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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 3 (Types of Proof), Chapter 6 (Competence and Compellability), Chapter 7 (Witness Testimony: Evidentiary Rules), Chapter 8 (Compelling Attendance), Chapter 10 (Absent Witnesses), Chapter 11 (Examining Your Own Witness), Chapter 14 (Hearsay), Chapter 15 (Character Evidence) and Chapter 17 (Privilege).

Highlights: Case Law

Witness Testimony: Evidentiary Rules — Controlling the Order of Witnesses and Exclusion of Witnesses — Can a Party Be Excluded? — At Trial — In *Carbone v. Dawes*, where the defendants in a negligence case brought an application requesting security for costs in the event of an unsuccessful action, the plaintiff sought to cross-examine four of the defendants in respect of the application and, to that end, made a request to exclude the co-defendants from attending each other's cross-examination. The request was ultimately rejected, but Marion J. was not content to adopt either the strict approach taken in *Liu Estate* or the more relaxed approach taken in respect of discovery that is discussed below. In his judgment he provided principles for an application to exclude a party from questioning on affidavits. Justice Marion then added three key considerations to apply during this inquiry. The author comments on these considerations: *Carbone v. Dawes*, 2023 ABKB 729, affirmed 2024 ABCA 405.

Examining Your Own Witness — Limits on Enhancing Credibility: the Rule Against Prior Consistent Statements — Specific Exceptions — Sections 715.1 and 715.2 of the Criminal Code — Adopting a Video Recording — In *R. v. Reves*, the RCMP took a video statement from a complainant in August of 2020, 19 months after the alleged offending. Five months later, the complainant provided a second statement under different circumstances. The Crown did not seek to tender the first statement, telling the trial judge that it had not been taken in an appropriate manner. Indeed, the statement was not even tendered on the admissibility voir dire, though it was used in cross-examining the complainant. The trial judge admitted the second statement, concluding that while she had "some hesitation" about allowing it to be tendered in light of the tainted initial statement, she was satisfied that cross-examination could rectify any shortcomings. The Alberta Court of Appeal disagreed. Quite correctly, it concluded that "the first statement would have been an important piece of evidence in assessing the . . . reliability of the [second] statement": *R. v. Reves*, 2025 ABCA 5.

Hearsay — The Principled Or Residual Exception — Substantive Reliability: Circumstantial Factors — Content/Nature of the Statement — Vagueness is not the only concern. A reviewing court must also look at the entirety of the hearsay at issue — which will often include more than one statement — and ascertain whether the declarant was consistent. Consider the facts of *R. v. Cardinal*, where the accused was convicted of numerous weapons charges primarily on the basis of a lengthy hearsay statement provided by the complainant. In this statement to police, the declarant's version of events changed as the interview went on. Amongst other things, she went from barely

knowing the accused to conceding that she had had sex with him the night before. His motivation for being there also changed, revealing that the declarant may have been in a plot to transfer illegal firearms. Relying primarily on the declarant's demeanour — the statement was audio recorded — and an admissible 911 call, the trial judge admitted the hearsay and said that any weaknesses went to the weight of the evidence. The Alberta Court of Appeal disagreed, holding that:

> The substantive reliability of the statement was further undermined by its inconsistencies. The trial judge minimized their significance. In doing so she improperly discounted the function of cross-examination in testing a witness's credibility and reliability. Where a witness shifts their account of how they met someone, and the nature of the relationship they had with them, it raises the possibility that other aspects of their account may change or shift when challenged in cross-examination. The inconsistencies here matter not because of the facts with respect to which [the declarant] was inconsistent, but because they reveal [the declarant] to be inconsistent. They call her credibility and reliability as a witness into question. And they raise the material possibility that further inconsistencies, including on facts material to the appellant's guilt, may have been revealed if [she had been] cross-examined at trial.

R. v. Cardinal, 2025 ABCA 128 at para. 43.

Character Evidence — Similar Fact Evidence: the Accused — Weighing Admissibility — The Balancing Process — In *R. v. Polemidiotis*, the accused, a physician, was convicted of three counts of sexual assault against different patients, and argued on appeal that the trial judge had erred in using the counts as similar fact evidence, primarily because the proof was used to "bolster" the credibility of each complainant. In dismissing the appeal, the Ontario Court of Appeal noted that similar fact evidence often had this impact, which was not improper. The approach set out by Copeland J. makes good sense. Ultimately, part of what *R. v. Handy*, [2002] 2 S.C.R. 908, set out to accomplish was provided a degree of transparency to the use of similar fact evidence, and ensure that situation specific propensity could be used to reach conclusions about the truthfulness of what is being alleged. Whether it is described as "credibility" or "proof of the actus reus" does not truly matter. The key is that the evidence, where similar enough, is used to disprove the suggestion that the impugned conduct is accidental or did not happen, as the case may be. This is not to suggest that care should not be taken in assessing the nature of the desired inference: *R. v. Polemidiotis*, 2024 ONCA 905.