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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 6 Competence and Compellability, Chapter 7 Witness Testimony: Evidentiary Rules, Chapter 12 Cross-Examination of an Opposing Witness, Chapter 13 Problematic Witnesses: Corroboration and Vetrovec Warnings, Chapter 16 Opinion Evidence and the Expert Witness, Chapter 17 Privilege, Chapter 19 Confessions and Other Protected Statements, Chapter 20 Improperly Obtained Evidence, and Chapter 21 The Protection of Witnesses.

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 — Scope of the Provision: Offences — In *R. v. A.M.*, the Court of Appeal rejected a "categorical application of s. 276 to prosecutions where the accused [is] charged with sexual services and/or human trafficking offences". Rather, the key is whether the commission of a listed offence, while not charged, arises on the facts "such that it is, in substance, implicated in the particular proceeding". *A.M.* is certainly an upgrade over the line of cases following *R. v. Floyd*, but it is far from perfect. Case-by-case applications are the bread and butter of appellate courts, but they are far less helpful in trial matters, especially where a jury is involved. The Court of Appeal appears to recognize that s. 276 will not normally be engaged unless sexual assault is an included offence (as was the case in Barton), but leaves open a category in which sex is in some way "implicated". The application of this regime is already complicated enough, and it is unclear why accused persons should have to navigate this "contextual" approach to sexual activity in borderline cases of this type. After all, there is nothing preventing a trial judge from excluding evidence of this sort when tendered, and eschewing a technical s. 276 application. As the Court stated in *R. v. A.M.*, a trial judge "… is well-positioned to balance the competing interests at play as testimony unfolds by barring or placing limits on the admissibility and use of evidence of other sexual activity, intervening to stop inappropriate questioning, and directing a voir dire in exceptional cases if one is required." Given the statutory wording, this seems to be a fair compromise: allow questions about sexual activity in any case without a formal application, unless sexual assault [or another enumerated offence] is directly involved. Treat s. 276 as if it means what it says, and let Parliament amend it if it chooses to do so. The courts should not encourage screening "sprawl" in this way, and asking judges to work through the "some connection" test and ambiguous "case by case determinations" to resolve whether the section applies. The law in this area is difficult enough to apply already: *R. v. A.M.*, 2024 ONCA 661.

Cross-Examination of an Opposing Witness — Limitations on Cross-Examination — Sections 276 and 277 of the Criminal Code — Sexual Activity Involving the Complainant — The Forbidden Inferences: Section 276(1) — In *R. v. Reimer*, 2024 ONCA 519 at paras. 76, 78, Paciocco J.A. remarked that: "There are passages to be found in jurisprudence, including appellate jurisprudence, that if read in isolation from the body of authority on point can be misunderstood as suggesting that s. 276 prevents using previous sexual behaviour from drawing any inferences about consent or credibility. This

is not the law … The text of the provision does not bar the use of sexual activity evidence absolutely. Indeed, nowhere does it suggest that sexual activity evidence is prohibited in all cases on the issue of consent or credibility. Section 276(1) prohibits using sexual activity evidence to advance only certain kinds of inferences relating to consent and credibility, namely, those that arise "by reason of the sexual nature of that activity"." *R. v. Reimer*, 2024 ONCA 519.

Improperly Obtained Evidence — Exclusion of Evidence Under the Canadian Charter of Rights and Freedoms in Criminal Cases — Seriousness of the Charter-Infringing State Conduct — Good Faith — In *R. v. Khamvongsa*, the police sought to rely on the fact of having obtained a search warrant before acting as indicative of good faith, and the trial judge agreed. When admitting the evidence, the trial judge found that police conducted themselves pursuant to a warrant, and the underlying problems with the warrant were not particularly egregious. But the British Columbia Court of Appeal disagreed, concluding that the assessment gave police too much credit. In particular, "there is a serious risk that the fact the police obtained a warrant … carried greater mitigating effect than it should have", especially when considering that the officers at the very least made a "careless factual misrepresentation" that did not equate with good faith: *R. v. Khamvongsa*, 2025 BCCA 33 at para. 36.