

# Index

## ABSENT WITNESSES

- Generally, **10:1**
- Absent from other jurisdictions and present in Canada
  - generally, **10:15**
  - foreign letters rogatory
    - evidentiary and procedural concerns, **10:20**
    - judicial discretion to refuse
      - conflict with Canadian policy objectives, **10:19**
      - materiality, **10:18**
      - undue burden, **10:17**
    - legislative prerequisites, **10:16**
  - mutual legal assistance in Canadian criminal courts, **10:21**
- Commission evidence
  - civil cases
    - generally, **10:2**
    - criteria for making order, **10:3**
    - procedural concerns, **10:4**
  - criminal cases
    - generally, **10:5**
    - application procedure, **10:5**
    - criteria for making order, **10:6**
    - presence of accused, **10:7**
- Testifying by video-conference or other means
  - Advances in technology, **10:8**
  - civil cases
    - historical approach, **10:9**
    - legislative guidelines, **10:10**
    - modern approach, **10:11**
    - witnesses in foreign jurisdictions, **10:12**
  - criminal cases
    - Evidentiary and procedural questions, **10:14**
    - factors for consideration, **10:14.50**
    - legislation, **10:13**

## ACCUSED PERSON, COMPELLABILITY OF

- Canada Evidence Act, effect of s.4(6), **6:37**

## ACCUSED PERSON, COMPELLABILITY OF—Cont'd

- Co-accused, **6:39**
- Criminal (penal) proceedings, **6:36**
- General rule—not compellable at own trial, **6:35**
- Officers of corporations, **6:40**
- Separate proceedings, **6:38**
- Spouse of accused person
  - historical approach, **6:41**
  - provincial prosecutions, **6:42**
- Tactical compulsion, **6:35.50**

## ADMINISTRATIVE TRIBUNALS

- Compelling attendance, **8:11**

## ADMISSIBILITY

- See also EXPERT WITNESSES
- Generally, **2:3**
- Conditional admissibility, **2:8**
- Consent, on
  - formal admissions, civil cases, **2:10**
  - formal admissions, criminal cases, **2:11**
- Exclusion
  - judicial discretion
    - history, **2:16**
    - modernization of discretion, **2:17 to 2:19**
    - rationales for, **2:15**
    - limited exclusion, **2:30**
- Judicial notice, **3:32**
- Legal prerequisite, **2:2**
- Legal relevance, **2:5**
- Limited admissibility, **2:9**
- Materiality, **2:4**
- Prejudicial effect
  - generally, **2:23**
  - distraction or undue focus, **2:26**
  - emotional prejudice, hostility or sympathy, **2:24**
  - misleading nature, **2:25**
  - time and expense, **2:27**
  - ultimate issue, **2:29**
  - unfair surprise, **2:28**

**ADMISSIBILITY—Cont'd**

- Probative value
  - generally, **2:5**
  - measuring, **2:20 to 2:22**
- Procedural issues
  - objections, **2:13**
  - voir dire, **2:14**
- Relaxed standards, **2:7**
- Weight, vs, **2:6**

**ADMISSION BY PARTIES,  
EXCEPTION TO HEARSAY RULE**

- Generally, **14:13**
- Adopted admissions, **14:14**
- Vicarious admissions, **14:15**

**ADULTERY**

- Privilege to protect against self-incrimination, **17:87**

**ADVERSARIAL PROCESS**

- See TRIAL PROCESS

**ADVERSE WITNESSES**

- See also HOSTILE WITNESSES
- Generally, **11:31**
- Adverse non-party witnesses, **11:34**
- Adversity, meaning, **11:27**
- Existing approach, concerns with, **11:29**
- Manner of examination, **11:33**
- Prohibited statements, **11:28**
- Scope of rule—technical requirements, **11:32**
- Statutory construction issues, **11:26**

**AFFIDAVITS**

- Generally, **3:4**

**AFFIRMATION, SWEARING**

- Generally, **6:5**

**AUTHENTICATION OF  
DOCUMENTARY EVIDENCE**

- Ancient documents, **3:8**
- Basic rule, **3:6**
- Direct or circumstantial evidence, by, **3:7**
- Judicial records, **3:9**
- Other statutory exceptions, **3:10**

**BAD CHARACTER EVIDENCE**

- Civil cases, use in, **15:7**
- Criminal cases, use in
  - accused, **15:2**
  - co-accused, **15:3**

**BAD CHARACTER EVIDENCE**

**—Cont'd**

- Criminal cases, use in—Cont'd
  - non-accused
    - generally, **15:4**
    - deceased or victim/complainant, **15:6**
    - third party suspect, **15:5**
- Direct relevance
  - civil cases, **15:13**
  - criminal cases
    - charging trier of fact, **15:11**
    - prejudicial effect, **15:9**
    - probative value, **15:8**
    - raised by accused, **15:10**
    - relevance to credibility, **15:12**

**BASIC PRINCIPLES OF LAW OF  
EVIDENCE**

- Bentham, Jeremy, **1:11**
- Categorical approach, **1:10**
- Efficiency, **1:7**
- Ehrenberg, Kenneth, **1:11**
- Evidentiary discretion, **1:10**
- Flexibility vs certainty, **1:10**
- Principled approach, **1:10**
- Protection of interests outside trial, **1:9**
- Protection of jury, **1:8**
- Requirement for, **1:11**
- Right to fair trial, **1:6**
- Search for truth, **1:5**
- Traditional approach, **1:10**

**BENTHAM, JEREMY**

- Generally, **1:11**

**BEST EVIDENCE RULE**

- Electronic evidence, **3:15**
- Exceptions
  - evidence not available, **3:13**
  - production inconvenient (public records), **3:14**
- Modern approach, **3:11**
- Rationale, **3:11**
- Scope, **3:12**

**BOARD AND TRIBUNAL MEMBERS,  
COMPETENCE AND  
COMPELLABILITY**

- Compellability and scope of questioning, **6:30**
- Privative clauses, effect, **6:31**

## INDEX

### **BROWNE v. DUNN, RULE IN**

Generally, **12:36 to 12:41**

### **BURDEN OF PROOF**

Civil proceedings

allocating burdens, **4:11**

legal standard, **4:10**

third standard of proof, **4:10**

Criminal proceedings, accused

due diligence defence, regulatory offences, and, **4:9**

statutory and common law burdens, **4:8**

Criminal proceedings, prosecution

generally, **4:3**

applies to case as whole, **4:4**

burden never shifts to accused, **4:5**

credibility, **4:7**

reasonable doubt, meaning, **4:6**

Evidential burden

generally, **4:12**

civil cases, **4:15**

criminal cases

accused, on, **4:14**

prosecution, on, **4:13**

Need for, **4:1**

Tendering evidence

threshold, **4:16**

who bears burden, **4:17**

Types, **4:2**

### **BUSINESS RECORDS, EXCEPTION TO HEARSAY RULE**

Definition, **14:37**

Historical development of exception, **14:35**

Specific exclusions, **14:38**

Which exception governs, **14:36**

### **CALLING EVIDENCE**

Appeal, on, **7:6**

due diligence (civil cases), **7:6.10**

due diligence (criminal cases), **7:6.10**

exceptions to general rule, **7:6.10**

importance of evidence, **7:6.10**

Order of evidence, **7:1**

Re-calling a witness, **7:3.50**

Re-opening case

civil cases, **7:4**

criminal cases, **7:5**

Rule against splitting case

generally, **7:2**

### **CALLING EVIDENCE—Cont'd**

Rule against splitting case—Cont'd

civil cases, **7:2**

criminal cases, **7:3**

### **CALLING WITNESSES**

Generally, **7:7**

Civil cases

additional witnesses, **7:12**

failure to call witnesses, **7:13**

Crown in criminal cases

adverse inference, **7:10**

failure to call witness and adverse inference, **7:10, 7:11**

crown commentary on in jury

address, **7:11.50**

no obligation to call witnesses, **7:8**

oblique motive/abuse of process, **7:9**

Defence in criminal cases, **7:11**

Expert witnesses, **7:24**

Trial judge's role

calling witnesses, **7:14**

jury's ability to question witnesses, **7:17**

questioning witnesses in adversarial proceedings, **7:15**

### **CANADA EVIDENCE ACT**

Adverse inference and effect of s.4(6), **6:37**

Child witnesses, presumption of competence, **6:16**

Cross-examination

s.10 of Canada Evidence Act

generally, **12:63**

intention to contradict witness, **12:65**

statement must have been made by witness, **12:64**

s.11 of Canada Evidence Act

addressing denial, proof of former statement, **12:67**

failing to contradict witness, **12:68**

witness response to prior statement, **12:66**

Journalist-source privilege, protection of, **17:90**

Public interest immunity, **18:6 to 18:16**

### **CHARACTER EVIDENCE**

Bad character evidence

civil cases, use in, **15:7**

**CHARACTER EVIDENCE—Cont'd**

- Bad character evidence—Cont'd
  - criminal cases, use in
    - accused, **15:2**
    - co-accused, **15:3**
    - Crown witnesses, **15:4**
    - Deceased or Victim complainant, **15:6**
    - third party suspect, **15:5**
  - direct relevance
    - civil cases, **15:13**
    - criminal cases
      - charging trier of fact, **15:11**
      - prejudicial effect, **15:9**
      - probative value, **15:8**
      - raised by accused, **15:10**
      - relevance to credibility, **15:12**
  - Good character evidence, civil cases, **15:36**
  - Good character evidence, criminal cases
    - generally, **15:30**
    - accused, **15:31**
    - impact of adducing
      - admitting bad character evidence in reply, impact, **15:34**
      - Crown's ability to respond, **15:33**
      - putting character "in issue," **15:32**
    - prosecution, **15:35**
  - Similar fact evidence, civil cases, **15:29**
  - Similar fact evidence, criminal cases
    - generally, **15:14**
    - admissibility
      - balancing process, **15:26**
      - deference to trial judge's decision, **15:25**
      - proving identity, **15:27**
    - conditions for admission
      - acts for which accused acquitted, **15:19**
      - evidence linking accused to similar acts, **15:20**
      - types of evidence, **15:18**
    - historical development of rule
      - early common law/iMakin/i rule, **15:15**
      - evolving past iMakin/i, **15:16**
      - R. v. Handy, **15:17**
    - multi-count indictments, **15:28**
    - prejudicial effect
      - moral prejudice, **15:23**

**CHARACTER EVIDENCE—Cont'd**

- Similar fact evidence, criminal cases
  - Cont'd
    - prejudicial effect—Cont'd
      - reasoning prejudice, **15:24**
    - probative value
      - collusion, **15:22**
      - relevant factors, **15:21**
  - Utility and dangers, **15:1**

**CHARTER OF RIGHTS AND FREEDOMS**

- See also IMPROPERLY OBTAINED EVIDENCE
- Presumptions of law, and, **4:22**
- s.13 and compellability in separate proceedings, **6:35.50, 6:38**
- s.7 and self-incrimination
  - derivative use immunity, **17:15**
  - residual protection against self-incrimination, **17:14**
  - statements compelled by statute, **17:16**
- s.13 and self-incrimination
  - application, **17:7**
  - compelled testimony, **17:9**
  - non-criminal proceedings, **17:13**
  - testifies in any proceedings, **17:8**
  - using prior testimony for other non-incriminating purposes, **17:12**
  - using prior testimony to impeach, **17:11**
  - whether s.13 can be waived, **17:10**
- s.11(c) and compellability, **6:35.50, 6:37, 6:38**
- Source of evidence law, **1:18**
- Violation would be caused, grounds for quashing subpoena, **8:18**

**CHILD WITNESSES**

- Historical treatment, **6:13**
- Presumption of competence under Canada Evidence Act, **6:16**
- Procedural issues in assessing competence, **6:17**
- Promising to tell truth, **6:15**
- Techniques to assist in providing evidence
  - child-friendly techniques, rationale, **6:18**
  - other measures and potential reforms, **6:22**
  - personal cross-examination, **6:21**
  - screens, in-camera evidence and testifying remotely, **6:19**

**CHILD WITNESSES—Cont'd**

- Techniques to assist in providing evidence—Cont'd
  - support persons and animals, **6:20**
- Unsworn testimony, **6:15**

**CIRCUMSTANTIAL EVIDENCE**

- Authenticating by, documentary evidence, **3:7**
- Criminal cases, special rules in, **3:2, 3:3**
- Distinguished from direct evidence, **3:1**

**CO-ACCUSED, COMPETENCE AND COMPELLABILITY**

- Generally, **6:39**

**CO-CONSPIRATOR STATEMENTS, EXCEPTION TO HEARSAY RULE**

- Admissibility, framework, **14:31**
- Admissibility in civil cases, **14:33**
- Concerns with exceptions and compliance with principled approach, **14:32**
- Principled basis for admission, **14:30**

**COLLATERAL FACT RULE**

- Generally, **12:41**
- Exceptions, **12:44**

**COMMISSION EVIDENCE**

- Civil cases
  - generally, **10:2**
  - criteria for making order, **10:3**
  - procedural concerns, **10:4**
- Criminal cases
  - generally, **10:5**
  - application procedure, **10:5**
  - criteria for making order, **10:6**
  - presence of accused, **10:7**

**COMMON LAW AS SOURCE OF EVIDENCE LAW**

- Generally, **1:12**

**COMMON LAW PRIVILEGE**

- Balancing of interests, **17:94**
- Confidentiality, **17:92**
- History, **17:91**
- Nature of relationship, **17:93**

**COMMUNICATING WITH TESTIFYING WITNESS**

- Communication between witnesses, **7:27**
- Examination for discovery, **7:26**
- Trial, **7:25**

**COMPELLING ATTENDANCE**

- Administrative tribunals, **8:11**
- Civil litigation
  - interprovincial subpoenas
    - generally, **8:3**
    - proceedings where subpoena available, **8:4**
    - witness fees and protection, **8:5**
    - witnesses within jurisdiction, **8:2**
- Coroners' inquests, **8:10**
- Criminal proceedings
  - duration of subpoena, **8:8**
  - issuance, **8:6**
  - likely to provide material evidence, **8:7**
  - technical requirements, **8:6**
- Enforcing attendance by arresting witness
  - civil and administrative proceedings, **9:2**
  - criminal proceedings, **9:3**
- Federal and provincial inquiries, **8:9**
- Power to compel, **8:1**
- Subpoenas or summons, setting aside
  - onus and procedure
    - civil proceedings, **8:13**
    - criminal proceedings, **8:14**
  - quashing, grounds for
    - abuse of process, **8:17**
    - Charter violation, **8:18**
    - health of witness would be at risk, **8:19**
    - irregularity in issuance, **8:15**
    - witness can provide to material evidence, **8:16**

**COMPETENCE AND COMPELLABILITY**

- Accused persons
  - Canada Evidence Act, effect of s.4(6), **6:37**
  - co-accused, **6:39**
  - criminal (penal) proceedings, **6:36**
  - general rule—not compellable at own trial, **6:35**
  - officers of corporations, **6:40**
  - separate proceedings, **6:38**
  - spouse of accused person
    - historical approach, **6:41**
    - provincial prosecutions, **6:42**
  - tactical compulsion, **6:35.50**
- Child witnesses
  - historical treatment, **6:13**

**COMPETENCE AND****COMPELLABILITY—Cont'd**

- Child witnesses—Cont'd
  - presumption of competence under Canada Evidence Act, **6:16**
  - procedural issues in assessing competence, **6:17**
  - promising to tell truth, **6:15**
  - techniques to assist in providing evidence
    - child-friendly techniques, rationale, **6:18**
    - other measures and potential reforms, **6:22**
    - personal cross-examination, **6:21**
    - screens, in-camera evidence and testifying remotely, **6:19**
    - support persons and animals, **6:20**
    - unsworn testimony, **6:14**
- Evolution of Rules, **6:1**
- Interest in proceedings
  - civil, **6:11**
  - criminal, **6:12**
- Intermediaries, **6:9.50**
- Lawyers
  - counsel for a party, **6:33**
  - counsel for opposing party, **6:34**
- Prerequisites
  - intelligibility, **6:8**
  - mental capacity, **6:9**
  - swearing oath or affirmation
    - affirmation, **6:5**
    - importance of sworn testimony, **6:3**
    - oath, **6:4**
    - questioning witness's choice, **6:6**
    - unsworn testimony, **6:7**
- Prior convictions, **6:10**
- State officials
  - board and tribunal members
    - compellability and scope of questioning, **6:30**
    - privative clauses, effect, **6:31**
  - Crown officials and Members of Parliament
    - discovery and inquiries, **6:25**
    - parliamentary privilege, **6:26**
    - prima facie compellable at trial, **6:24**
  - judges and jurors
    - incompetent in the particular proceeding, **6:28**
    - unrelated proceedings, **6:29**

**COMPETENCE AND****COMPELLABILITY—Cont'd**

- State officials—Cont'd
  - ombudspersons, investigators, and mediators, **6:32**
  - representatives of foreign governments, **6:27**
  - sovereign, **6:23**
- CONFESSIONS AND OTHER PROTECTED STATEMENTS**
- Generally, **19:1**
- Application of confessions rule
  - generally, **19:9**
  - appellate review, **19:11**
  - burden of proof, **19:9**
  - ivoir dire/i, **19:10**
- Derived confessions rule, **19:6**
- Improper means: Mr. Big investigations
  - abuse of process, **19:32**
  - background: R v. Hart, **19:28**
  - extending approach to other types of investigations, **19:34**
  - jury instructions, **19:33**
  - measuring probative value
    - circumstances surrounding confession, **19:29**
    - markers of reliability, **19:30**
    - prejudicial effect, **19:31**
- Persons in authority
  - generally, **19:12**
  - confessions made to person not in authority, **19:14**
  - evidentiary burden, **19:15**
  - who is a person in authority, **19:13**
- Right to silence
  - detention and choice
    - elicitation, **19:26**
    - is recipient a state agent, **19:25**
    - recognition of right, R. v. Hebert, **19:24**
  - police questioning, **19:27**
- Scope of rule
  - applicable only in criminal proceedings, **19:8**
  - derivative evidence, **19:7**
  - statements by accused, **19:5**
  - subsequent statements, derived confessions rule, **19:6**
- Voluntariness
  - generally, **19:16, 19:22**

**CONFESSIONS AND OTHER  
PROTECTED STATEMENTS  
—Cont'd**

- Voluntariness—Cont'd
  - caution, **19:17**
  - excluding statements obtained by violations of fairness, **19:3**
  - modern approach to confessions rule, **19:4**
  - operating mind, **19:20**
  - oppression, **19:19**
  - police trickery, **19:21**
  - threats and inducements, **19:18**
  - unreliable statements, fear of prejudice/hope of advantage, **19:2**
- Young persons, **19:23**

**CONTEMPT OF COURT**

- See also NON-COMPLIANT WITNESSES, Punishment
- Authority to punish for contempt, **9:7**
- Civil or criminal contempt, **9:6**
- Elements of offence, **9:8**
- Rationale, **9:5**
- Restraint in use, **9:9**

**CORONERS' INQUESTS,  
COMPELLING ATTENDANCE**

- Generally, **8:10**

**CORROBORATION AND VETROVEC  
WARNINGS**

- Civil cases
  - estates litigation, **13:6**
  - requirements, **13:5**
  - when required, **13:4**
- Criminal cases
  - common law
    - cautions reviewed on appeal, **13:13**
    - content of rule, **13:11**
    - content of warning, **13:12**
    - focus of rule, **13:8**
    - is Vetrovec warning required, **13:10**
    - Vetrovec warnings apply exclusively to Crown evidence, **13:9**
    - Vetrovec warnings in cases involving Co-Accused, **13:9.50**
  - Criminal Code, **13:7**
- Historical approach
  - absolute requirement, corroboration as, **13:2**
  - concept of proof, corroboration as, **13:1**

**CORROBORATION AND VETROVEC  
WARNINGS—Cont'd**

- Historical approach—Cont'd
  - evolution of corroboration requirements, **13:3**
- Jailhouse informants
  - generally, **13:14**
  - precluding informants from testifying, **13:15**
- Vetrovec warnings for, **13:16**

**CREDIBILITY**

- Cross-examination
  - generally, **12:1, 12:2**
  - prior judicial findings, **12:28**
- Enhancing, limits on
  - rule against oath helping, **11:11 to 11:14**
  - rule against prior inconsistent statements, **11:15 to 11:23**
- Experts, **16:20**
- Overview, **12:24**
- Physical symptoms, **12:15**
- Probative value and witness credibility, **2:21**
- Reasonable doubt, and, **4:7**

**CROSS-EXAMINATION OF  
OPPOSING WITNESS**

- Avoid unfair/adverse inference, **12:20**
- Bias or interest in outcome, **12:69**
- Browne v. Dunn, rule in, **12:36 to 12:41**
- Collateral fact rule, controls on attacking credibility
  - procedure, **12:26**
  - scope, **12:25**
- Credibility
  - assessment, **12:1**
  - demeanor evidence, **12:2**
- Discretion
  - admissions, **12:59**
  - convictions considered individually, **12:52**
  - convictions should be admitted, **12:51**
  - crimes against the administration of justice, **12:54**
  - crimes of an abhorrent nature, **12:56**
  - crimes of dishonesty, **12:53**
  - Indigenous offenders, **12:57**
  - remote or trivial convictions, **12:55**
  - similar crimes, **12:58**

**CROSS-EXAMINATION OF****OPPOSING WITNESS—Cont'd**

- Failure to cross-examine witnesses—rule in *Browne v. Dunn*
  - generally, **12:36**
  - concerns with rule, **12:4**
  - honest mistaken belief, **12:23**
  - post charge sexual activity, **12:22**
  - remedies for breach of rule
    - drawing adverse inference, **12:40**
    - similar conduct, **12:21**
- Friendly parties and discretion to prohibit cross-examination, **12:4**
- General reputation, **12:70**
- Limits
  - contradicting testimony/statements of complainant, **12:17**
  - criminal case, in
    - contradicting element of actus reus, **12:16**
    - imposed on Crown, **12:29**
    - interest in outcome, **12:31**
    - presence in court, **12:33**
    - receipt of disclosure, **12:33**
    - silence, **12:30**
  - good faith for question, **12:5**
  - legal restrictions, **12:6**
  - narrative/relationship evidence, **12:18**
  - physical symptoms, **12:15**
  - Presumption of openness, **12:12**
  - prior judicial findings on credibility, **12:28**
  - sexual experience of complainant—ss.276, 277 of Criminal Code
    - admissibility, test under s.276(2), **12:13**
    - history, **12:7 to 12:14**
    - probative value and prejudicial effect—s.276(3), **12:14**
    - scope of the provision, **12:8 to 12:10**
- Motive to fabricate, **12:19**
- Prior convictions
  - discretion to exclude—civil cases, **12:61**
  - discretion to exclude—criminal cases
    - concerns with existing approach, **12:60**
    - factors to assess, **12:50**
    - procedural issues, **12:49**
    - R. v. Corbett*, **12:48**

**CROSS-EXAMINATION OF****OPPOSING WITNESS—Cont'd**

- Prior convictions—Cont'd
    - offences for which pardon has been granted, **12:46**
    - procedural issues, **12:47**
    - scope of examination, **12:47**
    - types of offences covered, **12:45**
  - Prior inconsistent statements
    - generally, **12:62**
    - s.10 of Canada Evidence Act
      - generally, **12:63**
      - intention to contradict witness, **12:65**
      - statement must have been made by witness, **12:64**
    - s.11 of Canada Evidence Act
      - addressing denial, proof of former statement, **12:67**
      - failing to contradict witness, **12:68**
      - witness response to prior statement, **12:66**
  - Scope, **12:3**
  - Testimonial qualifications, lack of, **12:71**
  - Witness bias or interest in outcome, **12:69**
- CROWN OFFICIALS AND MEMBERS OF PARLIAMENT, COMPETENCE AND COMPELLABILITY**
- Discovery and inquiries, **6:25**
  - Parliamentary privilege, **6:26**
  - Prima facie compellable at trial, **6:24**
- CROWN PRIVILEGE**
- See PUBLIC INTEREST IMMUNITY
- DEALING WITH WITNESSES ON OPPOSITE SIDE**
- Improper communication with witness, **5:16**
  - Physicians and experts retained by party, **5:15**
  - Represented parties
    - generally, **5:13**
    - employees and directors of, **5:14**
  - Unrepresented witnesses, **5:12**
- DECLARATIONS AGAINST INTEREST, EXCEPTION TO HEARSAY RULE**
- Pecuniary interest, **14:16**
  - Penal interest, **14:17**



**DEMONSTRATIVE EVIDENCE,  
EXPERIMENTS, AND  
RECONSTRUCTIONS**

- Demonstrative evidence, **3:28**
- Distinctions, **3:24**
- Experiments
  - generally, **3:25**
  - opinion, and, **3:27**
  - probative value, **3:26**
- Re-enactments or reconstructions, **3:29**

**DIRECT EVIDENCE**

- Authenticating documentary evidence, **3:7**
- Criminal cases, special rules in, **3:2, 3:3**
- Distinguished from circumstantial evidence, **3:1**

**DOCUMENTARY EVIDENCE**

- Generally, **3:5**
- Authentication
  - ancient documents, **3:8**
  - basic rule, **3:6**
  - direct or circumstantial evidence, by, **3:7**
  - judicial records, **3:9**
  - other statutory exceptions, **3:10**
  - photographs, videos and other recordings, **3:17 to 3:19**
- Definition, **3:5**

**DOUBLE HEARSAY**

- Generally, **14:8**

**DYING DECLARATIONS,  
EXCEPTION TO HEARSAY RULE**

- Generally, **14:24**

**ELECTRONIC EVIDENCE**

- Generally, **3:15**

**EVIDENTIAL BURDEN**

- Generally, **4:12**
- Civil cases, **4:15**
- Criminal cases
  - accused, on, **4:14**
  - prosecution, on, **4:13**

**EXAMINATION OF OWN WITNESS**

- Generally, **11:1**
- Adverse witness
  - generally, **11:31**
  - adverse non-party witness, **11:34**
  - adversity, meaning, **11:27**

**EXAMINATION OF OWN WITNESS****—Cont'd**

- Adverse witness—Cont'd
  - existing approach, concerns with, **11:29**
  - manner of examination, **11:33**
  - permissible use of prior inconsistent statement, **11:30**
  - prohibited statements, **11:28**
  - scope of rule—technical requirements, **11:32**
  - statutory construction issues, **11:26**
- Charging the jury, **11:23.30**
- Enhancing credibility, limits
  - rule against oath helping, **11:11 to 11:14**
  - rule against prior inconsistent statements, **11:15 to 11:23**
- Examination-in-chief
  - direct examination, **11:2**
  - re-examination, rules of, **11:3**
- Hostile witnesses
  - common law rule, **11:25**
  - existing approach, concerns with, **11:29**
- Impeaching own witness, rule against, **11:24**
- Memory and witness testimony
  - general approach, **11:4**
  - present memory revived, **11:5**
- Prior consistent statements, **11:23.70**
- Refreshing memory, aids
  - prior to trial
    - general procedure and disclosure, **11:6**
    - hypnosis and similar methods, **11:7**
  - trial
    - can witness review document, **11:8**
    - is witness's memory being refreshed, **11:9**
    - should document be admitted as exhibit, **11:10**
- Rule against oath helping
  - generally, **11:11**
  - accused in criminal case, **11:14**
  - common variants
    - opinions about credibility, **11:12**
    - polygraph evidence, **11:13**
    - self-bolstering statements, **11:12.50**
- Rule against prior inconsistent statements
  - adopting video recording—ss.715.1 and 715.2 of Criminal Code, **11:19**

**EXAMINATION OF OWN WITNESS****—Cont'd**

- Rule against prior inconsistent statements
  - Cont'd
    - exculpatory statements of accused on arrest, **11:22**
    - general rule, **11:15**
    - narrative/context to physical actions, **11:21**
    - permissible use, **11:30**
    - previous identification, **11:18**
    - recent complaints and narrative exception, **11:20**
    - recent fabrication, **11:17**
    - responding to prior inconsistent statement, **11:23**
    - theory of exceptions, **11:16**

**EXCLUDING WITNESSES**

- Generally, **7:18**
- Administrative hearings, **7:22**
- Discovery, during, **7:21**
- Failure to comply with exclusion order, **7:19**
- Ordering accused to testify first, **7:23**
- Trial, **7:20**

**EXCLUSION OF EVIDENCE**

- Judicial discretion
  - history, **2:16**
  - modernization of discretion
    - civil cases, **2:19**
    - Crown evidence in criminal cases, **2:17**
    - defence evidence in criminal cases, **2:18**
    - rationales for, **2:15**
- Limited, **2:30**

**EXPERIMENTS, DEMONSTRATIVE EVIDENCE AND RECONSTRUCTIONS**

- Demonstrative evidence, **3:28**
- Distinctions, **3:24**
- Experiments
  - generally, **3:25**
  - opinion, and, **3:27**
  - probative value, **3:26**
- Re-enactments or reconstructions, **3:29**

**EXPERT WITNESSES**

- Admissibility, test for, **16:9, 16:13**

**EXPERT WITNESSES—Cont'd**

- Admissibility and cost/benefit analysis
    - balancing risks and benefits, **16:34**
    - factual foundation and hearsay concerns, **16:35 to 16:37**
  - Court-appointed or jointly appointed experts, **16:38**
  - Exclusionary rules
    - generally, **7:24**
    - rules of evidence, **16:25**
    - statutory restrictions
      - number of experts, **16:26**
      - restrictions in civil proceedings, **16:27**
  - Necessity
    - identity or propensity, **16:22**
    - issues of credibility at trial, **16:20**
    - providing context to human behaviour, **16:21**
    - questions of law, **16:23**
    - threshold, **16:18**
    - ultimate issue, expertise going to, **16:24**
  - Prejudicial effect, **16:6**
  - Probative value, **16:5**
  - Qualification
    - generally, **16:28**
    - expertise in specialized area, **16:29, 16:30**
    - independence and impartiality, **16:31 to 16:33**
  - Relevance, **16:11**
  - Reliability in cases of novel or contested science
    - concerns raised by reliability of expert opinion, **16:12**
    - Frye/Daubert approaches to admissibility, **16:13**
    - reliability standard, application, **16:14 to 16:16**
    - specialized rather than scientific knowledge, **16:17**
  - Scrutinizing expert testimony
    - classes of expert witness, **16:8**
    - judicial role, **16:7**
  - Standard of review on appeal, **16:10**
- FOREIGN LETTERS ROGATORY**
- Evidentiary and procedural concerns, **10:20**

**FOREIGN LETTERS ROGATORY****—Cont'd**

- Judicial discretion to refuse
  - conflict with Canadian policy objectives, **10:19**
  - materiality, **10:18**
  - undue burden, **10:17**
- Legislative prerequisites, **10:16**

**GENERAL REPUTATION,  
CROSS-EXAMINATION**

- Generally, **12:70**

**GOOD CHARACTER EVIDENCE**

- Generally, **15:30**
- Accused, **15:31**
- Civil cases, **15:36**
- Impact of adducing
  - admitting bad character evidence in reply, impact, **15:34**
  - Crown's ability to respond, **15:33**
  - putting character "in issue," **15:32**
- Prosecution, **15:35**

**HEARSAY**

- Categorical exceptions
  - admission by parties
    - generally, **14:13**
    - adopted admissions, **14:14**
    - vicarious admissions, **14:15**
  - bodily condition, statements as to, **14:21**
  - business records
    - definition, **14:37**
    - historical development of exception, **14:35**
    - specific exclusions, **14:38**
    - which exception governs, **14:36**
  - co-conspirator statements
    - admissibility, framework, **14:31**
    - admissibility in civil cases, **14:33**
    - concerns with exceptions and compliance with principled approach, **14:32**
    - principled basis for admission, **14:30**
  - declarations against interest
    - pecuniary interest, **14:16**
    - penal interest, **14:17**
  - dying declarations, **14:24**
  - excluding evidence tendered under exception, **14:11.50**
  - historical matters, **14:40**

**HEARSAY—Cont'd**

- Categorical exceptions—Cont'd
  - past recollection recorded, **14:26**
  - prior identification, **14:25**
  - prior inconsistent statements, **14:34**
  - public records, **14:39**
  - ires gestae/i/spontaneous utterances
    - components of exception, **14:19**
    - criticisms of exception, **14:20**
    - ires gestae/i as non-hearsay, **14:18**
  - state of mind
    - generally, **14:22**
    - circumstances of suspicion, **14:23.50**
    - inadmissible to prove third party's intention, **14:23**
  - sworn testimony from other proceedings
    - civil cases—common law, **14:27**
    - civil cases—statutory exceptions, **14:28**
    - criminal cases, **14:29**
- Elements
  - double hearsay, **14:8**
  - offered to prove truth
    - common examples of non-hearsay usages, **14:6**
    - implied assertions and hearsay by conduct, **14:7**
  - out-of-court statement
    - basic components, **14:2**
    - statements made by animals, **14:4**
    - statements made by computers, machines or instruments, **14:3**
    - witness's prior statements, **14:5**
- Exceptions to rule
  - charging trier of fact about admissible hearsay, **14:12**
  - historical treatment—categorical or pigeon-hole approach, **14:9**
  - modern approach—categorical and principles, **14:11**
  - principled approach, **14:10**
- Principled or residual exception
  - admitting hearsay from defence, **14:62**
  - necessity
    - absolute necessity, **14:57**
    - general approach, **14:56**
    - necessity and fairness concerns, **14:60**
    - relativity necessity, **14:58, 14:59**

**HEARSAY—Cont'd**

- Principled or residual exception—Cont'd
  - other policy concerns and resolving admissibility, **14:61**
  - procedural reliability—adequate substitutes for cross-examination availability to cross-examination, **14:54**
  - cross-examination in another forum, **14:53**
  - lesser substitutes for cross-examination, **14:55**
- reliability and fairness
  - circumstantial reliability, **14:41**
  - different ways of assessing reliability, **14:42**
  - importance of the evidence, **14:43**
- substantive reliability
  - generally, **14:44**
  - contents of statement, **14:47**
  - corroborating evidence, **14:51**
  - motive to fabricate, **14:46**
  - relationship of declarant to recipient, **14:48**
  - reliability of declarant, **14:50**
  - reliability of testifying witness, **14:52**
  - statement taken under oath or in formal setting, **14:45**
  - timing and spontaneity, **14:49**
  - Wigmore principles, **17:91**

**HISTORICAL MATTERS, EXCEPTION TO HEARSAY RULE**

- Generally, **14:40**

**HODGE'S CASE, RULE IN**

- Generally, **3:2**

**HOSTILE WITNESSES**

- Common law rule, **11:25**
- Existing approach, concerns with, **11:29**

**HUMAN SOURCE PRIVILEGE**

- Generally, **17:88**

**HYPNOSIS, REFRESHING MEMORY THROUGH**

- Generally, **11:7**

**IMPEACHING OWN WITNESS, RULE AGAINST**

- Choosing witnesses carefully, **11:24**

**IMPROPERLY OBTAINED EVIDENCE**

- Common law exclusionary rule since enactment of Charter
  - alternative route to exclusion in criminal trials, **20:37**
  - exclusion in civil proceedings generally, **20:38**
  - concerns about prevailing approach, **20:40**
  - current approach, **20:39**
- Connection of evidence and breach, **20:30.50**
- Exclusion of evidence and s.24(2) in civil cases
  - generally, **20:33**
  - proceedings without state party, **20:34**
  - proceedings with state party, **20:35**
- Exclusion of evidence under Charter in criminal cases
  - adjudication on the merits, society's interest in, **20:31**
  - importance of evidence to prosecution case, **20:31.50**
  - reliability of evidence, **20:31.20**
  - seriousness of offence, **20:31.70**
- appellate review, **20:32**
  - deference, proper approach to, **20:32.70**
  - s. 24(2) findings made in the alternative, **20:32.70**
- bringing administration of justice into disrepute
  - current approach: R. v. Grant, **20:17**
  - history, **20:14**
  - R. v. Collins, **20:15**
  - R. v. Stillman, **20:16**
- court of competent jurisdiction, **20:4**
- government action, **20:5.50**
- impact on accused's interests
  - generally, **20:26**
  - bodily evidence, **20:28**
  - discoverability and impact on accused's interests, **20:30**
  - non-bodily physical evidence, **20:29**
  - statements, **20:27**
- importance of evidence to prosecution case, **20:31.50**
- obtained in a manner
  - causal connections and remoteness, **20:9**

**IMPROPERLY OBTAINED EVIDENCE****—Cont'd**

- Exclusion of evidence under Charter in criminal cases—Cont'd
  - obtained in a manner—Cont'd
    - evidence not obtained in a manner, severing the connection, **20:10**
    - modern approach: searching for contextual connections, **20:8**
    - modified approach proposal, **20:11**
    - no need for causal connection, **20:6**
    - temporal approach, **20:7**
  - procedural issues
    - burden of proof, **20:12**
    - revisiting a s.24(2) decision, **20:13, 20:32 to 20:32.70**
  - reliability of evidence, **20:31.20**
  - seriousness of Charter-infringing state conduct
    - generally, **20:18**
    - deceit or falsehoods by police, **20:23**
    - good faith, **20:19**
    - gravity of breach, **20:20**
    - magnitude of breach—impact on third parties, **20:25**
    - pattern of disregard, **20:24**
    - systemic concerns, **20:22**
    - urgency, **20:21**
    - seriousness of offence, **20:31.70**
    - standing, **20:5**
  - Exclusion of evidence under s.24(1), **20:36**
  - Historical approach
    - Bill of Rights and pre-Charter negotiations, **20:3**
    - English common law, **20:1**
    - R. v. Wray, **20:2**

**INFORMER PRIVILEGE**

- Exceptions
  - agent provocateur, **17:67**
  - Charter challenge, **17:69**
  - innocence at stake, **17:66**
  - material witness, **17:68**
- Other uses, **17:69.50**
- Protecting confidential sources, **17:62**
- Scope
  - information protected by privilege, **17:64**
  - who is informant, **17:63**
- Waiver, **17:65**

**INQUIRIES, COMPELLING****ATTENDANCE**

- Generally, **8:9**

**INTERPRETERS AT COMMON LAW AND IN RULES OF CIVIL PROCEDURE**

- Charter, s.14, **7:30**
- Official languages, **7:31**
- Qualifying as interpreter, **7:29**
- Types of Translation, **7:29.50**
- When ordered, **7:28**

**JAILHOUSE INFORMANTS**

- Generally, **13:14 to 13:16**

**JOURNALIST-SOURCE PRIVILEGE**

- Common law, **17:89**
- Statutory protection—Canada Evidence Act, **17:90**

**JUDGES AND JURORS, COMPETENCE AND COMPELLABILITY**

- Incompetent in the particular proceeding, **6:28**
- Unrelated proceedings, **6:29**

**JUDICIAL NOTICE**

- Generally, **3:30**
- Adjudicative facts
  - defining, **3:31**
  - established by sources of indisputable accuracy, **3:34**
  - impact of judicial notice, **3:35**
  - notorious or generally accepted facts, **3:33**
  - procedural concerns, **3:35**
  - threshold for admission, **3:32**
- Legislative facts or social framework, **3:36**

**JUROR DELIBERATIONS, PRIVILEGE**

- Generally, **17:85**

**LAWYERS, COMPETENCE AND COMPELLABILITY**

- Counsel for a party, **6:33**
- Counsel for opposing party, **6:34**

**LEGAL ADVICE PRIVILEGE**

- Generally, **17:17**
- Burden of proving valid claim, **17:39**

**LEGAL ADVICE PRIVILEGE—Cont'd**

- Communication between lawyer and client
  - who is client, **17:20**
  - who is lawyer, **17:19**
- Communication made in course of seeking legal advice
  - acting in legal role, **17:24**
  - communication made for purpose of seeking legal advice, **17:26**
  - part of lawyer-client relationship, **17:25**
- Exceptions
  - crime/fraud, **17:34**
  - innocence at stake, **17:36**
  - limitation by statute, **17:37**
  - public safety, **17:35**
  - testamentary intentions, **17:38**
- Express waiver
  - limited waiver, **17:28**
  - who can waive privilege, **17:27**
- Implied waiver
  - imputations against lawyer, **17:30**
  - loss of confidentiality
    - accidental or compelled disclosure, **17:31**
    - deliberate disclosure to third parties (common interest privilege), **17:32**
  - state of mind or other fairness considerations, **17:29**
- Need for confidence
  - lack of relative confidentiality—parties with common interest, **17:22**
  - presence of third parties, **17:21**

**LITIGATION PRIVILEGE**

- Generally, **17:40**
- Core components
  - dominant purpose standard, **17:42**
  - need for adversarial proceedings, **17:41**
  - privilege can be invoked against any party, **17:45**
  - purpose for which material was created, **17:44**
  - when and how dominant purpose is measured, **17:43**
- Lawyer's work product, **17:46**
- Limitations
  - end of litigation, **17:48**
  - exceptions, **17:50**
  - statutory intervention, **17:47**

**LITIGATION PRIVILEGE—Cont'd**

- Limitations—Cont'd
  - waiver, **17:49**

**MARITAL COMMUNICATIONS PRIVILEGE**

- Generally, **17:80**
- Asserting privilege, **17:83**
- Need for valid marriage, **17:81**
- Protected communications, **17:82**
- Reform, need for, **17:84**

**MATERIALITY**

- Generally, **2:4**

**MEMORY OF WITNESS**

- General approach, **11:4**
- Present memory revived, **11:5**
- Refreshing memory, aids
  - prior to trial
    - general procedure and disclosure, **11:6**
    - hypnosis and similar methods, **11:7**
  - trial
    - can witness review document, **11:8**
    - is witness's memory being refreshed, **11:9**
    - should document be admitted as exhibit, **11:10**

**MISCONDUCT OF WITNESS**

- Generally, **9:1**
- Enforcing attendance by arresting witness
  - civil and administrative proceedings, **9:2**
  - criminal proceedings, **9:3**
- Perjury
  - corroboration, **9:23**
  - elements of offence
    - falsity of statement, **9:20**
    - intent to mislead, **9:22**
    - knowledge of falsity, **9:21**
    - qualifying statement, **9:19**
  - historical approach, **9:18**
  - issue estoppel, **9:24**
  - offences related to perjury, **9:25**
- Punishment for non-compliance
  - generally, **9:4**
  - civil action for damages, **9:17**
  - contempt exhibited by witnesses
    - disruptive conduct of witnesses amounting to contempt, **9:11**

**MISCONDUCT OF WITNESS—Cont'd**

- Punishment for non-compliance—Cont'd
  - contempt exhibited by witnesses
    - Cont'd
      - refusing to testify or answer, **9:10**
  - contempt of court
    - authority to punish for contempt, **9:7**
    - civil or criminal contempt, **9:6**
    - elements of offence, **9:8**
    - rationale, **9:5**
    - restraint in use, **9:9**
  - contempt procedures
    - Charter considerations, **9:13**
    - criminal cases, **9:14**
    - summary process, **9:12**
  - criminal offences
    - refusal at preliminary inquiry, **9:15**
    - refusal at trial, **9:16**

**MR. BIG INVESTIGATIONS:  
CONFESSIONS OBTAINED  
THROUGH IMPROPER MEANS**

- Abuse of process, **19:32**
- Background: R v. Hart, **19:28**
- Extending approach to other types of investigations, **19:34**
- Jury instructions, **19:33**
- Measuring probative value
  - circumstances surrounding confession, **19:29**
  - markers of reliability, **19:30**
- Prejudicial effect, **19:31**

**MUTUAL LEGAL ASSISTANCE IN  
CRIMINAL MATTERS ACT**

- Generally, **10:21**

**NON-COMPLIANT WITNESSES,  
PUNISHMENT**

- Contempt exhibited by witnesses
  - disruptive conduct of witnesses
    - amounting to contempt, **9:11**
  - refusing to testify or answer, **9:10**
- Contempt of court
  - authority to punish for contempt, **9:7**
  - civil or criminal contempt, **9:6**
  - elements of offence, **9:8**
  - rationale, **9:5**
  - restraint in use, **9:9**
- Contempt procedures
  - Charter considerations, **9:13**
  - criminal cases, **9:14**

**NON-COMPLIANT WITNESSES,  
PUNISHMENT—Cont'd**

- Contempt procedures—Cont'd
  - summary process, **9:12**

**OATH**

- Generally, **6:3 to 6:7**

**OATH HELPING, RULE AGAINST**

- Generally, **11:11**
- Accused in criminal case, **11:14**
- Common variants
  - opinions about credibility, **11:12**
  - polygraph evidence, **11:13**
  - self-bolstering statements, **11:12.50**

**OPINION EVIDENCE**

- Distinguishing fact from opinion, **16:2**
- General prohibition, **16:1**
- Non-expert opinion evidence
  - lay opinion vs expert opinion, **16:4**
  - R. v. Graat, flexible approach, **16:3**

**ORAL TESTIMONY AND AFFIDAVITS**

- Generally, **3:4**

**PARLIAMENT, WITNESSES BEFORE**

- Jurisdiction of courts to review, **22:13**
- Power to summon witnesses
  - Parliament, **22:1**
  - provincial legislatures, **22:2**
- Problem witness
  - improving contempt procedures, **22:12**
  - procedural concerns, **22:10**
  - punishment, **22:11**
- Witness protections
  - immunity from prosecution, **22:6**
  - other privileges and right to refuse to answer, **22:7**
  - other protections, **22:8**
- Parliamentary privilege
  - privilege for statements made in provincial legislatures or committees, **22:5**
  - statements made in Parliament inadmissible in other proceeding, **22:3**
  - waiver, **22:4**

**PARLIAMENTARY PRIVILEGE**

- Generally, **6:26**
- Privilege for statements made in provincial legislatures or committees, **22:5**

**PARLIAMENTARY PRIVILEGE****—Cont'd**

- Statements made in Parliament inadmissible in other proceedings, **22:3**
- Waiver, **22:4**

**PAST RECOLLECTION RECORDED, EXCEPTION TO HEARSAY RULE**

- Generally, **14:26**

**PERJURY**

- Corroboration, **9:23**
- Elements of offence
  - falsity of statement, **9:20**
  - intent to mislead, **9:22**
  - knowledge of falsity, **9:21**
  - qualifying statement, **9:19**
- Historical approach, **9:18**
- Issue estoppel, **9:24**
- Offences related to perjury, **9:25**

**PERSONAL RECORDS IN CASES OF SEXUAL NATURE, s.278.1 CRIMINAL CODE — PRIVILEGE**

- Constitutionality, **12:27, 17:74**
- Framework for resolving applications, **12:24 to 12:27, 17:72**
- History, **12:24 to 12:27, 17:70**
- Likely relevance, **17:75**
- Material in hands of defence, **12:24 to 12:27**
- Production
  - need for accused to make full answer and defence, **12:24 to 12:27, 17:76**
  - privacy interests, **17:78**
  - probative value, **17:77**
  - systemic and specific prejudice, **17:79**
- Sexual Assault cases
  - constitutionality and application, **12:27**
  - overview, **12:24**
  - procedure, **12:26**
  - scope of s. 278.1 of Criminal Code regime, **12:25**
- Types of protected records, **12:24 to 12:27, 17:71**

**PREJUDICIAL EFFECT, EXCLUSION OF EVIDENCE**

- Generally, **2:23**
- Distraction or undue focus, **2:26**
- Emotional prejudice, hostility or sympathy, **2:24**

**PREJUDICIAL EFFECT, EXCLUSION OF EVIDENCE—Cont'd**

- Misleading nature, **2:25**
- Time and expense, **2:27**
- Ultimate issue, **2:29**
- Unfair surprise, **2:28**

**PRESUMPTIONS**

- Meaning, **4:18**
- Presumption of fact as matter of proof, **4:19**
- Presumption of law
  - Charter, and, **4:22**
  - irrebuttable presumptions, **4:21**
  - rebuttable presumptions, **4:20**
- Use, **4:18**

**PRINCIPLED OR RESIDUAL EXCEPTION TO HEARSAY RULE**

- Admitting hearsay from defence, **14:62**
- Necessity
  - absolute necessity, **14:57**
  - general approach, **14:56**
  - necessity and fairness concerns, **14:60**
  - relativity necessity, **14:58, 14:59**
- Other policy concerns and resolving admissibility, **14:61**
- Procedural reliability—adequate substitutes for cross-examination
  - availability to cross-examination, **14:54**
  - cross-examination in another forum, **14:53**
  - lesser substitutes for cross-examination, **14:55**
- Reliability and fairness
  - circumstantial reliability, **14:41**
  - different ways of assessing reliability, **14:42**
  - importance of the evidence, **14:43**
- Substantive reliability
  - generally, **14:44**
  - contents of statement, **14:47**
  - corroborating evidence, **14:51**
  - motive to fabricate, **14:46**
  - relationship of declarant to recipient, **14:48**
  - reliability of declarant, **14:50**
  - reliability of testifying witness, **14:52**
  - statement taken under oath or in formal setting, **14:45**
  - timing and spontaneity, **14:49**



**PRIOR CONVICTIONS,****CROSS-EXAMINATION**

- Discretion to exclude—civil cases, **12:61**
- Discretion to exclude—criminal cases
  - concerns with existing approach, **12:60**
  - factors to assess, **12:50**
  - procedural issues, **12:49**
  - R. v. Corbett, **12:48**
- Offences for which pardon has been granted, **12:46**
- Procedural issues, **12:47**
- Scope of examination, **12:47**
- Types of offences covered, **12:45**

**PRIOR IDENTIFICATION,****EXCEPTION TO HEARSAY RULE**

- Generally, **14:25**

**PRIOR INCONSISTENT STATEMENTS**

- Adopting video recording—ss.715.1 and 715.2 of Criminal Code, **11:19**
- Cross-examination, **12:62 to 12:68**
- Exculpatory statements of accused on arrest, **11:22**
- General rule, **11:15**
- Hearsay rule, and, **14:34**
- Narrative/context to physical actions, **11:21**
- Permissible use, **11:30**
- Previous identification, **11:18**
- Recent complaints and narrative exception, **11:20**
- Recent fabrication, **11:17**
- Responding to prior inconsistent statement, **11:23**
- Theory of exceptions, **11:16**

**PRIVILEGE**

- Adultery, **17:87**
- Common law privilege
  - balancing of interests, **17:94**
  - confidentiality, **17:92**
  - history, **17:91**
  - nature of relationship, **17:93**
- Concept
  - categories of privilege, **17:2**
  - exclusion of probative information, **17:1**
- Human source privilege, **17:88**
- Informer privilege
  - generally, **17:62**

**PRIVILEGE—Cont'd**

- Informer privilege—Cont'd
  - exceptions
    - agent provocateur, **17:67**
    - Charter challenge, **17:69**
    - innocence at stake, **17:66**
    - material witness, **17:68**
  - scope
    - information protected by privilege, **17:64**
    - who is informant, **17:63**
    - waiver, **17:65**
- Journalist-source privilege
  - common law, **17:89**
  - statutory protection—Canada Evidence Act, **17:90**
- Juror deliberations, **17:85**
- Legal advice privilege
  - generally, **17:17**
  - burden of proving valid claim, **17:39**
  - communication between lawyer and client, **17:18**
  - communication made in course of seeking legal advice, **17:23**
  - exceptions, **17:33**
  - express waiver, **17:27, 17:28**
  - implied waiver, **17:29 to 17:32**
  - limiting state of mind waiver, **17:29.20**
  - need for confidence, **17:21, 17:22**
- Litigation privilege
  - generally, **17:40**
  - core components
    - dominant purpose standard, **17:42**
    - need for adversarial proceedings, **17:41**
    - privilege can be invoked against any party, **17:45**
    - purpose for which material was created, **17:44**
    - when and how dominant purpose is measured, **17:43**
  - lawyer's work product, **17:46**
  - limitations
    - end of litigation, **17:48**
    - exceptions, **17:50**
    - statutory intervention, **17:47**
    - waiver, **17:49**
- Marital communications
  - generally, **17:80**
  - asserting privilege, **17:83**

**PRIVILEGE—Cont'd**

- Marital communications—Cont'd
  - need for valid marriage, **17:81**
  - protected communications, **17:82**
  - reform, need for, **17:84**
- Personal records in cases of sexual nature, s.278.1 Criminal Code
  - constitutionality, **12:27, 17:74**
  - framework for resolving applications, **17:72**
  - history, **12:24 to 12:27, 17:70**
  - likely relevance, **17:75**
  - material in hands of defence, **12:24 to 12:27**
  - production
    - need for accused to make full answer and defence, **17:76**
    - privacy interests, **17:78**
    - probative value, **17:77**
    - systemic and specific prejudice, **17:79**
- Sexual Assault cases
  - constitutionality and application, **12:27**
  - overview, **12:24**
  - procedure, **12:26**
  - scope of s. 278.1 of Criminal Code regime, **12:25**
  - types of protected records, **12:24 to 12:27, 17:71**
- Self-incrimination, privilege against
  - generally, **17:3**
  - common law privilege, **17:4**
  - protection against civil liability, **17:6**
  - s.7 of Charter
    - derivative use immunity, **17:15**
    - residual protection against self-incrimination, **17:14**
    - statements compelled by statute, **17:16**
  - s.13 of Charter
    - application, **17:7**
    - compelled testimony, **17:9**
    - non-criminal proceedings, **17:13**
    - testifies in any proceedings, **17:8**
    - using prior testimony for other non-incriminating purposes, **17:12**
    - using prior testimony to impeach, **17:11**
    - whether s.13 can be waived, **17:10**

**PRIVILEGE—Cont'd**

- Self-incrimination, privilege against
    - Cont'd
      - statutory intervention, restricting future use of incriminatory statements, **17:5**
  - Settlement privilege—statements made without prejudice
    - generally, **17:51**
    - components of privilege
      - communication made in effort to settle, **17:54**
      - existence of dispute, **17:52**
      - intention for non-disclosure, **17:53**
    - exceptions
      - competing interest, **17:59**
      - general theory, **17:56**
      - threatening or fraudulent conduct, **17:58**
      - waiver, **17:57**
    - scope and application, **17:55**
    - statutory provisions creating, **17:60**
  - Voting, **17:86**
- PROBATIVE VALUE**
- Generally, **2:5**
  - Measuring
    - factors guiding assessment, **2:20**
    - reliability, challenging common sense, **2:22**
    - witness credibility, **2:21**
- PROOF, TYPES OF**
- Best evidence rule
    - electronic evidence, **3:15**
    - exceptions
      - evidence not available, **3:13**
      - production inconvenient (public records), **3:14**
    - modern approach, **3:11**
    - rationale, **3:11**
    - scope, **3:12**
  - Direct and circumstantial evidence
    - criminal cases, special rules
      - Hodge's Case, rule in, **3:2**
      - modern approach, **3:3**
    - distinction, **3:1**
  - Documentary evidence
    - generally, **3:5**
    - authentication
      - ancient documents, **3:8**

**PROOF, TYPES OF—Cont'd**

Documentary evidence—Cont'd

authentication—Cont'd

basic rule, **3:6**direct or circumstantial evidence, by, **3:7**judicial records, **3:9**other statutory exceptions, **3:10**photographs, videos and other recordings, **3:17 to 3:19**definition, **3:5**

Experiments, demonstrative evidence and reconstructions

demonstrative evidence, **3:28**distinctions, **3:24**

experiments

generally, **3:25**opinion, and, **3:27**probative value, **3:26**re-enactments or reconstructions, **3:29**

Judicial notice

adjudicative facts

defining, **3:31**established by sources of indisputable accuracy, **3:34**impact of judicial notice, **3:35**notorious or generally accepted facts, **3:33**procedural concerns, **3:35**threshold for admission, **3:32**legislative facts or social framework, **3:36**Rationale and Underlying Conditions, **3:30**types, **3:30.5**Oral testimony and affidavits, **3:4**

Real evidence

objects, **3:16**photographs and other recordings, authentication, **3:17**

videos

authentication, **3:18**use of, **3:19**

Views

evidentiary use, **3:22**procedure, **3:20**safeguards, **3:23**when ordered, **3:21****PROTECTION OF WITNESSES**Generally, **21:1****PROTECTION OF WITNESSES**

—Cont'd

Protection from civil actions—witness immunity

generally, **21:14**expert witnesses, **21:18**

scope of immunity

all witness statements absolutely protected, **21:15**is it a witness statement, **21:16**statements ancillary to other actions not protected, **21:17**

Protection from physical harm, intimidate or retribution

civil protection from retribution, **21:25**need to protect witnesses, **21:19**

specific crimes

contempt, **21:23**intimidation, **21:22**obstruction of justice, **21:21**witness protection program, **21:24**

Protection from publicity

anonymity, **21:13**Criminal Code and international comparisons, **21:13.50**

in camera hearing

civil and administrative proceedings, **21:6**criminal proceedings, **21:5**presumption of open courts, **21:4**publication bans, civil proceedings, **21:12**publication bans, criminal proceedings generally, **21:7**other witnesses, **21:10**varying order, **21:11**victims in cases of sexual offences, **21:8**young persons, **21:9**Protection of witnesses in the courtroom, **21:26**Right to counsel, **21:2**Standing to represent witnesses in court, **21:3**Statutory Protections in Criminal Proceedings, **21:27****PUBLIC INTEREST IMMUNITY**Generally, **18:1**

Canada Evidence Act

generally, **18:6**

**PUBLIC INTEREST IMMUNITY****—Cont'd**

- Canada Evidence Act—Cont'd
- Cabinet confidences—s.39
  - generally, **18:13**
  - constitutional challenges to immunity, **18:16**
  - procedural issues, **18:14**
  - waiver of immunity, **18:15**
- general public interest—s.37
  - balancing test for production, **18:7**
  - jurisdiction and procedure, **18:8**
- special information—s.38
  - criminal proceedings, **18:12**
  - information covered, **18:9**
  - procedural issues, **18:10**
  - residual power to withhold information—certificate, **18:11**
  - test for production, **18:10**
- Common law immunity
  - disclosure, balancing test, **18:5**
  - early developments, **18:2**
  - power to examine documents, **18:4**
  - relevance, **18:3**
- Jurisdictional concerns, **18:1**

**PUBLICITY, PROTECTION OF WITNESSES FROM**

- Anonymity, **21:13**
- Criminal Code and international comparisons, **21:13.50**
- In camera hearing
  - civil and administrative proceedings, **21:6**
  - criminal proceedings, **21:5**
- Presumption of open courts, **21:4**
- Publication bans, civil proceedings, **21:12**
- Publication bans, criminal proceedings
  - generally, **21:7**
  - other witnesses, **21:10**
  - varying order, **21:11**
  - victims in cases of sexual offences, **21:8**
  - young persons, **21:9**

**PUBLIC RECORDS, EXCEPTION TO HEARSAY RULE**

- Generally, **14:39**

**REAL EVIDENCE**

- Objects, **3:16**

**REAL EVIDENCE—Cont'd**

- Photographs and other recordings, authentication, **3:17**
- Videos
  - authentication, **3:18**
  - use of, **3:19**
- Views
  - evidentiary use, **3:22**
  - procedure, **3:20**
  - safeguards, **3:23**
  - when ordered, **3:21**

**RECONSTRUCTIONS, DEMONSTRATIVE EVIDENCE AND EXPERIMENTS**

- Demonstrative evidence, **3:28**
- Distinctions, **3:24**
- Experiments
  - generally, **3:25**
  - opinion, and, **3:27**
  - probative value, **3:26**
- Re-enactments or reconstructions, **3:29**

**RE-ENACTMENTS**

- Generally, **3:29**

**REFRESHING MEMORY, AIDS TO**

- Prior to trial
  - general procedure and disclosure, **11:6**
  - hypnosis and similar methods, **11:7**
- Trial
  - can witness review document, **11:8**
  - is witness's memory being refreshed, **11:9**
  - should document be admitted as exhibit, **11:10**

**RELEVANCE**

- Objective of legal proceedings, **2:1**
- Rationale, **2:1**

**RES GESTAE/SPONTANEOUS UTTERANCES, EXCEPTION TO HEARSAY RULE**

- Generally, **14:18**

**RIGHT TO COUNSEL**

- Generally, **21:2**

**RIGHT TO FAIR TRIAL**

- Generally, **1:6**

**RIGHT TO REFUSE TO ANSWER**

- Generally, **22:7**

## INDEX

### RIGHT TO SILENCE

- Detention and choice elicitation, **19:26**
- is recipient a state agent, **19:25**
- recognition of right, *R. v. Hebert*, **19:24**
- Right to silence, **19:27**

### RULE AGAINST OATH HELPING

- Generally, **11:11**
- Accused in criminal case, **11:14**
- Common variants
  - opinions about credibility, **11:12**
  - polygraph evidence, **11:13**
  - self-bolstering statements, **11:12.50**

### RULE AGAINST PRIOR INCONSISTENT STATEMENTS

- Adopting video recording—ss.715.1 and 715.2 of Criminal Code, **11:19**
- Exculpatory statements of accused on arrest, **11:22**
- General rule, **11:15**
- Narrative/context to physical actions, **11:21**
- Permissible use, **11:30**
- Previous identification, **11:18**
- Recent complaints and narrative exception, **11:20**
- Recent fabrication, **11:17**
- Responding to prior inconsistent statement, **11:23**
- Theory of exceptions, **11:16**

### SELF-INCRIMINATION, PRIVILEGE AGAINST

- Generally, **17:3**
- Common law privilege, **17:4**
- Protection against civil liability, **17:6**
- s.7 of Charter
  - derivative use immunity, **17:15**
  - residual protection against self-incrimination, **17:14**
  - statements compelled by statute, **17:16**
- s.13 of Charter
  - application, **17:7**
  - compelled testimony, **17:9**
  - non-criminal proceedings, **17:13**
  - testifies in any proceedings, **17:8**
  - using prior testimony for other non-incriminating purposes, **17:12**
  - using prior testimony to impeach, **17:11**
  - whether s.13 can be waived, **17:10**

### SELF-INCRIMINATION, PRIVILEGE AGAINST—Cont'd

- Statutory intervention, restricting future use of incriminatory statements, **17:5**

### SETTLEMENT

#### PRIVILEGE—STATEMENTS MADE WITHOUT PREJUDICE

- Generally, **17:51**
- Components of privilege
  - communication made in effort to settle, **17:54**
  - existence of dispute, **17:52**
  - intention for non-disclosure, **17:53**
- Exceptions
  - competing interest, **17:59**
  - general theory, **17:56**
  - threatening or fraudulent conduct, **17:58**
  - waiver, **17:57**
- Scope and application, **17:55**
- Statutory provisions creating, **17:60**

### SIMILAR FACT EVIDENCE

- Generally, **15:14**
- Admissibility
  - balancing process, **15:26**
  - deference to trial judge's decision, **15:25**
  - proving identity, **15:27**
- Civil cases, **15:29**
- Conditions for admission
  - acts for which accused acquitted, **15:22**
  - evidence linking accused to similar acts, **15:19**
  - types of evidence, **15:21**
- Historical development of rule
  - early common law/*Makin/i* rule, **15:15**
  - evolving past *Makin/i*, **15:16**
  - R. v. Handy*, **15:17**
- Instructing jury, **15:28**
- Prejudicial effect
  - moral prejudice, **15:25**
  - reasoning prejudice, **15:26**
- Probative value
  - collusion, **15:24**
  - relevant factors, **15:23**

### SOURCES OF EVIDENCE LAW

- Charter of Rights and Freedoms, **1:18**
- Common law, **1:12**
- Statutory intervention, **1:13 to 1:17**

**SPONTANEOUS UTTERANCES,  
EXCEPTION TO HEARSAY RULE**

Generally, **14:18**

**SPOUSE OF ACCUSED PERSON,  
COMPETENCE AND  
COMPELLABILITY**

Historical approach, **6:41**

Provincial prosecutions, **6:42**

**STATEMENTS AS TO BODILY  
CONDITION, EXCEPTION TO  
HEARSAY RULE**

Generally, **14:21**

**STATE OFFICIALS,  
COMPELLABILITY AND  
COMPETENCE**

Board and tribunal members

compellability and scope of question-  
ing, **6:30**

privative clauses, effect, **6:31**

Crown officials and Members of Parlia-  
ment

discovery and inquiries, **6:25**

parliamentary privilege, **6:26**

prima facie compellable at trial, **6:24**

Judges and jurors

incompetent in the particular proceed-  
ing, **6:28**

unrelated proceedings, **6:29**

Ombudspersons, investigators, and  
mediators, **6:32**

Representatives of foreign governments,  
**6:27**

Sovereign, **6:23**

**STATE OF MIND, EXCEPTION TO  
HEARSAY RULE**

Generally, **14:22**

Inadmissible to prove third party's inten-  
tion, **14:23**

**STATE SECRETS**

See PUBLIC INTEREST IMMUNITY

**STATUTORY INTERVENTION AS  
SOURCE OF EVIDENCE LAW**

Ethical rules, **1:16**

Evidence legislation, **1:13**

Other legislation, **1:14**

Rules of Court and Civil Procedure, **1:15**

Statutory reform, need for, **1:17**

**SUBPOENAS OR SUMMONS,  
SETTING ASIDE**

See also COMPELLING ATTENDANCE

Onus and procedure

civil proceedings, **8:13**

criminal proceedings, **8:14**

Quashing, grounds for

abuse of process, **8:17**

Charter violation, **8:18**

health of witness would be at risk, **8:19**

irregularity in issuance, **8:15**

witness can provide to material evi-  
dence, **8:16**

**SWORN TESTIMONY FROM OTHER  
PROCEEDINGS, EXCEPTION TO  
HEARSAY RULE**

Civil cases—common law, **14:27**

Civil cases—statutory exceptions, **14:28**

Criminal cases, **14:29**

**TESTIFYING BY  
VIDEO-CONFERENCE OR  
OTHER MEANS**

Advances in technology, **10:8**

Civil cases

historical approach, **10:9**

legislative guidelines, **10:10**

modern approach, **10:11**

witnesses in foreign jurisdictions,  
**10:12**

Criminal cases

Evidentiary and procedural questions,  
**10:14**

legislation, **10:13**

**TRIAL PROCESS, GENERALLY**

Adversarial process, generally, **1:2**

Calling evidence

appeal, on, **7:6**

order of evidence, **7:1**

re-calling a witness, **7:3.50**

re-opening case

civil cases, **7:4**

criminal cases, **7:5, 7:5.50**

rule against splitting case

generally, **7:2**

civil cases, **7:2**

criminal cases, **7:3**

Calling witnesses

generally, **7:7**

**TRIAL PROCESS, GENERALLY****—Cont'd**

- Calling witnesses—Cont'd
  - civil cases
    - additional witnesses, **7:12**
    - failure to call witnesses, **7:13**
  - Crown in criminal cases
    - adverse inference, **7:10**
    - failure to call witness and adverse inference, **7:10**
    - no obligation to call witnesses, **7:8**
    - oblique motive/abuse of process, **7:9**
  - defence in criminal cases, **7:11**
  - failure to call witnesses, **7:11**
    - crown commentary on, in jury address, **7:11.50**
  - trial judge's role
    - calling witnesses, **7:14**
    - jury's ability to question witnesses, **7:17**
    - questioning witnesses in adversarial proceedings, **7:15**
- Communicating with testifying witness
  - communication between witnesses, **7:27**
  - examination for discovery, **7:26**
  - trial, **7:25**
- Dealing with witnesses on opposite side
  - improper communication with witness, **5:16**
  - physicians and experts retained by party, **5:15**
  - represented parties
    - generally, **5:13**
    - employees and directors of, **5:14**
    - unrepresented witnesses, **5:12**
- Excluding witnesses
  - generally, **7:18**
  - administrative hearings, **7:22**
  - discovery, during, **7:21**
  - failure to comply with exclusion order, **7:19**
  - ordering accused to testify first, **7:23**
  - trial, **7:20**
- Expert witnesses, **7:24**
- Inquisitorial process, generally, **1:3**
- Interpreters at common law and in iRules of Civil Procedure/i
  - Charter, s.14, **7:30**
  - official languages, **7:31**
  - qualifying as interpreter, **7:29**

**TRIAL PROCESS, GENERALLY****—Cont'd**

- Interpreters at common law and in iRules of Civil Procedure/i—Cont'd
    - when ordered, **7:28**
  - Types of Translation, **7:29.50**
  - Witnesses not property of any party, **5:1**
  - Witness preparation
    - Crown ability to communicate with witness pre-charge, **5:11**
    - interview, **5:10**
- ULTIMATE ISSUE**
- Generally, **2:29**
- UNFAIR SURPRISE**
- Generally, **2:28**
- VETROVEC WARNINGS**
- Generally, **13:3, 13:8 to 13:13, 13:16**
- VIDEO-CONFERENCE OR OTHER MEANS, TESTIFYING BY**
- Advances in technology, **10:8**
  - Civil cases
    - historical approach, **10:9**
    - legislative guidelines, **10:10**
    - modern approach, **10:11**
    - witnesses in foreign jurisdictions, **10:12**
  - Criminal cases
    - Evidentiary and procedural questions, **10:14**
    - legislation, **10:13**
- VIDEO RECORDINGS**
- Authentication, **3:18**
  - Use of, **3:19**
- VIEWS**
- Evidentiary use, **3:22**
  - Procedure, **3:20**
  - Safeguards, **3:23**
  - When ordered
    - contested issue, **3:21**
    - extent of change since material time, **3:21**
    - importance of issue to be decided, **3:21**
    - information available from other sources, **3:21**
    - logistical difficulties, **3:21**
    - security or safety concerns, **3:21**

**WEIGHT, DISTINGUISHED FROM  
ADMISSIBILITY**

Generally, **2:6**

**WITNESSES BEFORE PARLIAMENT**

Jurisdiction of courts to review, **22:13**

Power to summon witnesses

Parliament, **22:1**

provincial legislatures, **22:2**

Problem witness

improving contempt procedures, **22:12**

procedural concerns, **22:10**

punishment, **22:11**

Witness protections

immunity from prosecution, **22:6**

other privileges and right to refuse to  
answer, **22:7**

other protections, **22:8**

Parliamentary privilege

privilege for statements made in  
provincial legislatures or com-  
mittees, **22:5**

statements made in Parliament  
inadmissible in other proceed-  
ings, **22:3**

**WITNESSES BEFORE PARLIAMENT**

—Cont'd

Witness protections—Cont'd

Parliamentary privilege—Cont'd  
waiver, **22:4**

**WITNESS IDENTITY**

Civil procedure

litigation privilege and witness identity,  
**5:4**

obligation to disclose identity of wit-  
nesses, **5:3**

Criminal procedure

Crown disclosure and witness identity,  
**5:5, 5:5.50**

defence disclosure and witness identity  
alibi evidence, **5:8**

expert evidence, **5:9**

limited tactical disclosure, **5:7**

no general obligation to disclose, **5:6**

**WITNESS PREPARATION**

Crown ability to communicate with wit-  
ness pre-charge, **5:11**

Interview, **5:10**