Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. *Distribution List*
☐
☐
☐
☐

THE LAW OF WITNESSES AND EVIDENCE IN CANADA

Peter J. Sankoff

Release No. 4, December 2024

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.

THOMSON REUTERS®

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
E-mail CustomerSupport.LegalTaxCanada@TR.com

What's new in this update:

The release updates the following chapters: Chapter 2 Relevance and Admissibility, Chapter 5 Out-of-Court Preparation of Witnesses, Chapter 6 Competence and Compellability, Chapter 9 Witness Misconduct: Refusing to Give Evidence or Committing Perjury, Chapter 11 Examining Your Own Witness, Chapter 12 Cross-Examination of an Opposing Witness, Chapter 16 Opinion Evidence and the Expert Witness, Chapter 17 Privilege and Chapter 19 Confessions and Other Protected Statements.

Highlights: Case Law

Cross-Examination of an Opposing Witness — Limitations on Cross-Examination — Sections 276 and 277 of the Criminal Code — Sexual Activity Involving the Complainant — The Test for Admissibility: Section 276(2) — The problematic treatment of the admissibility standard is also seen in the Supreme Court's decision in *R. v. T.W.W.*. In *T.W.W.*, O'Bonsawin J for the Court made several statements that appear to push the balance even further in favour of exclusion. The court's comments bear little resemblance to the "trifling relevance" statement in *Darrach*. It is impossible to view the Supreme Court's continuing retreat from *Darrach* as unintentional, or sloppy word choice. The only logical conclusion is that the balancing of interests – which supposedly favours admission, given the use of the word "substantial" – actually is geared towards exclusion: *R. v. T.W.W.*, 2024 SCC 19.

Opinion Evidence and the Expert Witness — Non-Expert Opinion Evidence — Distinguishing Lay Opinion from Expert Opinion — Another common and problematic form of police opinion arises in drug cases, where police conduct surveillance in an effort to find a pattern of activity that is circumstantially probative of trafficking. Consider *R. v. Jenkins*, where the accused was charged with multiple trafficking and possession offences. In that case, the Crown called five police officers to testify about the accused's movements and actions. But the officers were also asked for their impressions of what these events meant. One responded:

> This sort of short meet [with another individual] is very consistent with a drug transaction. It's also very consistent for drug dealers and buyers to conduct their business in vehicles where they're afforded some concealment. It's very common.

The Ontario Court of Appeal had little difficulty ordering a new trial. To begin with, the opinion evidence was entirely unnecessary, as "the jury was capable of weighing the shortness of the appellant's interactions with third parties as a factor that may… be probative of drug trafficking transactions". But it was also prejudicial, especially because it was stressed by the Crown in its closing address, and even the trial judge stated that officers believed the encounters to be drug trafficking "based on their many years of experience": *R. v. Jenkins*, 2024 ONCA 533.

Privilege — Informer Privilege — Exceptions — Charter Challenge — Although *R. v. Scott*, [1990] 3 S.C.R. 979, set down three exceptions that can be used to demonstrate "innocence at stake", these should be regarded as illustra-

tive rather than exhaustive. Ultimately, the question is whether the evidence meets the legal standard for "innocence at stake", not whether it falls within a categorical exception. In the Ontario Court of Appeal's decision of *R. v. Ruthowsky*, the accused, a former police officer, was charged with breach of trust, amongst other offences, for divulging confidential informants to a drug dealer he was trying to extort. The drug dealer testified but left out the name of the confidential informant whose name he had obtained. On appeal, the accused argued that he was disadvantaged by his inability to cross-examine about the alleged informant, which could have undermined the witness's evidence. The Court of Appeal disagreed, noting that:

> The appellant was not without remedies if, as is now posited, Mr. X was wrong about who the informants were. As I have noted, the appellant knew, through disclosure and his own knowledge, whether Mr. X had the wrong name ... If the name was wrong, this would be powerful – almost irrefutable – evidence that the appellant had not disclosed the name of the informant … to Mr. X. It would be evidence that would bear directly on an element of the offence of breach of trust – whether the appellant breached the trust placed in him as a police officer by improperly disclosing privileged information. It is difficult to see how this would not form the basis for a viable innocence at stake application ... Yet no motion to lift informer privilege on the basis of the innocence at stake exception was brought by the appellant.

R. v. Ruthowsky, 2024 ONCA 432.

Privilege — Common Law Privilege — Application of the General Principles — Confidentiality — It is probably somewhat trite to observe that the application of the common law privilege will depend heavily upon the facts of the particular case. For example, the key in *R. v. Dupont* (1998), 129 C.C.C. (3d) 77 (Que. C.A.), was the nature of the relationship, and why the claimant was speaking to the psychologist in the first place. A good contrast is *R. v. N.S.*, also a decision of the Quebec Court of Appeal. In that case, the accused was hospitalized after a suicide attempt and met with a forensic psychiatrist to help determine her immediate needs. She signed an authorization allowing for communication of her disclosures with the police "if this proved necessary due to dangerousness". In other words, the psychiatrist was only permitted to disclose where there was a risk of harm to others – an exception that did not extend to discussions about past events. The trial judge concluded – in a finding upheld by the Court of Appeal "that [she] did not thereby waive confidentiality of the information communicated and [the psychiatrist] limited herself to the strict minimum in her communications with the police". As such, confidentiality remained an essential part of the communications: *R. v. N.S.*, 2024 QCCA 876.