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THE LAW OF WITNESSES AND EVIDENCE IN CANADA

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The Law of Witnesses and Evidence in Canada (formerly Witnesses) is a leading comprehensive treatment of the law of evidence as it applies to evidence given by witnesses in civil and criminal proceedings, as well as before administrative tribunals, public inquiries, and legislative committees. This is a practical reference work, providing coverage and expert analysis of evidentiary issues as they arise in these types of proceedings. Individual chapters examine testimonial evidence under subjects such as competence, compellability, compelling attendance, examination and cross-examination, and privilege.

This completely revised work also introduces 6 new chapters on a variety of topics and continues on the standards of excellence established by Witnesses, originally authored by Alan W. Mewett and Peter Sankoff.

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What's new in this update:

The release updates the following chapters: Chapter 2 Relevance and Admissibility, Chapter 7 Witness Testimony: Evidentiary Rules, Chapter 10 Absent Witnesses, Chapter 12 Cross-Examination of an Opposing Witness, Chapter 13 Problematic Witnesses: Corroboration and Vetrovec Warnings, and Chapter 20 Improperly Obtained Evidence.

Highlights: Case Law

Relevance and Admissibility — Relevance — Components of Relevance — Probativeness — In *R. v. Merritt*, surreptitious recording of two co-accused picked up a portion of a conversation that had potential incriminatory elements against the maker. There was an inaudible portion immediately preceding the statement that gave rise to considerable ambiguity. The Court of Appeal concluded that this was not simply a matter relating to admissibility. Instead, questions of "conditional" relevance – in that the evidence is only relevant if a factual finding is first made – required careful instructions. The failure to provide clear instructions required a new trial. Rather than instructing the jury that reliance on the statement was dependent upon jurors first finding that the meaning was the one the Crown suggested, the trial judge left them to their own devices, giving them room to use the statement as they saw fit, subject to the inherent weaknesses of an incomplete context. This was simply not enough, however, since admission was contingent on a finding the jury had to make. As such, the trial judge should have told jurors that "if after having taken into account that a statement is only a partial statement, they cannot determine the meaning of what the accused said, they must disregard that partial statement": *R. v. Merritt*, 2023 ONCA 3.

Absent Witnesses — Testifying by Video-Conference or Other Means — Criminal Cases — Evidentiary and Procedural Questions — The Code provides no indication of whether an evidentiary foundation is required for an application for virtual testimony. The case law on this question has varied. The early case law suggested that applications should be supported by affidavit evidence addressing how the statutory factors are met. More recent jurisprudence suggests that a more informal approach is desirable. In *R. v. J.L.K.*, the British Columbia Court of Appeal concluded that sworn evidence was not generally required for s. 714.1 applications. The Court felt that counsel submissions could provide a proper basis to resolve the matter unless the trial judge felt that further evidence was required. Given how common it has become for such technology to be used, this approach has much to commend it. But its applicability should vary depending upon the extent to which the virtual testimony is likely to be contested by the opposing party. Ultimately, the party who chooses to call the witness is obliged to provide a sufficient foundation to depart from the ordinary procedure of evidentiary testimony. The more important the witness, the more counsel should give serious thought to providing affidavit evidence explaining the reason why video-conferencing is required in the circumstances. In order to allow these applications to be properly adjudicated, "best practices suggest that an application under s. 714.1 should, where possible, be brought in advance of the trial and should be supported by evidence about the location where the witness will testify from, the technology to be used, and the results of advance testing": *R. v. J.L.K.*, 2023 BCCA 87.

Problematic Witnesses: Corroboration and Vetrovec Warnings — Corroboration in Civil Cases — What Does Corroboration Require? — Though the importance of corroboration in civil cases has waned over time, an assessment of what the concept requires in terms of proof must stay firmly focused on the fact that it only comes into operation when the evidence of a party is being assessed as a whole. The need to keep the limitations of corroboration in mind was on full display in *Waters Estate v. Henry*, where the plaintiff estate was seeking to have large sums of money returned by the defendant, who had cared for the deceased's spouse for a number of years and somehow obtained close to $30 million for her services. The estate obtained a Mareva injunction that froze the defendant's assets pending a trial of the matter, and the defendant brought an application to have it set aside. In support of the application, the defendant submitted a lengthy affidavit explaining her relationship with the deceased in an attempt to show the weakness of the plaintiff's case. In response, the plaintiff argued that large parts of the affidavit should be struck because they were uncorroborated accounts of what had occurred with the deceased. Not surprisingly, Centa J. rejected this approach. Though there were judicial decisions using language suggesting that uncorroborated evidence from an adverse party about matters occurring before the death of the testator was "inadmissible", the better approach ". . . is to view s. 13 as requiring corroborating evidence before the court may grant judgment or make a decision in favour of an interested person on the basis of her own evidence": *Waters Estate v. Henry*, 2022 ONSC 5485.

Improperly Obtained Evidence — Exclusion of Evidence Under the Canadian Charter of Rights and Freedoms in Criminal Cases — Obtained in a Manner — Severing the Connection: Evidence That is Not 'Obtained in a Manner' — In the Ontario Court of Appeal case of *R. v. Davis*, the accused was acquitted at trial of driving while intoxicated over the legal limit, after breath samples were excluded because of a breach of the accused's Charter rights. In particular, the accused was not properly informed of his right to counsel until eight minutes after being arrested. He was later provided with this right, and spoke to a lawyer before providing evidential breath samples. On appeal, the Crown relied heavily on *Beaver*, contending that the proper warning constituted a "fresh start" that cure the original breach, and made it impossible for the breath samples to have been obtained in a manner that engaged s. 24(2). Writing for the Court of Appeal, Paciocco J.A. rejected this approach, suggesting that the obtained in a manner test needed to be construed generously. Insofar as *R. v. Beaver*, 2022 SCC 54 was concerned, Paciocco J.A. concluded that the Crown's reliance upon it was misguided, for the decision "has not changed the law". He proceeded to select excerpts from *Beaver* that adopted a broader view of causation. In this chapter update the author provides his analysis of this decision and its interpretation of the *Beaver* case: *R. v. Davis*, 2023 ONCA 227.

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