

# TABLE OF CONTENTS

<i>Preface</i> .....	iii
<i>Table of Cases</i> .....	xi
<b>CHAPTER 1 – THE ROLE OF THE WITNESS</b>	
1. The Witness and the Trial Process .....	1
2. Relevance and Admissibility .....	1
(a) Relevance as a Limiting Criteria .....	1
(b) The Definition of Relevance .....	2
3. Providing Admissible Evidence .....	3
(a) The Discretion to Exclude .....	3
(b) Probative Value .....	4
(c) Prejudicial Effect .....	5
4. Fact and Opinion .....	6
<b>CHAPTER 2 – CAN THE WITNESS BE CALLED?</b>	
1. Competence .....	9
(a) The Oath .....	9
(b) Intelligibility, Perception and Capacity .....	10
(c) Spouses .....	13
(d) Judges and Jurors .....	15
2. Compellability .....	16
(a) Crown Officials .....	16
(b) Members of Parliament .....	17
(c) Judges, Board and Tribunal Members .....	17
(d) Ombudsmen, Investigators and Mediators .....	19
(e) The Accused in a Criminal Prosecution .....	20
(f) Opposing Counsel .....	24
<b>CHAPTER 3 – CALLING A WITNESS TO TESTIFY</b>	
1. The Order of Witnesses and the Form of Testimony ....	27
(a) Examination and Cross-Examination .....	27
(b) Re-examination .....	28
(c) The Trial Judge’s Role in Questioning Witnesses .....	29
(d) Questions From the Jury .....	31
(e) The Rule Against Splitting the Case .....	31
(f) Re-opening the Case .....	32
2. Excluding Witnesses Prior to their Testimony .....	35

## TABLE OF CONTENTS

(a) General Presumption of Exclusion .....	35
(b) Exceptions .....	36
3. Subpoenaing a Witness .....	38
(a) Civil Litigation — Witness Within the Province ...	38
(b) Criminal Litigation — Witness Within the Province .....	39
(c) Interprovincial Subpoenas .....	40
4. Setting Aside a Subpoena — Reasons .....	41
(a) Witness Has No Material Evidence .....	41
(b) Subpoena is an Abuse of Process .....	42
(c) Subpoena Would Cause a Charter Violation .....	43
(d) Subpoena Would Put the Witness's Health at Risk .....	43
5. Setting Aside a Subpoena — Procedure .....	43
(a) Civil Proceedings .....	43
(b) Criminal Proceedings .....	44
6. Can the Trial Judge Call a Witness? .....	45
7. The Failure to Call a Witness .....	46
(a) Civil Cases .....	46
(b) The Crown in a Criminal Prosecution .....	47
(c) The Accused in a Criminal Prosecution .....	49
8. Contesting the Admissibility of a Witness .....	50
(a) Objecting and the Failure to Object .....	50
(b) The Voir Dire .....	51

**CHAPTER 4 – COMMUNICATING WITH WITNESSES**

1. No Property in a Witness .....	55
2. Locating the Witness .....	56
(a) Civil Cases .....	56
(b) Criminal Cases .....	57
3. Contacting a Witness .....	60
(a) Unrepresented Witnesses .....	60
(b) Represented Witnesses .....	61
(c) Physicians .....	63
4. Interviewing the Witness .....	64
5. Communicating with a Witness During the Trial .....	65
6. Communication Between Witnesses .....	67
7. Witness Testimony and Language Choice .....	68
(a) Common Law .....	68
(b) Section 14 of the <i>Charter of Rights and         Freedoms</i> .....	69

TABLE OF CONTENTS

vii

(c) Official Languages Legislation ..... 70

**CHAPTER 5 – THE TROUBLESOME WITNESS**

1. The Power to Enforce the Attendance of Witnesses ..... 73

2. Punishing a Failure to Attend or Answer ..... 74

    (a) Contempt of Court: The Authority to Punish ..... 74

    (b) Conduct Amounting to Contempt ..... 74

    (c) Procedure for Punishing Contempt ..... 75

    (d) Alternative Means of Punishing the Failure to Attend or Answer ..... 76

3. Lawful Excuse ..... 77

4. Civil Liability for Refusing to Testify ..... 78

5. Perjury ..... 79

    (a) Falsity of the Statement ..... 79

    (b) Knowledge of the Falsity ..... 80

    (c) Intent to Mislead ..... 80

    (d) Corroboration ..... 81

6. The Hostile Witness ..... 81

7. The Adverse Witness ..... 83

8. The Adverse Party as a Witness ..... 84

**CHAPTER 6 – THE FORGETFUL WITNESS**

1. Present Memory Revived ..... 89

2. Past Recollection Recorded ..... 91

3. Procedure in Using Testimonial Aids ..... 93

4. Other Devices to Aid Memory ..... 94

**CHAPTER 7 – THE ABSENT WITNESS**

1. Commission Evidence ..... 97

2. Testifying By Videoconference or Other Means ..... 99

    (a) Civil Cases ..... 100

    (b) Criminal Cases ..... 102

3. Foreign Letters Rogatory in Canada ..... 103

4. Evidence from Absent Witnesses: the Hearsay Rule .... 107

5. Out-of-Court Statements ..... 109

    (a) Basic Definition ..... 109

    (b) Statements by Machines, Instruments or Animals ..... 109

    (c) Witness’s Prior Statements ..... 111

6. Offered to Prove the Truth ..... 112

    (a) Common Examples of Non-Hearsay ..... 112

(b) Implied Assertions .....	113
7. Major Exceptions to the Rule .....	116
(a) General Approach .....	116
(b) Admissions by a Party .....	117
(c) Spontaneous Utterances .....	119
(d) Statements of Mental or Physical Condition .....	120
(e) Declarations Against Interest .....	121
(f) Business Records .....	122
(g) Co-Conspirator Exception .....	124
(h) Dying Declarations .....	127
8. The Principled Exception .....	127
(a) Reliability .....	127
(b) Necessity .....	131
 <b>CHAPTER 8 – THE CHILD WITNESS</b>	
1. Competence and the Oath .....	133
2. The Inquiry .....	137
3. Techniques to Assist Children in Giving Evidence .....	140
 <b>CHAPTER 9 – THE EXPERT WITNESS</b>	
1. Admissibility of Expert Evidence .....	145
2. Relevance .....	146
(a) Probative Value and Prejudicial Effect .....	147
(b) Reliability – Field of Expertise .....	147
3. Necessity .....	151
4. Qualification of the Expert .....	158
(a) Quality and Scope of Expertise .....	158
(b) Independence .....	159
5. Basis of the Opinion .....	161
6. Exclusionary Rules .....	163
 <b>CHAPTER 10 – CREDIBILITY AND WEIGHT</b>	
1. Assessing Credibility: The Role of Demeanour .....	167
2. Enhancing Credibility: The Rule Against Self-Serving Evidence .....	169
(a) The Rule Against “Oath Helping” .....	169
(b) The Rule Against Prior Consistent Statements .....	170
3. Exceptions to the Rule Against Prior Consistent Statements .....	171
(a) General Theory of Exceptions .....	171
(b) Recent Fabrication .....	173

TABLE OF CONTENTS

ix

(c) Narrative Evidence .....	174
(d) Prior Identification .....	175
(e) Video Evidence from Children .....	176
(f) Statements by the Accused on Arrest .....	178
4. Attacking a Witness’s Credibility .....	179
(a) Relevance .....	179
(b) Good Faith Basis for Questioning .....	179
(c) Sexual Experience .....	181
(d) Limits in Questioning the Accused .....	185
5. The Collateral Fact/Issue Rule .....	187
6. Exceptions to the Collateral Fact/Issue Rule .....	187
(a) Prior Convictions .....	187
(b) Prior Inconsistent Statement .....	191
(c) Bias or Interest in the Outcome .....	192
(d) General Reputation in the Community .....	192
7. The Failure to Cross Examine (Rule in <i>Browne v. Dunn</i> ) .....	194

**CHAPTER 11 – THE PROTECTION OF WITNESSES**

1. Independent Counsel .....	197
2. Protection from Publicity .....	199
(a) <i>In Camera</i> Hearing .....	200
(b) Ban on Publication of Identity or Testimony .....	202
3. Witness Immunity from Civil Action .....	205
4. Statutory Protections from Harm, Intimidation or Retribution .....	207
(a) Obstruction of Justice .....	208
(b) Intimidation .....	209
(c) Contempt .....	210
5. Protection of Witnesses from Emotional Harm in the Courtroom .....	214
<i>Index</i> .....	219