Sopinka, Lederman & Bryant

The Law of Evidence in Canada

FIFTH EDITION

Student Edition

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I. GENERALLY

§16.1 The adjudicative process in our adversarial system relies overwhelmingly on *viva voce* testimony adduced from witnesses examined before the trier of fact. This chapter analyzes the permissible scope and manner of the examination of witnesses before the court.

§16.2 In general terms, it is the role of the parties, not the court, to call and examine witnesses. At common law, counsel have wide latitude to determine what witnesses to call,[1] in what order,[2] and what evidence to adduce from them. There are no witnesses which a party must call.[3] The plaintiff, or prosecution, calls its witnesses first. In civil actions, parties in the same interest then have the right to examine the witness, but not to cross-examine. Parties adverse in interest have the right to cross-examine, a right of fundamental importance. Finally, the party producing the witness may re-examine the witness.

§16.3 The parties have a right to be present at trial. In civil cases, however, the trial judge has the authority to order any or all witnesses out of the courtroom until called to testify. It is doubtful that the trial judge has the power at common law to exclude a party. In civil cases, however, the trial judge has a discretion to order that a party who wishes to be present in the courtroom during the examination of witnesses testify first. There is no such discretion in criminal cases as the accused under s. 650(1) of the *Criminal Code*[4] is entitled to be present at all stages of the trial, including in-chambers discussions that involve the accused's vital interests.[5] This statement of the law applies to e-mails between counsel and the trial judge that do not include the accused. However, where the contents of the e-mails do not contain substantive submissions and are therefore not a part of the trial, there will not be a breach of s. 650(1).[6]

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1 *Lemay v. R.*, [1952] 1 S.C.R. 232, [1951] S.C.J. No. 42 (S.C.C.); *Harwood v. Wilkinson*, [1930] 2 D.L.R. 199, [1929] O.J. No. 100 (Ont. C.A.). There is no duty on the Crown to call witnesses listed on the back of the indictment.

2 *Briscoe v. Briscoe*, [1966] 1 All E.R. 465, [1966] 2 W.L.R. 205 (Div. Ct.).

3 In Canada, there is no duty on the Crown to call witnesses, not even the complainant or victim. That is a matter for the discretion of Crown counsel: *R. v. Cook*, [1997] 1 S.C.R. 1113, [1997] S.C.J. No. 2 (S.C.C.); *R. v. Teerhuis-Moar*, 2010 MBCA 102, 258 Man. R. (2d) 290, 263 C.C.C. (3d) 100, [2010] M.J. No. 342 (Man. C.A.), leave to appeal refused [2011] S.C.C.A. No. 18 (S.C.C.). In Australia, there is no such obligation, but the verdict can be set aside on general grounds if the failure to call a witness led to a substantial miscarriage of justice: *R. v. Apostilides* (1984), 53 A.L.R. 445 (S.C.). As to an adverse inference that may be drawn for the failure to call witnesses, see Chapter 6, Hearsay, §§ 6.471-6.473.

4 R.S.C. 1985, c. C-46.

5 *R. v. Schofield*, 2012 ONCA 120, [2012] O.J. No. 777 (Ont. C.A.); *R. v. Poulos* (2015), 124 O.R. (3d) 675, [2015] O.J. No. 1282 (Ont. C.A.).

6 *R. v. Hassanzada* (2016), 335 C.C.C. (3d) 1, [2016] O.J. No. 2057 (Ont. C.A.); *R. v. Iyamuremye*, 2017 ABCA 276, [2017] A.J. No. 877 (Alta. C.A.).