden for crown is that probative > prejudicial
* Lower for defence: only exclude where the probative value of the evidence is substantially outweighed by its prejudice.
* In a close call between probative and prejudicial, err on side of exclusion for Crown and inclusion for the defence.
* In civil case, it is always whether probative outweighs prejudice, for both sides.

**Circumstantial Evidence**

* Evidence that requires the trier of fact to make an inference from it in order to make use of it and find a relevant fact. Can’t just use it in its raw state – it doesn’t speak for itself.
* For direct evidence, evidence that speaks for itself without needing further inference to be drawn from it, two sources of error: credibility (person is lying) and reliability (witness is telling the truth but affected by distance, speed of events, emotional state, etc)
* Circumstantial evidence is subject to credibility and reliability but also that the inference is incorrect. May be that the most obvious inference isn’t the correct one.

**General Jury Instruction**

* Robert: evidence is to be looked at as a whole and not individualized. It’s wrong to just throw out evidence you don’t believe before considering verdict. Evidence is not to be analyzed piecemeal, but as a whole.
* Baltrusaitis: inform the jury that they are to look at the evidence as a whole and consider it as a whole when making critical findings in the case. When you add all this evidence up, you m ust be convinced that the guilt of the accused is the only reasonable explanation.

**Real Evidence**

* Type of direct evidence that allows first-hand impression to trier of fact, can be directly inspected by the court. It must be authenticated, though it’s admissibility is assumed.

**Demonstrative Evidence (videos and photos)**

* It must be authenticated, either by the person who took it or by someone who was present at the scene and can confirm that it’s consistent with what they saw (Penney). May not need this if it’s obvious, like TV broadcast of a big, public event.
* Penney: two steps: is it authenticated and is it fundamentally misleading?
* Fundamentally misleading is if there is something about it that will make it more likely that the trier of fact will be misled by it? This can include editing of the video (not just raw footage), gaps in the video (selective footage), that it was filmed by a concerned party, or format changes.
* May also be prejudicial if it’s not just a footage of the events, but also has the accused doing something else bad in them.
* Onus is on the party presenting it to show all this.

**Inflammatory Demonstrative Evidence**

* May also be deemed prejudicial if it’s inflammatory: not misleading, but prejudices the jury because it’s so disturbing.
* Kinkead: high standard. The probative value goes down the more photos you introduce and the more grisly/close-up they are, or if it’s video. May not need that much detail or that MANY photos enough to justify their inflammatory/disturbing conduct.

**Documents**

* Lowe: even if it seems obvious, they must be authenticated by the party leading them if there are no admissions from the other side. Have the person who produced the document, possessed it, or can otherwise testify to its authenticity.
* Admission about its authenticity isn’t worth anything if he’s not sure/has no recollection.

**Judicial Notice**

* Court can say that even though no evidence has been led on a point, it’s of such common sense or common knowledge and is a general proposition, so court will just accept it. The more central the issue is to the case, the warier judges are to use judicial notice.
* Olson: if there are contrary arguments to it, can’t get judicial notice. It must also be a very general proposition (almost always true and a natural inference).

**Similar Fact Evidence**

* Another way to bring in extrinsic misconduct evidence other than Cuadra.
* Handy judicial instruction: you may conclude from the other evidence that accused has a specific propensity to do this MO, if you find that you may find that these prior incidents make it more likely he did this one.
* Must show a specific propensity to do a specific act in specific circumstances.
* Handy Factors: first factor: proximity in time: the closer the events are to this offence, the more likely they are to show specific propensity.
* Number of incidents: standard of similarity is higher with only one or two other incidents, lower if there’s a whole string of them.
* Similarity between incidents (most important): person leading it must show similarity between the physical acts in the incidents themselves (the actual conduct) and the context in which the conduct occurred. The weaker you are on the prior two criteria, the stronger the similarity needed.
* After Handy factors are established, is there collusion? Where you can show the victim in the prior incident and the complainant have communicated or know each other or if the story was newsworthy and details were published before it went to court. This generally goes to weight.
* UNLESS there’s a strong air of reality not just that they talked or knew about the case but that there was a reasonable possibility of the similar fact story/prior incident alleged being a product of collusion or information sharing. If this reasonable possibility can be shown, onus is then shifted to the Crown to show on balance of probability that it wasn’t.

**Post-Offence Conduct**

* Evidence of the accused taking steps after the offence to avoid detection or successful prosecution – flight, destroying evidence, intimidating potential witnesses.
* White test for admissibility: it needs to give rise to a reasonable inference of guilt; it’s not any conduct after an offence that someone might see as suspicious, can’t be a speculative inference of guilt based on guesswork, suspicion, or possibility. Inference of guilt can be reasonable even if there can be other reasonable possibilities, just can’t be guesswork.
* Jury instruction: consider it in the context of the evidence as a whole, don’t make too much use of it, and there may be other explanations for the conduct.
* Two step White test: is at least one reasonable inference from the evidence that the accused is aware of committing the crime? Then, does the defence present evidence pointing to another reasonable inference? If there are two reasonable inferences, it goes to weight.
* Arcangioli: there being two reasonable inferences CAN make it inadmissible if the two inferences are just two different levels of culpability or two different offences that arise out of the same incident.
* Peavoy: post-offence conduct can have probative value not just in proving identity but also rebut defences of intoxication or self-defence.
* B(SC): lower standard for letting the defence bring in post-offence conduct of innocence, but can’t bring in stuff with trifling probative value to distract jury or prolong trial, like self-serving things that are easy to do (accused yelling he’s innocent). It’s not probative if it’s an empty gesture.

**Prior Offences of a Witness**

* S.12 of the Canada Evidence Act says that a witness may be question on prior convictions. For non-accused witnesses, no need to worry about prejudice, can put in whole record and ask about details. Titus says you can even bring in things they’ve not been convicted of if it’s not too speculative: this includes things you’ve been discharged for or not yet been tried for or it’s not a criminal conviction. Acquittals probably can’t be brought in.

**S.12: Bringing in Prior Offences of the Accused through the CEA**

* If the accused testifies, you can use s.12 on them too, but if you succeed, you don’t get the details of the offences, just the names of the offences and the time. If you want details, go Cuadra or similar fact evidence route. Again, s.12 only works if accused testifies.
* Corbett: limiting instruction that prior criminal record is only to be used for credibility, not propensity or to punish them for those crimes.
* For accused, despite s.12, judge has discretion to allow none or only part of the rap sheet.
* Corbett Reading: before going to box, accused makes application to decide what parts of their reading are in or out. Four factors: timing (convictions closer to time of trial are likelier in)
* Second: does the conviction relate to some form of dishonesty (convictions for fraud, theft, perjury are likelier in)
* Third: has the defence been going after the Crown witness’ records (likelier to get in)
* Fourth: how similar are the names of the prior offences to the offence accused is charged with (unlikely to get in).

**Vetrovec Instruction (for severely unreliable witnesses)**

* Vetrovec witness if meets one of the overwhelming factors: they have a perjury conviction, they are a jailhouse informant, or they are accomplices to the offence.
* May also be a combo of significant factors: general criminal background, extensive criminal record, bias that they would have (deal they got, involvement in the case), their having varying versions of events, and unexplained passage of time where they didn't co’e forward.
* First step of instruction: separate them out from the rest of the evidence, give instructions on how to consider witnesses, but single them out with different instructions.
* Second step: give jury general reminder of factors that put them in Vetrovec category
* Third: remind them that they CAN on Vetrovec witness’ evidence alone, but probably shouldn’t.
* Fourth step: direct them to concept of confirmatory evidence and that it need not necessarily back up that they were the perpetrator.
* Khela: adds to the fourth step: while it need say he’s the perpetrator, the confirmatory evidence needs to backup some material part of their evidence and not some peripheral part of the story. Must be something important.
* Also, Khela says fourth step must say confirmatory evidence must be independent – no good if there’s reasonable possibility that Vetrovec witness influenced the corroborating witness’ evidence.
* Khela also adds to the instruction: it must be “sufficient evidence to restore faith”: the worse you feel the witness is, the more and the better confirmatory evidence you’ll need.
* Khela: if the ONLY real issue in the case is who the perpetrator was, then corroborating evidence must lend confidence to that conclusion.
* Evidence can back up more than one Vetrovec witness and one Vetrovec can back up another.
* Dhillon: jailhouse informant is automatically Vetrovec, don’t need evidence of rewards/promises
* Basic bad character evidence, extrinsic evidence, is never confirmatory (Dhillon)
* Dhillon: if evidence is a confession, confirmatory evidence is not material if it only says that the witness talked to the Vetrovec witness – that doesn’t confirm that they confessed, just talked.

**Prior ID Evidence**

* ID evidence is presumptive admissible.
* Prior ID is exception that allows prior, even out of courtroom, statements in.
* Gonsalves: early use of line-up or photo-pack is good if close to the events and is admissible as prior id evidence.
* Doing a Photo ID: done by someone not involved in the investigation who tells the witness they don’t know if suspect is in the pack or not, show the photos one at a time without telling them when you’re going to be done, do it as early as possible, and wait for each one, don’t flip thru.
* Whether it’s prior statement by the witness or a photo ID, to be admissible, must be early on.
* Jury Instruction for ID evidence (Gonsalves): be very cautious with it, tell them numerous wrongful convictions caused by mistaken eye witnesses. Experts not needed. Instruction also gives jury criteria for evaluating strength of ID evidence: the opportunity to view (lighting, length of time of the view, was it a stranger, stressful circumstances), how closely does the original description match the actual physical characteristics of the accused, and are these things that are easy matches (tall) or distinctive traits (tattoos). Jury should also be told to look for corroborative evidence.

**Non-Experts Offering Opinions**

* Graat: certain impressions and common sense people can provide because they are within experience and expertise of everyday persons and help fill in trier of fact as to what they were seeing. If it’s within ordinary experience of people and it’s relevant, you can give basic opinion.
* Can’t phrase that opinion in manner ofa legal test, should not be on a purely speculative matter with no reasonable basis for the opinion, and shouldn’t be too specific so as to cross the line into expert opinion.

**Expert Witnesses: Mohan Test (must meet all criteria)**

* S.7 of Charter demands early disclosure by Crown of experts it’s going to call while Criminal Code says defence must also disclose.
* First criteria: they must have expertise, a background that lets them draw these inferences. Simply must have greater expertise than ordinary person. No one way you need to gain the expertise, but the less ideal the qualifications, it’ll affect final balancing.
* Second: are they speaking to a relevant issue? Must be an issue that is relevant in the litigation. The more relevant the issue, the better for the balancing.
* Third: necessity: expert is to help us draw an inference we wouldn’t otherwise be able to draw, must actually need them and if ordinary triers of fact could draw that inference, don’t need expert. Not enough that we could draw it BETTER with the expert.
* Fourth: is the evidence otherwise inadmissible due to other rules?
* If you meet these four criteria, then must balance them against the risk of usurpation of the trier of fact, that the jury will just go with that opinion without critical analysis. The more it’s beyond the knowledge of trier of fact, the more reliant they’ll be.
* The stronger you are on the criteria, the further you can go in usurping the jury: most indirect way is just to have the expert set out factors that may be relevant. More direct would be to frame the factors in the context of the accused/case, like say by giving ranges for those factors (not just age and weight, but ages 14-16 and weight 180-200 lbs). Even further is to give the expert a hypothetical mirroring the case and ask his opinion on it. Must direct is to just ask the expert what his view on the key issue of the case is.
* The more it goes to the ultimate issue, the more it tries to directly answer the very question of the case, that is also a balancing factor weight against it that will have to be met by strong Mohan criteria. For instance, if it’s a very intense area of expertise, may be impossible not to be directly usurping or going to ultimate issue.
* Palma: to be admitted, exper opinions must have foundation in the facts of the case and not be wholly detached from them. For instance, if the expert gives factors, the Crown must then lead evidence on those factors. Lavoie does establish that a disconnect between evidence led and basis of expert’s opinion generally geos to weight if only some of the foundation is missing.
* D(D): if it’s a close issue on necessity, err on side of exclusion. Case lists problems with experts.

**Expert Evidence for Credibility**

* Expert evidence can’t go directly to issue of credibility, unless there is an issue we need an expert to assist a jury with so it can make a credibility determination. This is generally where experts come in to ensure the jury won’t make the WRONG determination, like saying an abuse victim is not credible because didn’t report quickly.

**Novel Expertise**

* J(LJ): must meet everything in Mohan but must also show that it’s generally accepted within the relevant scientific community. Some dissent is okay.
* Must then show that it has been subject to peer review and publication.
* Was rejected in JLJ for the science not being at a point where it’s reliable enough (intense reliability requirement here) and expert’s inability to explain.

**Abbey Test for Experts**

* Stage 1: do the first three Mohan criteria
* Stage 2: balance how well you met those criteria against how directly the person is going to the issue, how long and complex their evidence is going to be, its reliability (including bias and J(LJ) novel expertise), and its potential to overwhelm or confuse the trier of fact.

**Collateral Evidence Rule**

* Segura: if you cross-examine a witness/testifying accused on their general credibility or on an issue related to it, you’re stuck with their answer – you generally won’t be able to call further evidence to contract their testimony on the matter. Can’t just call evidence that purely pertains to their credibility. You can do it if the issue didn’t just go to her general credibility but to something else material as well.

**Competence and Compellability**

* The accused is not a compellable witness, but always competent.
* If you are unable to provide an oath, you are incompetent. Can be an oath or a solid affirmation, some process where you articulate that you are aware of the importance of telling truth and the legal sanctions if you don’t. If you can’t, you’re not competent (s.14)
* S.3: other pre-req is that you must be able to communicate and be capable of promising to tell the truth.

**Competence: Kids and Mentally Disabled**

* S.16: just have them utter the words “I promise to tell the truth” and there can then be no inquiry at the admissibility stage of their understanding of that phrase or what “truth” is. The statute doesn’t say anything about questioning the mentally disabled’s ability to understand this, but cases have read it in. You can only question them on their understanding of it on cross and it goes to weight.
* S.16.1: your only area of inauiry is whether they can understand and respond to questionse.
* If kid doesn’t say “I promise to tell the truth” or can’t answer or respond to questions, or mentally disabled cannot either, they can’t testify. Otherwise, goes to weight.
* JZS: it’s generally presumed that kids can testify behind a screen unless a good reason is offered. Accused don’t get a perfect trial, just one that’s not fundamentally u nfair (s.7 of Charter)

**Spousal Competence**

* Spouses cannot be compelled to testify against one another unless: the case involves violence from one spouse to another (common law)
* S.4(1): spouse can always be compelled to testify by the defence.
* S.4(2) and s.4(4): list of offences where the Crown can compel a spouse to testify. Includes particular offences against children where the spouse needn’t be the victim.
* S.4(3): no spouse is compellable to disclose any communication made to them by their spouse during the marriage. They can be compelled to disclose what they saw or head, but not any conversations between them. This can be waived by the spouse being called.

**Order of Witnesses**

* Smuk: counsel cannot be directed to call the accused at the start of the case, that’s discretion of counsel when to call them, can even change in middle of trial. That the accused, unlike other witnesses, is in the courtroom the whole time isn’t a big enough deal to break this tradition.
* This can result in judge giving instruction to take into account that accused heard earlier testimony, but this is rare, as it amounts to judge telling jury accused isn’t credible witness.

**Breaking a Promise to Call a Witness**

* Jolivet: if you can show that the Crown engaged in an abuse of process, you may be able to convince the judge to force them to call the witness. Abuse of process = Crown acting in bad faith or for an improper purpose, like if they know the witness was highly legitimate and saw everything but didn’t call them because they wanted a conviction.
* On the other hand, if it’s abuse of process or no reason for not calling, may get an inference.
* Adverse inference: jury can infer that the Crown didn’t call that witness because that witness was going to say something that would hurt their case.
* Crown can avoid adverse inference by offering some reason for not calling the witness that is legitimate or credible, like they don’t seem as trustworthy as they thought or had a bad attitude. Jolivet shows that even if the Crown’s proffered reason isn’t credible, the court can dig around and put forward their own potential explanations.
* If no adverse inference (it’s explained): remedy is that defence/opposing counsel can make a comment to the jury that the witness that wasn’t called can’t be taken by the jury to offer up anything to help the Crown case or corroborate any part of it.

**Reversible Error**

* Jolivet: if the error had not been made, is there a reasonable possibility that the verdict would be different? Also factor in policy concerns of the time, effort, money for a new trial.

**Leading Questions**

* Examination in chief generally can’t ask “yes or no” type questions, like just giving the witness propositions to confirm.
* Maves: exception to this is that leading questions are allowed at start of their testimony for non-controversial aspects of their testimony, like who they are. May also lead on aspects that both sides agree on, with notice to the judge. Can also lead where witness is having difficulty testifying, like if they’re very young, provided it doesn’t go to heart of the case.

**Present Memory Revived**

* Using a document with a prior statement of the witness, showing it to them to see if it revives their memory.
* This is not a witness improvement technique: if they talked about the testimony but just didn’t put it as firmly or severely as they did in prior statement, can’t use this. Can only ask the witness to cover the basic areas; it’s only where they clearly forgot something.
* It must be the witness’ own statement and it must be extremely contemporaneous to events.
* Shergill: demonstrate that there was something important that wasn’t there now.
* First step: give court the document that gave you the expectation of what they were going to say, which shows they forgot something material.
* Second: show that the witness’ memory has been exhausted. This will often be done by the judge offering leave to ask more leading questions; if that doesn’t work, exhausted.
* Third: court has to ensure this is a good faith attempt to revive memory and not just an attempt to get evidence (the prior statement) before a jury that isn’t admissible.
* There is not a strict contemporaneity requirement, though it is a factor (should be significantly earlier than trial.
* If the witness didn’t record/write it down themselves: is it reliable? Has the witness verified its accuracy? Is it suggestive or distortionary? Is it verbatim or is there summarizing
* Jury Instruction: must be followed by instruction that the prior statement isn’t admissible for its truth, just as an aid to the witness.

**Past Recollection Recorded**

* Normally where present memory revived fails.
* Fliss: first: recollection must be recorded in some reliable way, like a taped recollection or verbatim notes as opposed to oral memory or loose notes.
* Second: strict contemporaneity – recollection must be fresh and vivid at time it was recorded
* Third: the witness doesn’t remember the contents of what they said, but they remember telling the truth when it was recollected/at the time they made that prior statement.
* JR: timeframe for contemporaneity varies based upon what’s being remembered.
* JR: this is not admissible only where the witness has zero memory of the circumstances; imperfect memory is fine so long as it’s just not witness improving: that what they said in the prior statement was just BETTER than what they’re saying now.

**Cross-Examination: Putting Propositions to Witnesses – Limits on Cross Examination**

* Can put propositions to witnesses, unlike in examination in chief, where no leading.
* Counsel must have a good faith belief in the proposition, but it doesn’t have be based on admissible evidence or complete/sure info. Just can’t be something counsel knows to be calse or is reckless about (incredibly speculative). Counsel has to genuinely think it possible.
* That said, no unwarranted innuendo: even if lawyer genuinely believes it, judge has discretion to say it’s manifestly suspect/tenuous/speculative and honest belief isn’t enough.
* Can’t cross witness on their general bad character.
* Crown, as officers of the court, can’t make heavy use of irony, sarcasm or theatrics.
* Crown can’t imply that defence has to show why the Crown evidence isn’t valid (reverses onus)

**Attacking the Witness AFTER Cross – When you MUST cross them on certain things**

* Carter: unfair to the witness to discredit them and their testimony later based on something you never cross-examined them on/gave them no chance to explain.
* Carter rule: if counsel is going to challenge the credibility of the witness by calling contrary evidence, the witness must be given a chance to address that contradicting evidence in cross-examination. This is only for significant, material matters.
* If counsel does not follow the Carter rule: if it’s a minor point, may just tell counsel they can’t bring it up later.
* Otherwise, can give helpful inference: judge tells jury that in assessing credibility of the complainant/witness, can take into account that the propositions were never examined on as a factor that supports their credibility.
* Adverse inference: if the accused testifies and contradicts the witness, but witness was never crossed on those contradictions, it may be an adverse inference against accused’s credibility.
* These remedies only apply where it’s a significant matter that wasn’t put to the other side, not if it’s just that certain slight details are contradicted (Carter).
* Whether the witness was crossed on it is determined by looking at the cross as a whole.

**Re-Examination**

* Moore: permitted where new matters were raised on cross-examination, stuff not brought up in examination-in-chief.
* Not witness improvement: if version witness gave crumbled in cross, can’t just go thru it again.
* Re-examination is limited to the matters newly brought up in cross unless judge says otherwise.
* New facts cannot be introduced through re-examination unless judge says okay, and if he does, defence can re-examine on that.
* Moore: even if judge doesn’t think it’s COMPLETELY new, has discretion to allow re-exam on it.

**Rebuttal Evidence**

* Krause: only where they raised a completely unanticipated defence, an explanation Crown never heard before. Must be something Crown couldn’t reasonably anticipate.
* Not valuable enough to merit rebuttal if it only goes to broader credibility. If it goes to a substantive matter, it’s not just general credibility. Basically, does the evidence you want to rebut go purely to credibility (can’t rebut) or does it also go to element of the offence?
* Also can’t rebut something that only goes to a collateral issue: something that’s not relevant to what the Crown must prove. Must be releated to essential issues
* At judge’s discretion, defence can rebut the Crown’s rebuttal evidence.

**Crossing on Prior Statements**

* Can cross-examins on prior inconsistent statements.
* Must be accompanied by jury instruction that this prior inconsistent statement isn’t in for its truth, only to test credibility. Only admissible for its truth if the witness adopts some of it.

**Prior Consistent Statements**

* General rule: can’t present the prior consistent statements of a witness you’re presenting.
* Can get it in if, as in Ay, it has probative value beyond its consistency.
* Ay: Narrative exception: can’t get in the details of the prior consistent statement, but you can get in the fact that it was made, the basic disclosure, so that the jury knows how the complaint was made, where it came from, how it got to law enforcement, and how it came to court. This will be accompanied by limiting instruction: goes to narrative purpose, don’t draw inference on credibility based on number of times story was told.
* Stirling: another exception – can bring it in as a rebuttal to an allegation of recent fabrication. Counsel may allege that a certain triggering event caused the person to adopt an untruthful position. A prior consistent statement that was given prior to the triggering event rebuts this.
* Swanston: prior identification is another exception. Can bring in evidence of original description even if it matches their current in-court ID.

**Attacking Your Own Witness When they are Inconsistent with Their Prior Statement**

* S.9(2): cross-examination is limited to the inconsistencies. Can point out the inconsistencies between testimony and prior statement and ask for an explanation of them, cross on that.
* Can only use s.9(2) if you have a prior, inconsistent statement that is reduced to writing or video/audio recording.
* The inconsistency must be clear and significant and relevant to a highly probative part of it.
* Milgaard: step 1: advise the cour they’re making a 9(2) application, need empty courtroom
* Step 2: provide judge with the evidence of the inconsistency: give them a copy of the prior statement and judge sees if there is a real inconsistency, not witness improvement
* Step 3: if judge does see it, has discretion to permit cross on the prior statement. May still not allow it if the details in the prior consistent statement are such that it would be too tempting for the jury to use it for its truth.
* Jury instruction: unless the witness adopts it, prior statement is not in for its truth, just to show inconsistencies for credibility determination.

**s.9(1): Destroying Your Own (Adverse) Witness**

* If witness doesn’t adopt prior testimony or explain after 9(2) cross)
* Can’t bring in evidence of general bad character in 9(1) cross.
* 9(1) cross allows broad cross allowing counsel to contradict them with other evidence and not limited to only asking about inconsistencies. Chance to reduce weight of their testimony.
* Haines: prior statement isn’t required, but it’ll usually be there because otherwise, no expectation for what they were going to say. But it can be oral. Also, even if you meet all the requirements, may still not get it if not in interests of justice.
* Adversity: they’re not only forgetting the evidence but offering completely different evidence and are contemptuous. Basically, there’s no clear or logical explanation for the change other than that the witness has changed sides and aligned interests with the other side, or no explanation at all. If there is a clear and logical explanation, there is no adversity.
* If their statement changes radically there is no logical explanation or judge takes issue with the witness’ explanation, it’s adversity. Demeanour can aid this determination.
* Cassibo process for s.9(1): if court finds there’s some logical explanation for the switch, but here, found none other than adversity.

**Cassibo Requirements to Use s.9(1)**

* Makes a very different statement from what she said prior.
* Her new testimony HURTS the Crown case.
* Court can find no logical explanation for the switch other than that she switched sides.
* McInroy: it must be that her new testimony hurts the Crown case (like, say, by arguing against an element Crown has to prove or buttressing defence’s theory). The fact that the witness just doesn’t come through or doesn’t help the Crown isn’t enough. It must be evidence that could be used to positively acquit the accused.
* Even if you cross under s.9(1), the prior statement still isn’t admissible for its truth.

**Hearsay**

* Out of court statements we want to bring in for their truth.
* Prior statements can be brought in to challenge credibility, but not for their truth
* Exception: unavailable witness, either because memory is shot (past recollection recorded) or they’re dead or disappeared and only way to bring in this highly relevant evidence is hearsay.
* Dying declearation: offence involved is homicide of the dead declarant, deceased had a settled and hopeless expectation of immediate death, and the statement was about the circumstances of their death and would have been admissible if he could testify to it.
* Res Gestae: a spontaneous utterance made as a reaction to a physical sensation. Cannot be a gap between the statement and the physical sensation, same moment, event must have been unexpected, and the statement can only relate to or be used to explain the act they accompany.

**General Exception to Hearsay**

* Baltzer: can be admitted because the words were said, can draw an inference just from the fact that the words were said, regardless of their truth or non-truth. It’s a circumstantial inference from the facts of those words and they’re being uttered without considering their truth. Ratten.

**Statements of Intention**

* if person says what they intend to do, it evidences intention – you can then infer from that that they later followed through on it by virtue of having uttered those words. You can lead evidence of that statement they made about what they intended to do to infer they followed through on it.
* Griffin: can lead statements, possibly from the victim, that they were scared of somebody/angry at somebody, use it for the fact that it was said, not truth of its contents, to infer state of mind of the victim – they’re scared of the accused, and then from that you can infer that there’s bad blood between them and hence motive for the accused. Can use out of court statement, fact that those words were said, to infer a state of mind in person which may go to accused motive.
* To use statements of intention or Griffin exception for complainant’s state of mind: we’re just using it for fact that it’s said, not truth of content. It must have been said in ordinary manner where natural inference is that they were being truthful and must not have been said in circumstances of suspicion (where they had a motive for not telling the truth).

**B(KG) Method for Bringing in Out of Court Statement for Its Truth**

* Cannot be otherwise inadmissible were it direct evidence, like if the hearsay statement amounts to bad character evidence.
* Cannot have been the product of coercion.
* Necessity: witness is unavailable, forgotten (past recollection recorded), or has come in with a completely new version that represents a radical change and you want to bring in their prior, out-of-court statement.
* Parrot: can’t just assume disabled persons can’t testify – the court will often want to see them first on a voir dire.
* Pelletier: a sure-to-be uncooperative witness doesn’t automatically give necessity either: must first show that you tried the regular means and failed. Also may not bring necessity if you brought a guy in and he just didn’t give you what you wanted.
* Criteria 1: is there a sufficient substitute for the oath? Put under oath when they made the prior statement? Or were they at least clearly informed of the seriousness of making a truthful statement?
* Criteria 2: Presence Substitute: audio/video recording – important to hear and see them and see their interaction with the questioner. Complete transcript is not as good, but still better than someone just recollecting the statement on the stand.
* Criteria 3: Cross-Examination substitute: if the witness changed his story dramatically, you can cross-examine him at trial. Of course, no substitute if the reason for hearsay is unavailable witness. All this is not a checklist.

**Khelawon – Inherent Trustworthiness Method to Bring in Hearsay**

* Is there necessity (like with B(KG))?
* First: look at content of the hearsay statement – does it flow logically?
* Second: did the person who made the hearsay statement have a motive to lie?
* Third: is there any coercion or pressure? Made naturally and spontaneously?
* Fourth: was it contemporaneous to the events?
* Fifth: is there any outside, corroborating evidence? (like Khan – if the out of court statement matches the physical evidence or, as in U(FJ), if it’s a confession that matches the complainant’s account in detail with no collusion).
* This is not a checklist.

**Statutory Hearsay Exceptions**

* S.715 of criminal Code: if Crown witness is unavailable a trial, you can bring in their testimony from the preliminary inquiry.
* Civil rules: can bring in what people said on examinations for discovery if unavailable.

**Statutory Business Records Exception (s.30)**

* The document must be otherwise admissible if testified to (no bad character).
* Must have been made in the usual and ordinary course of business.
* S.30(10): does not apply to records made in the course of an investigation or inquiry, a record made in course of getting/giving legal advice, and if revealing the records would be contrary to public policy, even if taken in ordinary course of business.
* Wilcox: it likely won’t count as in the ordinary course of business if the person who took the records wasn’t required to as part of their job and definitely won’t if they weren’t supposed to.

**Common Law Business Record Exception**

* Wilcox: Must be an original entry made contemporaneously in the routine of business by a recorder with personal knowledge of the thing who has a duty to make the record and no motive to misrepresent the record.
* S.30 is more lenient because it doesn’t explicitly require the recorder to be under a duty to make the record.
* If you’re CLOSE to meeting these exceptions but don’t, you probably would meet the broader necessity/reliability exceptions.

**Common Law Statements Against Interest Exception**

* O’Brien: first, would the testimony have been inadmissible at trial?
* Necessity: the person who made the statement is unable to testify.
* Reliability: it’s a statement against your financial or liberty interest. It must be one that put them in fairly IMMEDIATE penal or financial prejudice.
* the declarant must have been of aware of this when they made it, made no effort to shield themselves. Needed to recognize that the statement made them vulnerable to financial or penal consequences and that this prejudice would be immediate.
* The vulnerability cannot have been remote.

**Mapara: Challenging Traditional Common Law Exceptions**

* First, does it fit one of the traditional hearsay exceptions (the common law stuff)?
* From there, you can challenge the hearsay exception as not being supported by necessity/reliability, that the whole exception should be wiped from the law. Never been done.
* Can also try to argue that that traditional exception should be extended to include you.
* May also try to argue that despite meeting an existing a traditional common law exception, in that particular case, it doesn’t meet necessity/reliability despite falling in an exception. Difficult, since all the exceptions save dying declaration require there being no motive to lie.
* If hearsay evidence doesn’t fall within common l aw exceptions, it can still be admitted if it has necessity and reliability. (through B(KG) or Khelawon)

**Final Balancing for Hearsay**

* Once you’ve gotten through some criteria to admit it, there’s still a final probative/prejducial balancing. Very rare to not meet this final balancing, or to be admitted for meeting it despite failing the criteria of all the exceptions.
* Possible that the reporting witness is so incredibly unreliable, like huge bias or different versions, that they may get kicked out at this stage.

**Formal Admissions**

* Pursuant to negotiations between counsel, before trial starts, give list of facts parties agree to the judge, file it as an exhibit, read it to jury as facts proven.
* Castellani: can’t force the other side to make admissions and it must be signed off on by both parties. You also cannot force your client to make an admission.

**Informal Admissions**

* Out-of-court statements made by the accused/a party to the proceedings that we want to use for its truth. Palma: this is not considered hearsay because the party is in court to dispute it. Informal admissions are presumed to be admissible.
* Palma: the content of the admission must be relevant to the case and with probative value not outweighed by its prejudicial effect. For instance, likely won’t be admissible if in it, the accused talks about other crimes they did.
* May be reported by Vetrovec witnesses: even if you’re very suspicious of the reporter, it’ll just go to weight given to the statement, not its admissibility (Murrin)
* Partial overhears: Hunter – not presumed admissible. Prejudicial over probative and inadmissible where only part of a sentence/sentence is heard without context. This form of unreliability goes to admissibility.
* Allison: party’s statements must be led in their entirety. May be able to argue that one statement is broken up in time enough to be separate statements, but court will take a broad view and may say that it’s a conversation broke up in statements unless there’s significant gaps of time between the comments.

**Voluntariness (applies to out-of-court statements by the accused to police)**

* Only applies to statements of accused persons.
* Kicks in when statement is made to a cop (need not be in detention). If so, Crown must prove beyond a reasonable doubt that statement was voluntary – not a product of fear or favour.
* Statement is made to a person of authority: it’s a police officer who the accused knows is a police officer.
* If there was a direct or indirect threat and it’s causative to the statement, it’s involuntary. Causation can be found where there’s a close temporal connection between threat and statement. Same for inducements: involuntary if it’s causal to the statement and this can be shown either explicitly or temporally.
* The inducement, to cause involuntariness, must be something the person in authority has control over: not moral or spiritual inducements. Legal inducements are improper if given in a quid pro quo fashion: give me statement, I’ll give you benefit.
* The threat or inducement need not be the ONLY causal factor, just a sufficient one.
* Fliss: to be found involuntary, the accused must KNOW the cop is a cop and it must be a state official acting in their more regular role (not just as corrupt cops). This is why threats and inducements are okay in the Mr. Big context.

**Coercion**

* State abuses its authority/conditions of interrogation to force someone to confess: no food, no sleep, cold conditions. Can find involuntariness on that basis alone, but usually combines with inducements.
* Coercion is usually a combination of factors: no sleep, holding off on water, cold, and no effort to improve the conditions.
* Frequent coercion f actor (Oickle): making up damning evidence or grossly overstsating the Crown case. This by itself isn’t generally enough, but in combination with other coercive factors or if it clearly had a huge impact on the accused
* Another factor: the sheer length of interrogation.

**Automatism and Police Trickery (other ways to toss out Informal Admissions to cops)**

* If accused is in state of automatism and not in control, can’t make a voluntary statement.
* If police did something shocking or improper to get someone to talk, some crazy ruse that is found to have had a causative impact, a ruse that society would frown upon even if it didn’t constitute a threat or inducement, the statement that was gained can get tossed out.

**Third Party Perpetrator Theory**

* Where the defendant is trying to raise a reasonable doubt by pointing the finger at someone else. They are allowed to lead propensity evidence against the person, bad character stuff.
* Grandinetti: to do this, there must be a reasonable connection between that alleged perpetrator and the crime. Under the Seaboyer standard, this needn’t be great, this third person having a motive or being at the scene of the crime might suffice, but a vague connection, suspicion, or speculation isn’t enough.

**Co-Accused Admissions**

* Grewall: can’t use evidence against one accused against all.
* Grewall: admissions by the accused are only admissible against that accused, the maker, not the co-accused that may be implicated by it.
* If tried separately, the maker can be called as a witnesses and if he refuses, his statement can go in as hearsay.
* With no severance: instruction to only use it against the maker after the Crown tries and edits the statement.
* It will be admissible so long as it can be edited to only implicate the maker while still mainting its overall integrity and coherence and the flow of the conversation in which statement arose. If the statement can’t be edited, Crown runs the risk of having the whole thing excluded. Alternatively, if it’s edited too much, the defence may argue that it’s unreliable.

**Evidence Gained in Breach of Charter (Right to Counsel)**

* S.10(b): upon detention, you have the right to retain and instruct counsel without delay. Police must inform you of that right as soon as you are detained and if you say you want it, they must facilitate that request without delay and without questioning you in the interval.
* If you give a statement/evidence without ever having been informed of this right or in that interval between asking for counsel and getting it, that evidence is in breach.

**Unreasonable Search and Seizure**

* S.8: state must have reasonable and probably grounds to search a place where a person has a reasonable expectation of privacy. Must show these grounds to a judge who will give pre-authorization of the search. Where they searched without those grounds, any evidence they got will be from a charter breach.

**When to Exclude Evidence Due to Charter Breach**

* S.24(2): if it would bring the justice system into greater disrepute by admitting the evidence than not admitting it, having regard to all the circumstances.
* Grant: determine this by looking at three factors –
* Criteria 1: How serious was the police’s breach? As in, was it deliberate and wilful, or inadvertent? Was it a good faith error (it was an honest and reasonable mistake). If it’s honest and unreasonable belief, it weighs against admission. A lack of clarity in the law will often lead to a good faith error.
* Criteria 2: seriousness of the breach to the accused: how badly did it violate their Charter right. For s.8, this would be how significant the privacy right engaged is: a strip search vs. search of a home, search of home versus search of cubicle in open workplace. For violations of s.10(b), the seriousness is always very high: self-incrimination.
* Third category: reliability of the evidence obtained (eg: real evidence like blood/breath samples are more reliable than statements).
* If it’s s.10(b)( that’s violated, there’s a strong presumption that it’s excluded: criteria 2 = self-incrimination, and criteria 1 is also strong as police are thought to know the rules well on this.
* For bodily evidence: criteria 1: degree of police misconduct, criteria 2: extent of the intrusion (was it a blood sample with needle going into them, or just a breath sample?). Reliability will always be very high though, so generally will require some police misconduct.

**Right to Silence**

* S.7: you cannot be forced to participate in the case by providing evidence against yourself. It’s a personal choice whether to talk to the police or not.
* Singh: that said, interrogation can continue even if accused asks it to stop. Police can make reasonable efforts to get you off of your position that you’re not talking as long as they’re not violating voluntariness rules or providing coercive conditions.
* Singh: that said, right to silence is violated if police every imply that the accused has some obligation to give a statement. To counteract this, they often start the interrogation telling the accused of his right to silence.
* Other factors to finding a violation: the sheer number of times the person asserts it and it’s ignored. This, however, is balanced against how it’s impacting the person and their level of sophistication with the justice system. May be a violation of the person is mentally falling apart under the pressure, but the number of times will have little effect if you don’t seem at all overwhelmed or vulnerable and, like Singh, have extensive awareness of justice system.
* Sinclair: asking to talk to your lawyer again does not stop the interrogation, you only get a right to instruct counsel at the start.
* Turcotte: you don’t waive your right to silence once you start talking. You can stop any time.

**Inferring Guilt from Silence**

* Turcotte: silence or refusal to talk/cooperate with police is not post-offence conduct of guilt: inferring guilt from silence is too speculative.
* Also, due to right of silence, you’re under no obligation to talk to or help the police so cannot infer guilt from exercising your right.
* Trier of fact may hear of the silence for narrative purposes, but this would need instruction.

**Using Accused’s Testimony from Another Proceeding**

* Where it’s a co-accused trial, a civil trial, a tribunal with subpoena power, or witness in another trial
* S.13 of Charter: a witness who testifies in any proceedings have right not to have the incriminating evidence they gave used to incriminate them in other proceedings EXCEPT prosecution for perjury.
* Henry: this protection also doesn’t apply for re-trials within the same indictment where the accused gave the prior testimony in the first trial and then testifies again in the re-trial. That said, can’t use it if they don’t testify again in the re-trial. If he does though, you can broadly cross-examine on their testimony from the first trial.
* Nedelcu: while s.13 and Henry say you can’t use their prior statement as a witness substantively, like using the truth of its content to build your case, but you CAN use it for credibility if they contradict it in their own trial. However, you can only refer to innocuous points from their prior testimony, not anything you could build the case off of and nothing related to the elements of the offence he’s being tried for.

**Statements from Proceedings Other than Trial where Accused is Forced to Talk**

* 83.28: s.13 didn’t apply because not court proceedings, but situation where accused was forced to come in somewhere and talk via statute with a legitimate policy reason.
* It’s not this being forced to talk that violates Charter but its use afterwards in criminal trial.
* S.7 of Charter says that this prior, statutory proceeding can force you to talk and throw you in jail as a result, but that testimony can’t later be used directly in a criminal proceeding, nor can derivative use be made of it.
* No transactional immunity: can still be charged with the crime, but must be by independent evidence, Crown can’t use evidence they found thanks to the testimony.
* Exception: inevitable discovery: Crown found the evidence thanks to the testimony but can show it was inevitable they’d have discovered it anyway (very hard to show).

**Privilege**

* Allows party to refuse to disclose information when its requested.
* If party tries to call that info in court, it’s inadmissible
* Class privilege: solicitor/client or informant. These are automatic once that relationship is shown and cannot be attacked save by “innocence at stake.”
* Case-by-case privilege: every other confidential relationship other than solicitor/client and informant must be run through the test.

**Case-by-Case Privilege Test (National Post) – NOT solicitor/client or informants**

* First: communication must originate in confidence, communication was anticipated to be confidential.
* Second: confidence must be essential to the relationship in which the communication arose.
* Third: relationship is one that should be fostered for the public good.
* Fourth: in this specific case, is the public interest better served by protecting the relationship or by getting to the truth. This is generally weighing the seriousness of the crime against how confidential/important the relationship is.
* If it’s a well-established relationship like doctor/patient, psychiatrist or counselor/patient, or reporter/source, you can skip to the fourth step.

**Qualifying for Solicitor/Client Class Privilege**

* Between lawyer and client.
* Must have been intended to be confidential. This can be suggested (eg: place of meeting).
* Must have been legal advice/involved some aspect of the law, not just a business strategy.
* Doesn’t apply to advice given to facilitate an offence, on how to break the law.
* Government lawyers/government count for this privilege (Shirose).
* Govn’t’s getting clearance for an operation does not = facilitating an offence (Shirose)

**Waiver of Solicitor/Client Privilege**

* Can’t open the door a bit and shut it again.
* Waiver can be done explicitly, but can also happen where a party discloses some privileged information to bolster their case. The other side now has right to access all communications on that issue and potentially lead them in court.
* Shirose: normally just mentioning a lawyer’s name or that you saw a lawyer won’t constitute waiver UNLESS you’re using your seeing a lawyer as a sword – that the trier of fact can or is meant to draw an inference about the content of that meeting just by your mentioning it.

**Innocence at Stake Exception to Privilege (Brown)**

* Applies to both class and case-by-case
* Where you have evidence that there’s another perpetrator who told his lawyer.
* Accused seeking production must demonstrate an evidentiary basis to conclude that a communication exists that could raise a reasonable doubt as to guilt.
* Accused must establish that this information they seek is not attainable from any other source.
* Accused must show that he is otherwise unable to raise a reasonable doubt (no other defence).
* Judge will then get the information, examine the communication and see whether it’s likely to raise a reasonable doubt, that it will almost inevitably acquit the person.
* In meeting requirements, it doesn’t matter if the other source for the information is shakier/more subject to attack or that the other defence you have is weaker.
* There is no use or derivative use of the disclosure in the prosecution of the other perpetrator, though they can still be charged with the offence.