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Witnesses

This release includes new Chapter 19: Confessions and Other Protected Statements, and updates the following chapters: 1 (Foundational Principles in the Law of Evidence); 4 (Burdens of Proof and Presumptions); 7 (Witness Testimony: Evidentiary Rules); 8 (Compelling Attendance); 14 (Hearsay); and 20 (Improperly Obtained Evidence).

Highlights

Witness Testimony: Evidentiary Rules — Witness Testimony and Language — Official Languages — The issue of witness language rights came before the Supreme Court in *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50 where the Court emphasized the importance of ensuring that witnesses be able to testify in the language of their choice. The Court made it clear that “language rights are not procedural rights related to the dispute that brought the parties before the court [but rather] they are fundamental rights related to access of the parties and their witnesses to that court in the official language of their choice”.

Confessions and Other Protected Statements — The Confessions Rule — Persons in Authority — Voluntariness — Threats and Inducements — An area that causes problems for the courts occurs when the police tell the suspect that it is important to provide their version of events. In the abstract, this is unproblematic, as merely indicating that the interview provides an opportunity for the accused to tell their side of the story does not amount to an inducement. But matters change when a *quid pro quo* element for telling that story emerges. For example, in *R. v. Othman*, 2007 SCC 11, the police told a suspected murderer that he might not get a chance to tell his

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story in court, and that if he did not tell them his side of the story, the video of him sitting silent would be shown in court. Effectively, this amounted to both a threat and an inducement, as the police “suggested negative legal consequences if the appellant failed to speak and positive consequences if he spoke”.

Improperly Obtained Evidence — Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms* in Criminal Cases — Impact on the Accused’s Interests — Non-Bodily Physical Evidence — Depending upon the type of breach that engages s. 24(2), privacy might not be the only Charter interest to consider. In *R. v. Rover*, 2018 ONCA 745, the accused was arrested and then held while a search warrant was obtained. Adhering to a local policy, the accused was not allowed to exercise his s. 10(b) rights while the warrant was executed, preventing his being able to access counsel for almost six hours. Though the police made no attempt to question him during this time, the Ontario Court of Appeal had to consider the impact of the breach upon his interest in deciding whether to exclude the fruits of the search, recognizing that privacy was not really a concern here. Nonetheless, the Court concluded that the breach still had a measurable impact on the accused.

Improperly Obtained Evidence — The Common Law Exclusionary Rule Since the Enactment of the *Charter* — Exclusion in Civil Proceedings — Current Approach to Exclusion — In British Columbia, the courts have framed the admissibility question somewhat differently, focusing directly upon the probative value and prejudicial effect of any evidence obtained. In *M.F.H. v. M.A.H.*, 2018 BCSC 2486, which involved another custody dispute, the mother obtained without permission and then attempted to tender into evidence emails exchanged between the father and his new spouse. In deciding not to admit the emails, the Court noted that the prejudicial impact of admission outweighed whatever probative value they might have. The prejudice associated with entering the evidence derived from three related factors: the mother’s actions extended beyond the scope of the permission granted by the father to access his account, the mother’s conduct constituted at least a *prima facie* invasion of the father’s privacy, and the practice of extending beyond the scope of permissible access is one that ought to be discouraged, as it has the potential to promote suspicion and disruption in already tumultuous proceedings.