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THE LAW OF WITNESSES AND EVIDENCE IN CANADA

Peter J. Sankoff

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Publisher's Special Release Note 2021

The pages in this work were reissued in June 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the June 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references. 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.

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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.

What's new in this update:

The release updates the following chapters: 2 (Relevance and Admissibility); 4 (Burdens of Proof and Presumptions); 6 (Competence and Compellability); 7 (Witness Testimony: Evidentiary Rules); 11 (Examining Your Own Witness); 12 (Cross-Examination of an Opening Witness); 14 (Hearsay); 16 (Opinion Evidence and the Expert Witness); 17 (Privilege); and 20 (Improperly Obtained Evidence).

Highlights: Case Law

Relevance and Admissibility — Admissibility — Admissibility on Consent — Formal Admissions: Criminal Trials — Formal admissions amount to conclusive proof of the facts asserted unless withdrawn, and withdrawal is not permitted lightly. A party can "admit" to facts in other ways, however. They can concede particular matters through examination for discovery, or by filing an affidavit in a specific proceeding. These sorts of concessions are referred to in the jurisprudence as "informal admissions", and, while important, they are far less significant. Informal admissions are simply treated as pieces of evidence, and the weight of such admissions depends upon the circumstances in which they were made. Admissions of this type do not need to be withdrawn, as they can be contradicted by the party who made them, or explained through other evidence. For this reason, it is an error of law to treat an informal admission as conclusive proof of a matter that binds the party who made it. For example, in Rosenberg v. Securtek Monitoring Solutions Inc., a witness on discovery for the defendants provided an admission that explicitly contradicted the defendant's position as described in the pleadings. The trial judge held it constituted a formal admission and undercut the only defence available, finding for the plaintiff as a result. The Manitoba Court of Appeal disagreed that the discovery testimony was in any way conclusive. In its view, "use of discovery evidence as part of a party's case at trial takes the form of an informal admission of the other party". By treating the discovery answer as a formal admission, and ignoring the defendant's other evidence as a consequence, the trial judge made a "palpable and overriding error" that required their judgment to be set aside on appeal: *Rosenberg v. Securtek Monitoring Solutions Inc.*, 2021 MBCA 100.

Witness Testimony: Evidentiary Rules — Controlling the Order of Witnesses and Exclusion of Witnesses — Can a Party be Excluded — Ordering the Accused to Testify First — In *R. v. Hudson*, a decision of the Ontario Court of Appeal, the Crown asked for, and received, permission to tell the jury that it should consider the fact that the accused had testified last, contrary to "convention", in weighing his evidence. Going further than the existing jurisprudence, Watt J.A. concluded that an adverse inference should not be drawn or invited because of the order in which the accused testified. Watt J.A. went even further in rebuking the Crown's comments about the importance of the accused testifying first for the defence. In his commentary, the author notes that judge's powerful language on this issue is extremely welcome. It should neces-

sitate re-evaluation of earlier authority suggesting that the order of testimony can constitute a reason for discounting the accused's evidence, and should apply equally to trial judges sitting alone. If "the order of defence witnesses is [solely] for the defence to determine", trial judges should think very carefully before deciding that such a decision was designed to advance a nebulous purpose. The better course of action recognizes that the exercise of constitutionally valid choices by the accused should not be used as a reason for discounting testimony provided as a result: *R. v. Hudson*, 2021 ONCA 772.

Witness Testimony: Evidentiary Rules — Witness Testimony and Language — Interpreters at Common Law and in the Rules of Civil Procedure — Qualifying an Interpreter — Without a constitutional imperative, the whispering method has remained the default form of translation in every Canadian jurisdiction owing largely to it being the least intrusive means of proceeding. Nonetheless, in *R. v. Dhingra*, the Quebec Court of Appeal sounded a clarion call for change. It held that "consecutive translation must remain the preferred method of interpretation in a criminal trial", citing the advantages of recording, the ability to clarify mistakes quickly, and the overall quality of translation. Though the Court recognized that delay was a bona fide concern, the justice system should not simply tolerate low quality interpretation because of worries about systemic delay. While Dhingra was specifically addressing trials conducted in French or English under s. 530, many of the comments made seem equally applicable to interpretation provided in accordance with s. 14 of the Charter. At the same time, Mainville J.A. recognized that trials held under the auspices of s. 530 required a special approach, owing to the status and importance of language rights in Canada. In such proceedings, consecutive interpretation is presumptively required, and no other form of interpretation can be used absent a waiver by the accused combined with evidence satisfying the trial judge "that the standards of continuity, precision, impartiality and competency of interpretation are maintained". The trial judge in such cases must verify that the proper equipment and personnel are at all times available to ensure a viable translation. Furthermore, any translation undertaken in a s. 530 trial must be recorded separately to ensure that the interpretation is preserved. Whispering translation is expressly forbidden. The author notes that in an ideal world, these standards would be applied to any case requiring an interpreter, to ensure that all parties properly understand the testimony being provided and allow for errors in translation to be corrected in rapid fashion. The current default to whispering translation is prioritizing efficiency over accuracy, and it is highly likely that justice is often being sacrificed as a consequence: *R. v. Dhingra*, 2021 QCCA 1681.

Cross-Examination of an Opposing Witness — Limitations on Cross-Examination — Limits on Questioning the Accused in a Criminal Case — Receipt of Disclosure — Some recent judgments suggest that a more expansive approach to questioning regarding any disclosure could be in the offing. For example, in *R. v. Fraser*, which involved an appeal of a murder conviction, the Crown's case included a statement by the accused to police indicating how he had acted on the night of the killing. The accused testified at trial and contradicted the statement and offering a statement which aligned more neatly with the evidence provided in disclosure. The Crown cross-examined him on this fact, and he was ultimately convicted. On appeal, the accused contended that the Crown had improperly cross-examined on the receipt of disclosure and was not entitled to do so because he had not affirmatively relied on that disclosure in his direct examination. The Court of Appeal agreed

that the accused's testimony never referred to the disclosure specifically, but disagreed "that an accused's affirmative use of disclosure is the only key that can open the door to cross-examination". Rather, "the propriety of any given cross-examination must be considered on a case-by-case basis and will depend on the circumstances". According to Frankel J.A., the cross-examination had been appropriate. After all, the Crown needed to probe the reasons for the accused suddenly being able to provide a version of events that meshed with the forensic evidence. Moreover, there was no suggestion that having access to such disclosure was in any way improper or unusual. The author notes that although the decision seems correct on its facts, he does discuss some concerns he has with this decision: *R. v. Fraser*, 2021 BCCA 432.

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