Italics refer to the mainwork — Mewett, "Witnesses"

#### Accused

criminal prosecution and, 20 failure to call a witness and, 49 generally, 5.5(a)(i)

#### Admissibility

generally, 1.4
providing admissible evidence, 3
discretion to exclude, 3
prejudicial effect, 5
probative value, 4
relevance and, 1
relevant evidence and, 2
defined, 2

#### **Adverse Witness**

adverse party as, 83, 84, 14.4

Canada Evidence Act and, 83

cross-examination, 84

friendly witness, 86

rules governing, 86

generally, 84, 14.4(a)

prior inconsistent statement and, 83, 14.3(b)

rules governing, 84

parties, 85

#### Calling of Witnesses: see also Witnesses

```
competency, 9
criteria for, 9
cross-examination, 27
examination, 27
excluding witnesses, 35
presumption of exclusion, 35
criminal cases, 38
accused and, 38
discovery and, 37
prior to their testimony, 35
exceptions, 36
failure to call witness, 46, 2.2(a), 2.2(b), 2.2(b)(iii)
civil cases, 46
```

```
adverse inference, 46
    criminal prosecution, 47, 49
         accused and, 49
             right to remain silent, 49
         crown and, 47
             "essential to the narrative", 47
             jury comment, 47
         defence, 49
             judicial comment on failure to call, 49
jury, 31
    questions from, 31
order of, 27
re-examination, 28
re-opening the case, 32
    application to, 32
    criteria, 32
    criminal cases and, 34
    judgment entered, 32
         test, 34
splitting the case, 31
    rule against, 31
subpoenaing witnesses, 38 see also Subpoena
    civil litigation, 38
         within province, 38
    criminal litigation, 39
         within province, 39
    generally, 38
    inter-provincial, 40
         criminal cases and, 41
    setting aside, 41
         procedure, 43
             civil proceedings, 43
                  timing, 44
             criminal proceedings, 44
         reasons, 41
             abuse of process, 42
             Charter violation, 43
             health risk to witness, 43
             no material evidence, 41
    trial judge, 45
         power to call witness, 45
             criminal proceeding, 45
             guidelines, 45
```

#### **Child Witnesses** Alberta Evidence Act and, 133 assistance in giving evidence, 140 burden of proof, 142 presumption granting the order, 142 cases of a sexual nature, 142 techniques, 140 screens, 141 video-conferencing, 141 Canada Evidence Act and, 133 presumption of capacity, 133 cases of a sexual nature, 140 competence, 133, 4.2 cross-examination by accused, 143, 4.4 evidence, 133 sworn, 133 unsworn, 133 corroboration, 135 Evidence Act, (B.C.), 134 Evidence Act, (Nfld.), 137 Evidence Act, (Ont.), 136 in camera testimony, 144 Criminal Code, s. 486(2), 144 inquiry, 137, 4.3 ability to communicate, 138 federal, 137 oath, 139, 4.2 provincial, 139 telling the truth, 138, 139, 140, 4.3 oath, 133, 139, 4.2 other measures, 144 Co-accused accused, 21 co-accused and, 21 Collateral Issue: see Credibility and Weight, Relevance rule, 187 exceptions to collateral issue rule, 187 **Commission Evidence** generally, 97, 19.2 **Compellability**

accused, 20, 5.5(a)

```
Canada Evidence Act and, 20
    criminal prosecution, 20, 5.5(a)(ii)
    right to remain silent and, 20
        jury instruction and, 21-22
board members, 18, 5.2(c)
counsel, 24
    opposing, 24, 5.6
Crown officials, 16, 5.2(a)
    constitutional theory and, 16
    discovery and, 16
    high officials, 16
investigators, 19, 5.2(d)
judges, 17, 5.2(d)
    decision-making process and, 18
mediators, 19, 5.2(d)
members of parliament, 17, 5.2(a)
    in session, 17
    parliamentary privilege, 17
ombudsmen, 19, 5.2(d)
tribunal members, 18, 5.2(c)
    decision-making process, 18
        judicial review and, 18
```

# Compelling Attendance: see also Contempt of Court, Failure to Attend, Inability to Testify, Foreign Letters Rogatory, Refusal to Testify, Subpoena

accused, 20 board members, 18 Canada Evidence Act and, 104 documentary evidence, 104 oral testimony, 104 Crown officials, 16, 7.3 enforcement, 103 criteria, 104 generally, 16, 103, 7.1, 17.3 international comity, 103 judges, 17 materiality of evidence, 106 members of parliament, 17, 7.3 opposing counsel, 24 motions and, 24 self-represented lawyer, 24 prejudice, 106 procedure of taking evidence under, 107 conditions on exercise, 107

```
refusal, 107
    public policy, 107
tribunal members, 18, 7.6
Competence: see also Oath
Canada Evidence Act and, 11
capacity, 11
    recall and perceive test, 11
generally, 9, 3.1
inquiry into competence, 12
intelligibility, 10, 3.2(f)
    non-speech, 11
    speech, 12
judges, 15, 3.2(g), 5.2(b)
jurors, 15, 3.2(g)
oath, 9, 3.2(a)
perception, 11
spouses, and, 13, 3.2(c)(i), 3.2(d), 15.3(a)
    common law, 13
    defined, 15
    "marital harmony", 15
    same sex, 15
    spousal incompetence, 13
         Canada Evidence Act and, 13
             accused and spouse, 13
             communications during marriage, 14
             failure to testify, 14
             idem, 13
             offences against young persons, 14
             saving, 14
        common law and, 13
        statute and, 13
Contempt of Court: see also Compelling Attendance, Failure to Attend,
Foreign Letters Rogatory, Refusal to Testify, Subpoena
authority to punish and, 74
conduct amounting to, 74, 8.3(c)(ii)
procedures, 75, 8.3(e)
Corroboration
conviction for perjury and, 81
perjury and, 81, 9.3(b)(iv)
Credibility and Weight
assessment, 167, 11.1
```

```
credibility, 167
    "data", 167
    demeanour, role of, 167
attacking credibility, 179, 186, 11.5(d)
    good faith basis for questioning, 179, 11.5(b)
         "fishing expeditions", 179
         rules of professional conduct and, 180
    limits in questioning the accused, 185
        bad character, 186, 11.5(d)(v)
             exception, 187
                  defence puts character "in issue", 187
         explaining actions of witnesses, 185
        right to disclosure, 186
        silence of accused, 185, 11.5(d)(i)
    relevance, 179
    sexual experience, 181, 11.5(c)
         consent and, 181
         Criminal Code, ss. 276, 277, 181
             in camera s. 276 hearing, 184
             jury warning and, 184
         specific prior incident, 183
collateral issue rule, 187, 11.6, 11.7
    exceptions, 187, 11.7
        bias, 192, 11.7(c)
        interest in outcome, 192, 11.7(c)
        prior convictions, 187, 11.7(a)
             admissibility, 188-189
         prior inconsistent statements, 191, 11.7(b)
             Canada Evidence Act and, 191-192
        reputation in the community, 192, 11.7(d)
             "community" defined, 193
             jury caution, 193
             limits, 193
enhancement, 169, 11.3
failure to cross-examine, 194, 2.4
    rule in Browne v. Dunn, 194, 2.4
    weight and, 195
oath helping, 169, 11.3
    counsel and, 169
    criminal cases, 170
         good character, 170
    rule against, 169
prior consistent statements, 170, 11.4(b)
    fabrication and, 173, 11.4(c)(i)
    rule against, 170
```

```
exceptions, 171, 11.4(b)

accused on arrest, statements by, 178

cases of a sexual nature, 174

general theory of exceptions, 171

"narrative" exception, 174, 11.4(c)(iv)

prior identification of a suspect, 175, 11.4(c)(ii)

recent complaint exception, 173, 11.4(c)(iv)

videotape evidence by child witness, 176, 11.4(c)(iii)

self serving evidence, 169

rule against, 169
```

#### **Cross-examination**

failure to cross-examine, 194, 2.4 rule in *Browne v. Dunn*, 194, 2.4 weight and, 195 generally, 27, 2.4, 2.5(a)

#### Crown Privilege: see State Secrets

Crown officials, 16, 5.2(a) constitutional theory and, 16 discovery and, 16 high officials, 16

#### **Disclosure**: see **Preparation for Trial**

alibi witness, 58
disclosure, 58
test for adequate disclosure, 58
expert witnesses, 59
statutory disclosure, 59
sanctions for non-disclosure, 59
limits in questioning the accused, 185
right to disclosure, 186
locating witness, 56
criminal, 57
Crown disclosure, 57

## Evidence: see also Admissibility, Credibility, Exclusion of Evidence, Expert Witness, Hearsay Rule, Relevance

admissibility of, 1 expert, 145 generally, *1.1* relevance and, 1

#### **Examination for Discovery: see Preparation for Trial**

Crown officials, 16, 5.2(a)

```
constitutional theory and, 16 discovery and, 16 excluding witnesses, 35, 2.3 presumption of exclusion, 35 criminal cases, 38 accused and, 38 discovery and, 37
```

#### **Examination-in-Chief**

generally, 27, 2.5(a)

#### **Exclusion of Evidence**

excluding witnesses, 35, 2.3
presumption of exclusion, 35
criminal cases, 38
accused and, 38

#### **Exclusion of Witnesses**

excluding witnesses, 35, 2.3
presumption of exclusion, 35
criminal cases, 38
accused and, 38

#### Expert Opinion: see also Expert Witness

opinion, 161 admissibility, 161-162 basis of, 161 opinion evidence, 145

quality and scope, 158

#### **Expert Witness**: see also **Expert Opinion**

admissibility, 145, 10.1
expert evidence, 145
exclusionary rules, 163
necessity, 151, 10.3
behavioural characteristics, 153-156, 10.3(b)(iii)
helpfulness to trier of fact, 152
outside the experience/knowledge of a judge/jury, 152-153, 10.3(b)
question of law, 156-158
opinion, 161
admissibility, 161-162
basis of, 161
opinion evidence, 145
qualifications, 158, 10.5
independence, 159

```
weight and, 158
relevance, 146, 10.2
    prejudicial defect, 147, 10.2(b)
    probative value, 147, 10.2(a)
    reliability, 147, 10.2(b)
        novel scientific theory, 148, 10.2(b)
             generally, 148-150
             test, 148
    weight, 147, 10.7
Fact
opinion and, 6
witness and, 6
Failure to Attend: see also Contempt of Court, Compelling Attendance,
Foreign Letters Rogatory, Inability to Testify, Refusal to Testify
generally, 77, 8.1, 8.2, 8.3(c)(i)
Failure to Testify
accused, 21
    co-accused and, 21
generally, 8.1, 8.2
Foreign Letters Rogatory In Canada
generally, 103, 19.2(a), 19.2(b), 19.4(a)
Hostile Witness: see also Adverse Witness
impeaching own witness, 81
lying, 82
test, 82
Hearsay Rule
generally, 107
major exceptions to rule, 116
    admissions by party, 117
    business records, 122
    co-conspirator exception, 124
    declarations against interest, 121
    dying declarations, 127
    general approach, 116
    spontaneous utterances, 119
    statements of mental or physical condition, 120
offered to prove truth, 112
    implied assertions, 113
    non-hearsay, common examples of, 112
```

```
out-of-court statements, 109
animals, statements by, 109
basic definition, 109
instruments, statements by, 109
machines, statements by, 109
prior statements by witnesses, 111
principled exception, 127
necessity, 131
reliability, 127
```

#### Hypnosis

hypnosis, 94, 13.5 memory aids, 94

Inability to Testify: see also Contempt of Court, Compelling Attendance, Foreign Letters Rogatory, Inability to Testify, Refusal to Testify

```
civil cases, 100, 19.2(a) inability to testify, 100, 19.1 generally, 77
```

#### **Interpreters**

```
language choice, 68, 2.6(b)

Charter, section 14, 69, 2.6(b)

pre-Charter jurisprudence and, 69

common law, 68

interpreter and, 68
```

#### Memory: see also Past Recollection Recorded

hypnosis, 94, 13.5 past recollection recorded, 91, 13.3 present memory revived, 89, 13.2

#### Oath

children and, 133, 4.2 evidence erroneously not taken under oath or affirmation, 10 generally, 9, 3.2(a) history, 9 solemn affirmation, 10, 3.2(a)

#### **Opinion**

```
fact and, 6
witness and, 6
permitted opinion and, 6
```

#### **Order of Witnesses**

general, 27, 2.3

#### **Parliament**

compellability of members, 17, 18.1, 18.2, 18.3

#### Parliamentary Privilege: see Parliament

members of parliament, 17, 5.2(a) in session, 17 parliamentary privilege, 17

#### Past Recollection Recorded: see also Memory

factors, 92 generally, 91, 13.3, 13.4 trustworthiness, 91

#### **Perjury**

generally, 79, 9.1, 9.3 corroboration, 81, 9.3(b) (iv) falsity of statement, 79, 9.3(b) (i) intent to mislead, 80, 9.3(b) (iii) knowledge of falsity, 80, 9.3(b)(ii)

#### Preparation for Trial: see also Witnesses

#### Present Memory Revived: see Memory, Past Recollection Recorded

admissibility, 89 generally, 89 police officer, 90

#### Prior Consistent Statements: see Credibility and Weight

rule against, 170 exceptions, 171

### Prior Inconsistent Statements: see Credibility and Weight, Memory, Adverse Witness, Hearsay Rule

generally, 191

#### Privilege: see also Self-Incrimination, Parliament

generally, 15.3

## **Protection of Witnesses**: see also **Credibility and Weight, Privilege, Publicity, Self-Incrimination, Right to Counsel**

emotional harm, 214 courtroom and, 214

```
judicial consideration, 215
    judicial discretion and, 214
    vulnerable witnesses, 214
immunity from civil action, 205
    abuse of process and, 206
    immune to being sued for damages, 206
    law of defamation and, 205
    privilege and, 205
independent counsel, 197, 20.2
    Bill of Rights and, 198
    Charter and, 198
    "ordinary" witness, 197
    witness as party, 197
publicity, 199, 20.3, 20.3(a)
    protection from, 199
        in camera hearing, 200, 20.3(b)
             Charter and, 199, 20.3
             civil cases and, 202
             Criminal Code and, 200
             exceptional circumstances, 200
             media and, 201
        publication ban, 202
             cases of a sexual nature, 202
             civil cases and, 204
             Criminal Code and, 202
             factors, 204
                 balancing of interests, 204
             identity, 202, 30.2(c)
             media and, 202
             testimony, 202
             witnesses, 202
                 pseudonym, 199
             young witnesses, 203
statutory protections, 207
    harm, from, 207, 20.5
    intimidation, from, 207, 20.5
    retribution, from, 207
        contempt, 210
             establishment of, 212
             "likelihood of harm", 214
        intimidation, 209, 20.5
        prohibited conduct and, 209-210
        obstruction of justice, 208-209
             threats and, 209
```

#### Provincial Legislature: see Parliament

```
Publicity
generally, 20.3
protection from, 199
    witnesses, 199

Re-examination
generally, 28, 2.5(b), 17.4

Refusal to Testify: see also Compelling Attendance, Contempt of Court,
Failure to Attend, Inability to Testify, Foreign Letters Rogatory
civil liability for refusing to testify, 78
generally, 77, 8.1

Relevance: see also Admissibility, Evidence, Expert Opinion
as limiting criteria, 1
defined, 2, 1.1, 11.1
```

#### Re-opening case

```
re-opening the case, 32, 2.5(c)(i) application to, 32 criteria, 32 criminal cases and, 34, 2.5(c)(ii) judgment entered, 32 test, 34
```

Right to Counsel: see also Privilege, Self-Incrimination

Self-Incrimination: see also Privilege

#### **Spouse**

```
spouses, and, 13, 3.2, 5.5, 15.3
common law, 13
defined, 15
"marital harmony", 15
same sex, 15
spousal incompetence, 13
Canada Evidence Act and, 13
accused and spouse, 13
communications during marriage, 14
failure to testify, 14
idem, 13
offences against young persons, 14
saving, 14
```

```
common law and, 13 statute and, 13
```

#### **State Secrets**

general, 16.1

#### Subpoena: see also Compelling Attendance

```
subpoenaing witnesses, 38
    civil litigation, 38
         within province, 38
    criminal litigation, 39
         within province, 39
    generally, 38, 7.1, 7.2(a), 7.3
    inter-provincial, 40, 7.2(b), 7.3
         criminal cases and, 41
    setting aside, 41
         procedure, 43
             civil proceedings, 43
                  timing, 44
             criminal proceedings, 44
         reasons, 41
             abuse of process, 42
             Charter violation, 43
             health risk to witness, 43
             no material evidence, 41
    trial judge, 45
         power to call witness, 45
             criminal proceeding, 45
             guidelines, 45
```

#### Summons: see Compelling Attendance, Subpoena

#### **Testimony**

```
civil hearing and, 22
criminal hearing, use at, 22
hearsay rule, 107
generally, 107
major exceptions to rule, 116
admissions by party, 117
business records, 122
co-conspirator exception, 124
declarations against interest, 121
dying declarations, 127
general approach, 116
spontaneous utterances, 119
```

```
statements of mental or physical condition, 120
    offered to prove truth, 112
        implied assertions, 113
        non-hearsay, common examples of, 112
    out-of-court statements, 109
        animals, statements by, 109
        basic definition, 109
        instruments, statements by, 109
        machines, statements by, 109
        prior statements by witnesses, 111
    principled exception, 127
        necessity, 131
        reliability, 127
"predominant purpose", 23
Trial Process
generally, 17.1, 17.4
witness and, 1
Tribunals
generally, 17.4
members, 18
    compellability, 18, 17.3, 5.2(c)
Video-Conference, Testifying by
civil cases, 100, 19.3(a)
    considerations, 100
criminal cases, 102, 19.3(b)
    Criminal Code, 714.1 and 714.2, 102
generally, 99, 19.3
Weight: see Credibility and Weight
expert witness, 145
    qualifications, 158, 10.5
         weight and, 158
    relevance, 146
        weight, 147
failure to cross-examine, 194, 2.4
    rule in Browne v. Dunn, 194-195, 2.4
    weight and, 195
memory aids, 94
    hypnosis, 94
        criteria, 94
        weight, 95
```

```
Witness: see also Calling of Witnesses, Accused, Adverse Witness,
Coaccused, Cross-examination, Hostile Witness
absent witness, 97
    commission evidence and, 97
        accused and, 99
        foreign jurisdiction, 97
             rules, 98
        letters rogatory and, 98
        materiality, 97
    generally, 97
alibi witness, 58
    disclosure, 58
        test for adequate disclosure, 58
communication with, 55
    communication between witnesses, 67
        judicial order not to communicate, 67
             ramifications of breach of order, 68
                  jury direction and, 68
    during trial, 65, 6.3
        during testimony, 65
        provincial variations, 66
        rules of professional conduct and, 65
    no property in, 55
contacting, 60
    physicians, 63
        duty of confidentiality towards patients, 63
    represented witnesses, 61
        exception to no property in witness rule, 61
         improper communications, 63
    unrepresented witnesses, 60
contesting admissibility of, 50
    objecting and failure to object, 50
    voir dire, 51
expert witnesses, 59, 2.1
    statutory disclosure, 59
        sanctions for non-disclosure, 59
failure to cross-examine, 194, 2.4
interviewing, 64
judge's role in questioning, 29
    child custody cases, 30
    clarification, 30
juror's questions, 31
language choice, 68
    Charter, section 14, 69
```

pre-Charter jurisprudence and, 69

```
common law, 68
        interpreter and, 68
    official languages legislation, 70
        by right, 70
locating, 56
    civil, 56
         discovery, 56
    criminal, 57
        Crown disclosure, 57
         Charter and, 58
testimonial aids, 93
    cross-examination, 93
    documents and, 93
    memory aids, 94
        hypnosis, 94
             criteria, 94
             weight, 95
        truth drugs, 94
    procedure in use, 93
troublesome witness, 73
    adverse party as witness, 84
    adverse witness, 83
    contempt of court, 74
        conduct amounting to, 74
             examples, 74
        procedures, 75
             criminal trial, 75
             summary procedure, 75
        punishment, 74
             authority, 74
             common law power, 74
    failure to attend/ answer, 74, 76
        civil cases, 73
        criminal cases, 73
             statutory provisions, 73
        strict liability, 78
    hostile witness, 81
    lawful excuse, 77
        examples, 78
    perjury, 79
        corroboration, 81
         falsity of statement, 79
             onus on Crown, 79
                  full subjective knowledge of falsity, 80
             qualification of false statement, 80
```

"statement" defined, 79 intention to mislead, 80 mental element, 80 under threat, 80 refusal to testify, 78 civil liability, 78 tort and, 78 payment of costs, 78