

Index

ACCUSED

Alibi evidence, *See* ALIBI DEFENCE Bail hearing

cross-examination by Crown,
738-743

examination by defence counsel,
735-738

Character, *See* CHARACTER WITNESSES

Confessions

audiotaped by police, 448-449

cross-examination on, by Crown,
131, 288-289

introduction by Crown, timing,
340-341

videotaped by police, 448-449

Preliminary hearing, *See* PRELIMINARY INQUIRY

Self-incrimination, *See*

SELF- INCRIMINATION

Unrepresented, role of trial Judge,
761-762

Voir dire, testimony at, 129-131

right against self-incrimination, 130
risks facing accused who
testifies, 130

voluntariness of accused's
previous statements, 129-130

Whether to testify at trial, 118-129

accused not following advice of
counsel, 126

accused's right to determine,
119, 126

alibi called by defence, 122

case against accused weak, 124

comment on failure to testify,
127, 639-640

creating impression on jury, 128

criminal record of accused,
122-123, 125

ethical questions for counsel,
118-121

jury trials, 121, 123-124, 127-128

likelihood of perjury by accused,
119-121

opportunity to address jury last, 125

serious charges with serious
consequences, 125

unexpected perjury by accused, 121

ADMISSIONS

At trial, 343-344

ADVERSE WITNESS, *See* HOSTILE WITNESS

ALIBI DEFENCE

Accused's failure to testify, 150

Burden of proof, 152

Collusion, 149

Fabrication, issue of, 136-139

Identification evidence, 140-141

Interviewing client, 62

Notice of, 141-145

Rejection of, 152

Sophonow Inquiry recommendations,
145-147

Trial, at, 147-149

Witnesses

collusion, 149

examination of, 148-149

failure to call, 150-151

impartiality, 150

interviewing, 135-136

BAIL HEARING, CONTESTED

Examination of accused

by defence counsel, 735-738

cross-examination by Crown, 738-743

Pre-trial detention

BAIL HEARING, CONTESTED —

continued

- effect upon defence, 733
- reverse onus for indictable offences, 734
- when justified, law, 733-734

Pre-trial release, effect upon
Crown, 733

Proposed sureties

- cross-examination by Crown,
744-748
- examination by defence, 743-744

BIASED WITNESS, 262

BODILY SUBSTANCES

As evidence incriminating accused,
707-708

BUSINESS RECORDS

Hearsay rule, exception to, 658-660

CHARACTER WITNESSES, *See also*
CRIMINAL RECORDS

Bad character evidence

- exceptions to limited admissibility
 - discreditable associations of accused,
588-589
 - habit or practice, to show, 587
 - motive, as evidence of, 586
 - necessary as part of narrative, 588
 - in reply, 509
 - limited admissibility, 585
 - previous convictions of accused,
586-587
 - putting character in issue, 509, 584,
587-588

Co-accused, evidence of character led
by, 591-592

Cross-examination of bias, to show, 598
suggested questions, 600-601
tenuous foundation, to show, 589-599

Good character evidence purpose,
579-580

reputation in the community,
580-582

- exceptions to general rule, 583-584
- suggested line of questioning,
582-583

Oath-helping defined, 601

- example of, 602-605
- exceptions to general rule, 602

Psychiatric evidence

disposition or propensity, to show,
590-591

distinctive, unusual character traits,
to show, 589-590

third persons, re, 593

Third persons, psychiatric evidence
concerning culpability, to show, 593

Victim, character evidence

concerning complainant's sexual
activity

Criminal Code sections governing,
595-597

- exceptions to general rule, 597
- procedure to determine whether
admissible, 598

exceptions to general rule

aggressor, to show deceased
victim was, 594-595

habit, to demonstrate person
acted in certain way, 594

provocation, to support defence
of, 594

state of mind of accused, to
show, 595

generally irrelevant, 593

peaceable disposition of victim, 595

Witness, character evidence concerning
cross-examination on prior
convictions, 593

impeaching character of Crown
witness, 592

oath-helping prohibited, 601

rehabilitating credibility of

impeached witness, 592

CHILD WITNESSES

Allegations of sexual impropriety
against

anatomical dolls, use of, 498-499

behaviour consistent with abuse,
485, 496-497

child's knowledge of sexual
matters, 485

expert evidence, when necessary,
485, 487

CHILD WITNESSES — *continued*

innocent explanations of child's symptoms, 496-497

interviewing techniques to avoid contamination, 487-496

positive re-enforcement of child's disclosure by adults, 500-501

suggestibility of children, 488-496

Competence and compellability, 497-499 *See also* COMPETENCE AND COMPELLABILITY

Cross-examination, 479-482

alternative explanations for child's symptoms, 496-497

approach to, 479-480

credibility, assessing, 484

demeanour, 484

encouraging child's imagination, 485

evidence learned by rote, 486

internal inconsistencies in testimony, 486

simple questions, 480

unresponsiveness of child to questions, 501-502

High status adults influencing child's beliefs, 500-501

Interviewing techniques to avoid contamination, 487-496

Legislation governing children's evidence, 89-90, 107, 111-112

Motives to lie, 485

Peer pressure influencing testimony, 495

Preparation of child witness, 88-90

allaying child's fears, 89

excluding public, 89, 107

method of testimony, 89-90

oaths, 90

reviewing questions and answers, 90

sexual offences against, 485

support person, presence of, 90, 107

Victims of abuse, 89

Vulnerabilities, inherent, 482-483

COLLATERAL FACT RULE, 509-511

COLLUSION

Witnesses, among

alibi defence and, 149

preparation of witnesses and, 69

re-examination re, 506

similar fact evidence and, 713-714, 731

COMPETENCE AND COMPELLABILITY

Affirmation, 637-638

Children

inquiry to determine ability to testify, 634-635

oaths, 634-635

promise to tell truth, 634-635

statutory provisions governing, 634

unresponsive to questioning, 501-5024

Co-accused, 641, 642

Corporations and corporate employees, 641-642

Failure to testify, by accused

comment prohibited, 639-640

Mental incompetence

effect upon ability to testify, 636

procedure for determining, 634-637

Spouses, 638-639

Victims Bill of Rights Act, 638-639

CONFESSIONS, *See* ACCUSED; EVIDENCE, PRESENTATION OF

CONSCIOUSNESS OF GUILT,

131-132, 213-224

COURTROOM MANNER

Civility, 196-197

Conduct, 66-67

Damaging answers, responding to, 196

Ethics, *See* PROFESSIONAL RESPONSIBILITY

Interactions with client, 191

Juror interest, maintaining, 194-196

Objecting, 197-200

Perjured witness

approaches to, 191-193

distinguished from honestly

mistaken witness, 191

COURTROOM MANNER — *continued*

- Personal characteristics of counsel, 193-194
- Prior inconsistent statements, *See* PRIOR INCONSISTENT STATEMENTS
- Procedure, explaining to client, 69
- Routine matters, 204
- Showing witness was mistaken, not lying, 205-206, 208
- Styles contrasted, 192-193
- Tactics to avoid, 189-191
 - arguing with witness, 190
 - distortion of facts, 190
 - pointless cross-examination, 189
 - sarcasm, 189

CRIMINAL RECORDS

- Accomplice guilty plea, 576
- Bail hearings, at, 735-736
- Canada Evidence Act*, s. 12, 564-566, 587
- Corbett* application, 574-576
- Criminal Code*, s. 666, 566-567, 587-588
- Cross-examination limits imposed on Crown
 - accused's criminal record, 567-573
 - witness's criminal record, 564-566, 568-569
- Discretion of Judge to exclude prejudicial evidence, 574-576
- Factor in decision whether to testify, as, 122-123
- Jury charge, 573-574
- Pardon, 577

CROSS-EXAMINATION (GENERAL)

- Aims generally, 153-154
- Criminal records, on
 - accused, 567-573
 - witnesses, 564-565, 568-569
- Demeanour, 171-172
- Duty to cross-examine, 145-155, 312-315
- Failure to put defence case to prosecution witnesses, 155

- Favourable answers on
 - cross-examination, 167
 - Motive to lie, 172
 - Objectives, defence,
 - argue case in form of cross-examination, 155-157, 158-165
 - avoidance of calling defence, 165
 - Order of, 186-187
 - Phrasing of questions to avoid, 158
 - Preliminary hearing as opportunity for, 181-182, 519
 - Preparation
 - anticipating the witness, 182
 - documentary evidence, 180
 - examination-in-chief, studying
 - body language, 183, 185
 - note taking, 183-185
 - observing Judge, jury, 184-185
 - unexpected evidence, 186
 - expert witness, *See* EXPERT EVIDENCE/WITNESSES
 - flow charts, creating, 182
 - physical evidence, 180-181
 - preliminary inquiry as tool for
 - cross-examination, 181-182
 - private investigators, use of, 175
 - questions, 169-171
 - research law, 183
 - scene of incident, attending, 176
 - view, taking, 176-180
 - witnesses, interviewing
 - manner of obtaining statement, 173-175
 - prior statements to police, 174
 - refusal to be interviewed, 175
 - timing, 174
 - unhelpful witnesses, 175
 - who to interview, 173
 - Silent cross-examination, when appropriate, 165-166
 - Social media, 173
- CROSS-EXAMINATION, TECHNIQUES
- Abusive, unfair cross-examination by Crown, 323-240
 - Avoiding adjournments to maintain momentum, 267
 - Biased witness, 262

- CROSS-EXAMINATION,
TECHNIQUES — *continued*
- Child witness, *See* CHILD WITNESSES
- Character witness
 bias, to show, 598
 suggested questions, 600-601
 tenuous foundation, to show, 598-599
- Controlling witness
 answering question with question, 241
 closing off avenues of escape for witness, 242-244
 knowing answer in advance, 245-247
 disclosure, effect of, 247
 exceptions, 245
 “feeling out” process, 246
 safe answers, obtaining, 246
 step-by-step approach, 246
 knowing when to stop, 268-270
 open-ended questions, 267-268
- Deliberately posing inadmissible questions, 308
- Documentary evidence as ammunition for, 180
- Ending with strong favourable answer, 263-264
- Enlarging on details, 260
- Evasive witness, 239-242
- Exaggerating witness, 263
- Expert witness, *See* EXPERT WITNESS
- Honest witness
 approaches suggested, 250-251
 factors unconsciously colouring testimony, 252
 identifying truthful witness, 250
- Hostile witness, on prior inconsistent statement, 295-306
- Interpreting evidence in more than one way, 256-259
- Jailhouse informant, *See* JAILHOUSE INFORMANTS
- Lulling into false sense of security, 171
- Lying witness
 approaches suggested, 169-171
 collateral matters, questioning on, 260
 contradictions, seeking, 261-262
 enlarging details, 260
 exclusion of witnesses, order, 261
 impressing witness with foreknowledge, 247
 motive to lie, unearthing, 172
 rapid-fire questions, 249
- Mistaken witness, 250-254
- Neutralizing damaging effect of examination-in-chief, 266
- Opening with contradiction, 234-238
- Opening with memorable question, 233-234
- Police officers, 439-453, *See also* POLICE OFFICERS
- Seeking contradictions between witnesses, 261-262
- Skip-around technique, 248-249
- Suggesting facts in cross-examination that cannot be proven, 307
- Summarizing points made in cross-examination, 264-467
- Threatening witness with charge of perjury, 323
- Unnerving witness at beginning, 233
- Vain witness, 255-256
- CROWN PRIVILEGE, *See* PRIVILEGE
- DECLARATIONS AGAINST PECUNIARY AND PROPRIETARY INTEREST
Hearsay rule, as exception to, 656-657
- DECLARATIONS AGAINST PENAL INTEREST
Hearsay rule, as exception to, 657-658
- DEMONSTRATIVE EVIDENCE, *See* EVIDENCE, PRESENTATION OF
- DISCLOSURE, *See also* JAILHOUSE INFORMANTS
Alibi defence, *See* ALIBI DEFENCE
Burden of proof, 17

DISCLOSURE — *continued*

Conduct of defence, effect upon, 10
 Criminal records, 565

Crown cross-examination upon, 24-25

Crown's continuing obligation

duty to inquire, 16

generally, 15-16

police misconduct materials, 11

Defence counsel's responsibility, 23

Electronic disclosure, 21-23

Expert evidence, 376-378

In-custody informers, 15, 413-414

Martin Committee Report, 12-15

Mills Regime

 duty to give notice, 32

 likely relevant standard, 32

 procedure, 30-31

 purpose, 29-30

 record, definition of, 31-32

O'Connor production regime

 balancing competing interests, 27

 Ferguson Report, 28

 generally, 25-26

 likely relevant records, 26-27

 police misconduct records, 28-29

Pre-trial disclosure generally

 copies of videotapes, 19

 electronic disclosure, 21-23

 failure to disclose, remedies, 19

 failure to pursue, effect, 23

 late disclosure, effect upon

 proceedings, 18-19

 lost or destroyed disclosure, 20-21

 material non-disclosure, 19

 prior inconsistent statement, 19

 will-say statements, 87

Preparation for trial, use in, 181-182

Relevance, 10

Remedies

 late disclosure, for, 18-19

 lost or destroyed disclosure, for,
 20-21

Requirement of Crown, as, 9, 15-16,
 413-414

Stinchcombe Regime

 effect upon disclosure generally,
 9-10

 materials to be disclosed, 10-12

 propositions arising from, 12-15

Undertaking by defence not to use for
 collateral purpose, 24

Witness contact information, 23-24

DYING DECLARATIONS, 652-653

ETHICS, *See* PROFESSIONAL

RESPONSIBILITY

EVASIVE WITNESS, 239-242

EVIDENCE, ELECTRONIC

Electronic documents

 authentication, 51

 best evidence rule, 51

 Facebook, 52-53

 presumption of integrity, 52

Photographs

 authentication by experts, 54

Police body cams, 56-57

EVIDENCE, PRESENTATION OF,
 See also WITNESSES

Admissions at trial, 343-344

Advising Crown if client will
 testify, 129

Basic rules, 95-100

Co-accused's statements, use of,
 288-289

Confessions

 cross-examination on, 340-341

 introduction by Crown, timing

 generally, 340-341

 voluntariness essential, 341

Consciousness of guilt evidence,
 132, 213-224

Demonstrative evidence advantages

 generally, 543

 charts, 553-554

 chronologies, 553-554

 computer simulation models,
 552-553

 diagrams, 552

 experiments, 548-551

 graphs, 553-554

 in-court demonstrations, 548-551

 maps, 552

 models, 552

EVIDENCE, PRESENTATION OF —

continued

photographs, 543-546
 reconstructed scenes, 548-551
 replicas, 552
 schedules, 553-554
 sketches, 552
 summaries, 553-554
 tests, 548-551
 videotapes, 546-548
 witness in-court sketches, 546

Exhibits, 554-556

Formal admissions, 343-344

Humanizing client, 108-110

demeanour of counsel, 100

positive interaction with counsel,
 110

refer to client by name, 108

sit with counsel instead of in
 prisoner's dock, 108

supportive family and friends in
 court, 109

Interpreters

ineffective, 135

use of, 132-134

Objectives, 93-94

Post-offence conduct, 131-132

Verbal evidence

credibility, enhancing, 105-106

eliciting for maximum impact,
 103-105

order of calling witnesses, 100-103

EVIDENCE, RULES OF

Hearsay testimony, *See* HEARSAY EVIDENCE

Leading questions of own witness

examples of leading questions, 81-83

exceptions to general rule, 80-81

generally not permitted, 72-73

privileged communications, *See*
 PRIVILEGE

Rebuttal evidence, 507-511

*Report of the Federal/Provincial Task
 Force on Uniform Rules of
 Evidence*, 607, 658, 679

EXAMINATION-IN-CHIEF, *See also*
EVIDENCE, PRESENTATION
OF; WITNESSES

Advising Crown if client will testify,
 129

Explaining inconsistencies in
 statements, 94

Lessening damaging impact of
 anticipated cross-examination, 93

Observing Judge, jury during, 184-185

Primary objective, 93

Revealing weaknesses in testimony of
 own witness, 93-94

Setting trap for opposing counsel, 95

EXCLUSION OF WITNESSES,
ORDER FOR, 261, 452-453

EXPERT EVIDENCE/WITNESSES

Admissibility of expert evidence

complainant, supporting veracity of,
 352-356

credibility of witness, bolstering 355

criteria for admissibility, 347-350

delayed disclosure of child sexual
 abuse, 353-354

novel scientific theories, 348

protected statements, 378

subject-matter not within common
 stock of knowledge, 348

symptoms consistent with sexual
 abuse, 353-355

Auditors, forensic, 357

Assessment, psychiatric

protected statements, 378

Basis of opinion

hearsay as, 362-363

reasons for conclusions, 362

Bias, 384-386

Cross-examination

admitting honest differences of
 opinion, 386

authoritative works, used to contra-
 dict testimony, 388-398, 393-396

bias of expert, suggesting, 384-386

casting doubt on opponent's

expert, 380-381

confirming own expert's testimony,
 use in, 388

EXPERT EVIDENCE/WITNESSES —

continued

- consulting own expert, 379
- contradicting with expert's own writings, 389-393
- disputed facts, expert relying upon, 401-402
- educating self on subject-matter, 378
- expert at counsel table, 361
- interviewing opponent's expert, 379
- lack of all relevant facts, 387-388
- posing different interpretation of facts, 396-401
- preliminary hearing as testing ground, 381-382, 527-528
- prior rejection of testimony, 404
- putting your case to opponent's expert, 259-260, 401-404
- qualifications of expert, challenging, 382-384
- researching opponent's expert, 380
- unreliability of interview on which opinion based, 387
- Disclosure of expert evidence, mutual obligation, 376-378
- Goudge Inquiry, 386
- Hypothetical questions, 364-376
- Leave of court, where required, 361-362
- Police as, 404-405
- Preparation of own expert, 357-358
- Non-expert opinion, *See*
- NON-EXPERT WITNESSES
- Qualification of expert
 - curriculum vitae as exhibit, 360
 - deficiencies going to weight, 359
 - details important, 360
- Social media evidence, 35-36
- Sources of expert witness, 356-357
- Ultimate issue to be decided, opinion on, 363-364

FLOW CHARTS, 182

HEARSAY EVIDENCE

- Advising witness about, 73
- Agreements to admit hearsay, 679
- Bail hearings, admissibility at, 678
- Basis for expert opinion, *See* EXPERT EVIDENCE/WITNESSES

- Cross-examination and, 677
- Defined, 644
- Disguising hearsay, 678
- Defence, use by, 674-676
- Exclusion of, discretionary, 673-674
- Exceptions to Rule, Traditional, 645
 - accused's own statements, 660
 - business records, 658-660
 - co-conspirators' acts and declarations, 660-661
 - declaration against pecuniary or proprietary interest, 656-657
 - declaration against penal interest, 657-658
 - dying declarations, 652-653
 - fact statement was made, to prove, 646-650
 - implied assertions arising from unintended conduct, 650-652
 - res gestae*, 653-656
 - statement of adoption by accused, 661-662
 - statement of bodily or mental feelings, 658
 - state of mind, 646
- Expert opinion and, 362-363, 677
- Eyewitness identification and, 474-475
- Failure to object, effect, 678
- K.G.B.* statements, *See*
- PRIOR INCONSISTENT STATEMENTS
- Necessity, *see* Principled approach
- Negative inquiry results, 678
- Newspaper articles, 679
- Preliminary inquiry, at, 677
- Principled approach
 - discretionary exclusion of hearsay, 673-674
 - evidence otherwise inadmissible and, 672
 - generally, 643-645, 662-663
 - Khelawon*, impact of, 671
 - motive to lie and, 671-672
 - narrative, 673
 - necessity precondition, 644-647
 - reliability precondition, 667-670
 - traditional hearsay exceptions and, 673
- Rationale for rule, 645

HEARSAY EVIDENCE — *continued*
 Reliability, *see* Principled approach
 Sentencing, 676
 Spousal incompetency and, 677

HOSTILE WITNESS

Canada Evidence Act, under
 definition of “adverse”, 292
 procedure under 9(1), 293-294
 procedure under 9(2), 295-296
 section 9 generally, 290-291
 section 9(1), 291-294
 section 9(2), 295-306
 Common law, at, 289-290
Milgaard procedure, 295-296

HUSBAND AND WIFE PRIVILEGE,
See PRIVILEGE

HYPOTHETICAL QUESTIONS

Posed to expert witness, 364-376

IDENTIFICATION OF ACCUSED

Alibi evidence raising reasonable
 doubt, 140
 Crown examination-in-chief preparation
 checklist, 473-474
 Discretion to exclude, 476
 Expert testimony, when
 admissible, 456-457
 Eyewitness identification
 charge to jury, 458, 476-477
 credibility, 455
 expert evidence re, 456-457
 hearsay and, 474-475
 hypnotically induced, 475
 police deception concerning, 79
 reliability, 455-456
Sophonow Inquiry
 recommendations, 455, 461-464,
 468-469
 Factors affecting generally, 458-460
 Hypnotically induced identification, 475
 Judge sitting alone, by, 475-476
 Jury charge on identification
 evidence, 476-477
 Mistaken eyewitness identification
 leading to conviction, 455-456
 Past identification, evidence of, 474-475

Photographic displays, 461-466
 Physical characteristics, particularity
 required, 457-458
 Police line-ups
 live line-ups, 466-470
 minor-league line-up, 470
 photo-pack line-ups, 461-466
 right not to participate in, 466, 479
 Prisoner dock identification, 470-473
 Recognition evidence, 460-461
 Voice identification, 475

INFORMER PRIVILEGE, *See* PRIVILEGE

INTERPRETERS

Ineffective, 135
 Use of, 132-134

INTERVIEWING CLIENT, *See also* STATEMENTS

Advising client of relevant law,
 timing, 62-63
 Assessing personal traits, 64
 Basic witness rules, 64-66
 Belief in accused's guilt or
 innocence, 73-74
 Conduct in prisoner's dock, 66
 Courtroom conduct generally, 66
 Courtroom procedure, explanation, 69
 Cross-examination, preparation
 for, 67-68
 Demeanour on witness stand, 65
 Detained clients, advising, 78-80
 Devil's advocate, playing, 63
 Dress rehearsal, 69
 First interview, 34-35, 61-62
 Giving statement to police,
 advisability, 75-80
 Grooming for court, 70-71
 Hearsay testimony, advising client
 about, 73
 Instructions not to discuss matter, 71-72
 Issues, explanation of, 66
 Plea of guilty where not, 74-75
 Preparing for witness stand, 62-72
 Questioning, explanation of, 66-68
 Witness discussing case with
 accused, 70

JAILHOUSE INFORMANTS

- Assessing reliability of informant, 414-416
- Awaiting sentencing, 417-418
- Confirming evidence of informant's testimony, 419-420
- Cross-examination of informant, 418-437
- How informant might gain information about accused, 417-417
- Motives for co-operation, 413, 417
- Motives for lying, 410-413, 417-418
- Onus on Crown to make complete disclosure, 413-414
- Painting unflattering picture of informant by defence, 421-421
- Twisting information by informants, 417
- Vetrovec warning, 407-410, 420
 - analogous persons, 410
 - defence witness, not to be given re, 419
 - dual purpose, 408
 - in-custody informers defined, 410
 - reasons underlying need for, 408, 411
 - when required, factors considered, 409

JOURNALIST AND SOURCE PRIVILEGE, *See* PRIVILEGE**JUDICIAL INTERFERENCE**

- Assuming mantle of prosecutor, 750-751
- Bias, giving impression of, 755
- Comments during witness's evidence, 755
- Convictions quashed as result of, 756-757
- Counsel's response to, 757-760
- Cross-examination, interrupting, 753
- Examination-in-chief, interrupting, 753
- Role of trial Judge in adversary system, 749-756
- Unrepresented accused, 761-762
- Witnesses
 - called by judge, 764-765

- permitting questions from jury, 765-766
- when judge may question, 763-764

JURY TRIALS

- Decision-making studies of juries, 121, 154
- Deliberation aids, 556-561
- Evidentiary matters prior to jury selection, 344-345
- Injudicial conduct, impact upon jury, 659
- Juror interest, maintaining during cross-examination, 194-196, 248
- Jury charge
 - character evidence, 580
 - co-accused's plea of guilty, 340
 - criminal record of accused, 573-574
 - identification evidence, 476-477
 - unsavoury witness, 407-410
- Observing jury during examination-in-chief, 185
- Presenting defence theory to jury through cross-examination, 155-156

MENTAL INCOMPETENCE

- Affecting ability to testify, 645-637

MISTAKEN WITNESS

- Cross-examination approaches to, 250-257

NON-EXPERT WITNESSES

- Opinion evidence by, 681-682
 - "compendious statement of facts" exception, 682
 - police officer opinions, 681
 - subject-matter on which permitted, 681

NOVEL SCIENTIFIC EVIDENCE, 348-439**OATH-HELPING**

- Defined, 601
- Examples of, 602-605
- Exceptions to general rule, 602
- General rule, 601
- Polygraph, 605-606

- OBJECTIONS, 197-200
- PERJURY
 Perjured witness
 approaches to cross-examination, 170-171
 Threatening witness with charge of perjury, 323
- PHYSICAL EVIDENCE, 180-181
- POLICE OFFICERS
 Cross-examination of
 approaches generally, 439-440
 notebook, 440-441
 collaboration with other officers in making notes, 445-448
 impeachment using notebook, 442-445
 refreshing memory from, 441-442
 verbal statements by accused recorded therein, 448-449
 sources of information for cross-examination, 450-452
 undercover officers, 440
 Exclusion from courtroom, 452
 Expert witness, as, 404-405
 Statements by accused persons
 audiotaping statements of suspects, 448-449
 videotaping statements of suspects, 448-449
 Subverting right to silence, 79-80, 696
- PREJUDICE, *See* SIMILAR FACT EVIDENCE
- PRELIMINARY INQUIRY
 Alibi evidence
 disclosure
 at preliminary inquiry, 143-144
 by mail, 143
Charter relief, no jurisdiction to grant, 519
Criminal Code provisions governing, 538-541
 Consenting to committal for trial, 536-537
 Cross-examination, as opportunity for, 519
 Crown reasons for holding, 534-535
 Defining and isolating issues, 519-520
 Determining reliability of Crown's evidence, 518
 Discovery, 520-530
 Experts
 Crown not obliged to call, 627-528
 questions defence should ask, 528-529
 Explaining proceedings to client, 537
 Gaining feel for witnesses, 519
 Mining Crown witness for helpful information, 534
 Preparation tool for defence, as, 181-182, 517-519
 Purpose of hearing, 517
 Reading in evidence at trial, 532-534
 Testing client's story against evidence, 518
 Tying witness down to answers favourable to your case, 530-534
- PRIOR CONSISTENT STATEMENTS
 Exceptions to non-admissibility
 emotions, state of mind, 316
 narrative, 316
 physical condition, 316
 post-arrest exculpatory statements, 318-320
 recent fabrication, 316-318
 res gestae, 285
 Oath-helping not permitted, 315
 Post-arrest exculpatory statements, 318-320
- PRIOR INCONSISTENT STATEMENTS
 Addressing during examination-in-chief, 288
Canada Evidence Act, s. 9, 290-306
Canada Evidence Act, s. 10(1), 273-275
Canada Evidence Act, s. 11, 287-288
Charter right against self-incrimination, 130-131
 Cross-examining accused on, 276-280
 by co-accused, 288-289

PRIOR INCONSISTENT

STATEMENTS — *continued*

by Crown, 288

Disclosure of, 19

Evidentiary significance, 275-276

Hostile or adverse witness, confronting with, 289-290 *See also* HOSTILE WITNESS

Impeaching witness with, 281-284

making prior inconsistent statement exhibit, 280-281

qualifying answer in another part of transcript, 277

technique to avoid witness wiggling out of answer, 279-280

K.G.B. statements admissibility

generally, 84, 276

jailhouse informant, of, 416

necessity, 291, 664-667

plea discussions and, 309-310

purpose of admission, 84

refreshing memory, 227-232

reliability, 291, 667-670

voir dire, 291

Omission, impeachment by, 284-286

Preliminary inquiry testimony, 286

Transcripts, cost of, 275

Voluntariness, 288-289

PRIVATE INVESTIGATORS, 175

PRIVILEGE

Applicability generally, 607-608

Burden of proof, 608, 615

Crown privilege, *See* Public interest immunity

Informant privilege

“innocence at stake” exception, 617-621

procedure to follow, 620

police agent distinguished from informer, 618

Journalist-informant privilege, 630

Judicial privilege, 632

Litigation privilege, 631-632

Marital privilege, 532-534

Mental assessment, statements made during, 632

Procedure for determining, 608, 615

Public interest immunity

conditions for application, 629-630

investigative techniques, 625-630

section 37 of the *Canada Evidence Act*, 624-625section 38 of the *Canada Evidence Act*, 630section 39 of the *Canada Evidence Act*, 630

undercover operational methods, 627

Wigmore criteria, 629-630

Religious communications, applicability to, 608

Report of the Federal/provincial Task Force on the Uniform Rules of Evidence, 607

Solicitor-client privilege

burden of proof, 615

co-accused falling out, effect of, 612

Crown and police, between, 609

exceptions, *See also* waiver

allegations against former counsel, 613-614

criminal purpose, furthering

of, 612

involuntary disclosure, 614-615

public safety, 615-617

physical evidence not covered, 611-612

police searches in lawyers' offices, 616-617

psychiatrist retained by defence counsel, 610

relationship, required, 608-609

waiver (express)

nature of waiver, 610-611

who may waive, 609-610

waiver (implied)

third parties present, 611

when applicable, 608-609

Third parties, presence of, 611

Wigmore criteria, 608, 629-630

Work product privilege, 631-632

PROFESSIONAL RESPONSIBILITY

Asking witness to comment on credibility of another witness, 307-308

PROFESSIONAL RESPONSIBILITY

— *continued*

Confessions, introduction by Crown, 340-341

Communication with witnesses giving evidence, 342-343

Crown counsel

abusive, unfair cross-examination, 323-340

confession by accused, timing of introduction, 340-341

contents of failed plea bargain, 309-310

giving unsworn evidence of personal knowledge, 310

role and obligations generally, 1-3

Cut-throat defence, 320-322

Defence counsel

cut-throat defence, 320-322

duty of loyalty, 5-7

objection to Crown misconduct, 328

role where client admits guilt, 6-7

role and obligations generally, 1, 3-5

subpoena to Crown counsel, 309

unfair cross-examination by Crown and, 328

Defence role distinguished from prosecution, 4-5

Deliberately posing inadmissible questions, 308

Distorted view of evidence, creating, 341

Duty to cross-examine, 312-315

Lawyers as advocates, ethics, 1

Plea discussions, admissibility of, 309

Prior consistent statements

accused, 318-320

witnesses, 315-318

Suggesting facts in cross-examination that cannot be proven, 307

Threatening witness with charge of perjury, 323

PSYCHIATRIC EVIDENCE

Disposition or propensity to commit crime, to prove, 589-590

Distinctive, unusual character traits of group, to show, 589-591

General behavioural and psychological conditions, to explain, 353-355

Identity, to prove, 590, 726

PUBLIC INTEREST IMMUNITY, *See* PRIVILEGE

REBUTTAL EVIDENCE, 507-511

Character evidence, 509

Collateral questions, 509-511

Surrebuttal, 509

When allowed, 507-508

RE-EXAMINATION

Counsel speaking to witness before, 506

Relevant law, 503-504

Situations requiring, 504-506

REFRESHING MEMORY, 227-232

Past recollection recorded, 227-228

Present recollection revived, 228-232

RE-OPENING CASE

Crown, by, 513-515

Defence, by, 515-516

REPUTATION IN THE

COMMUNITY, *See*

CHARACTER EVIDENCE

RES GESTAE

Hearsay rule, as exception to, 653-656

SCREEN TESTIMONY, 89, 107

SELF-INCRIMINATION

Bodily substances incriminating accused, 707-708

Canada Evidence Act, s. 5, 705-706*Charter of Rights and Freedoms*, s. 7, 683-685, 687, 689-690*Charter of Rights and Freedoms*,

s. 13, 683

witness knowledge of, 705

Co-accused charged separately,

702-704

preliminary hearing, compellable

witness at, 703-704

Compelled testimony, 687-690

SELF-INCRIMINATION — *continued*

Cross-examination on co-accused's silence, 692-693
 Derivative evidence, 704-705
 Judicial comment regarding failure to testify, 122, 127, 639-640
 Mr. Big cases, 695-696
 Operating mind, 699
 Persistent questioning, 697-699
 Police undercover agents, 694-697
 Protected statements, 707
 Right to silence
 before and after arrest, 79, 683-687
 common law right to, 683
 exceptions to, 690-691
 legal advice to client, when detained, 685-687
 scope of, 683
 vetting Crown's questions, 693-694
 waiver of, 699-701
 Roadside co-ordination tests, 707
 Statements made for purpose of assessment, 707
 Statutorily compelled statements, 701-702
 Subterfuge by police after right expressed, 79-80, 649-647

SIMILAR FACT EVIDENCE

Accident, to refute, 722
 Admissibility, arguing, 729
 Acquittal, effect of, 728-729
 Appellate review, 732
 Charge to jury re, 730-732
 Coincidence and, 713, 724
 Collusion, 713-714, 731
 Complainant's actions, to explain, 727
 Controversial issues, 717
 Evidential link to accused, 716-717
Handy decision
 connecting factors, 711-712
 countervailing factors, 712-713
 collusion, 713-714
 generally, 709-711
 prejudice, 714-716
 Identity, to establish
 commission of crime not in issue, 723-726
 commission of crime in issue, 723

non-similar extrinsic evidence, use of, 726-727
 psychiatric evidence, 726
 Intent, to show
 defence, to rebut, 721-722, 723
 continuing malice, 720-721
 generally, 720
 motive, 720-721
 state of mind, 722-723
 Issues, controversial, 717
 Motive, to show, 720-721
 Nature of, generally, 727-728
 Pattern of behaviour, to show, 718-720
 Prejudice, 714-716
 Procedure respecting, 729
 Similarity, degree of, 711-712
 State of mind, to show, 722-723
 System, to show, 718-720

SOCIAL NETWORKING EVIDENCE

alibi evidence, 136
 cell phones, search incident to arrest, 47-50
 challenging potential jurors for cause, 57-59
Charter, s. 24(2), 38
 computers, 42-47
 cross examination on, 173
 deactivating, 62
 defence access to, 38-39
 experts, 35-36
 Facebook, 36, 40-42
 generally, 34-35
 intrusion on reasonable expectation of privacy, 39-40
Mutual Legal Assistance in Criminal Matters Act, 33-34
 private investigators, 35
R. v. Cole, 43-44
R. v. Fearon, 47-50
R. v. Morelli, 42-43
R. v. Sop, 45-46
R. v. Spencer, 46-47
R. v. Telus Communications Co., 45
R. v. Vu, 44-45
 reasonable expectation of privacy in, 40
 search warrants and warrantless searches, 37-38
 text messages, 45

SOLICITOR-CLIENT PRIVILEGE,
See PRIVILEGE

STATEMENTS, *See also* PRIOR
CONSISTENT STATEMENTS;
PRIOR INCONSISTENT
STATEMENTS

Assessment, made for purpose of, 707
Attending scene of incident with
witness, 69, 85
Compulsion of statute, made under,
701-702
Different statements to police and
defence, 87
Handwritten statements by witness, 85
Interview of witness generally
Crown counsel, by, 86-87
 in presence of witness, 88
 screening for hearsay,
 exaggerations, 86
 separate taking from each
 witness, 86
 videotaped statements, 20, 88
 will-say statements, determining
 accuracy, 87-88
 without signed statement, 85
Signed statements, 84-86
Sworn statements
 disadvantages for defence, 84-85
 when important, 84-85
Use and derivative use immunity,
704-705

STATE OF MIND

Hearsay rule, as exception to, 646

VETROVEC WARNING, 407-410

VIDEOTAPES

Demonstrative evidence, as, 546-548
Pretrial disclosure, as part of, 20, 88
Videotaped testimony of witnesses,
110-113
Videotaping police statements of
suspects, 448-449

VIEW, TAKING, 176-180

VOIR DIRE

Accused testifying at, 129-131

Evidence not part of trial, 340

WAIVER, *See* PRIVILEGE

WITNESSES

Alibi, interviewing, 135-136
Accused, whether to testify, 118-129,
See also ACCUSED
Asking witness to comment on
credibility of another witness,
307-308
Character evidence concerning, *See*
CHARACTER WITNESSES
Children, *See* CHILD WITNESSES
Collusion among witnesses, 69, 149,
294, 506, 713-714, 731
Communication by counsel with
witness giving evidence, 342-343
Crown duty to call, 116-118
Defence duty to call, 113-116
Demeanour
 credibility and, 224-226
 evidence, of the accused, 213-224
 evidence, of the complainant, 224
 when testifying, 224-225
Exclusion of witnesses, order, 261-262,
452-453
Humanizing client, witness, 108-110
Interviewing by Crown counsel, 86-87
Morin Inquiry
 recommendations, 87
Observation and recollection
 details before and after event, 210
 factors affecting, 201-203
 imagination taking over, 210-211
 probing to test accuracy, 202-203
 routine matters, 204
 showing witness was mistaken, not
 lying, 205-208, 212
 statements given long after event,
 204-205, 208-209
 unconscious partisanship, 212-213
Order of calling, 100-103
Privileged communications, *See*
PRIVILEGE
Putting witness at ease, 106-107
Refreshing memory, 272-232
 past recollection recorded, 228-232
Wigmore criteria, 228

WITNESSES — *continued*

present recollection revived, 228-232

Testimonial trustworthiness

factors affecting, 201-204

statements given long after event, 204

Threatening witness with charge of perjury, 323

Types of witnesses, *See also*

CROSS-EXAMINATION,
TECHNIQUES

biased witness, 262

character witness, *See*

CHARACTER WITNESSES

child witness, *See* CHILD

WITNESS

exaggerating witness, 263

expert witness, *See* EXPERT

EVIDENCE/WITNESSES

honest witness, 250-259

hostile witness, *See* HOSTILE

WITNESS

jailhouse informant, *See*

JAILHOUSE INFORMANT

mistaken witness, 250-259

non-expert witness, opinion evidence
by, 681-682

vain witness, 255-256

Videotaped testimony, 110-113

adoption of statement in video, 112

necessity of *voir dire* to determine
admissibility, 112

when permitted, 110-113

whether made within reasonable
time, 112

WITNESS STATEMENTS, *See*
STATEMENTS