Sopinka, Lederman & Bryant

The Law of Evidence in Canada

FIFTH EDITION

Student Edition

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applications may be exercised to ensure that any challenge to credibility under s. 12 of the *Canada Evidence Act*[35] by reason of a prior conviction does not cross the line of undue prejudice to an accused witness for fear that the trier of fact may consider the accused's bad character as influencing the decision of guilt or innocence.

§1.36 What this has meant is rather than a complete abandonment of s. 12 of the *Canada Evidence Act*, trial judges are given broad discretion (taking into account factors such as the nature of the previous convictions, whether for acts of deceit or dishonesty, and their proximity in time to the present charge) to adapt a rule of evidence to ensure that its operation does not violate the rights of accused persons, the objective being substantive fairness to an accused, but at the same time, not losing sight of the objective of truth. The assessment is one of weighing the probative value in relation to credibility as against the potential prejudice that a trier of fact may improperly use such information as proof that the accused is the sort of person who would commit the crime in question.

III. THE DEVELOPMENT OF PRINCIPLES WHICH ENHANCE THE GOALS OF THE LAW OF EVIDENCE

§1.37 The law of evidence controls the presentation of facts before the court. It is made up of common law principles, statutory provisions and constitutional principles. Its purpose is to facilitate the introduction of all logically relevant facts without sacrificing any fundamental policy of the law which may be of more importance than the ascertainment of the truth.

A. Search for Truth

§1.38 The essential purpose and feature of the trial system in our society is the search for truth.[36] This is the case with respect to civil as well as criminal proceedings.[37] However, because our system is an adversarial one where fact presentation is controlled by the litigants and their counsel, this goal can be elusive in many cases. Apart from this deficiency in the framework in which the

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35 R.S.C. 1985, c. C-5.

36 For example, see *R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403, at 409, [1996] S.C.J. No. 122 (S.C.C.). But see Keith D. Kilback & Michael D. Tochor, "Searching for Truth but Missing the Point" (2002) 40 Alta. L. Rev. 333, who argue that the better view is that a criminal trial is nothing more than a systematic testing of evidence to the legal standard of proof beyond a reasonable doubt, which has nothing to do with the truth.

37 *Imperial Oil v. Jacques*, [2014] 3 S.C.R. 287, [2014] S.C.J. No. 66, at para. 24 (S.C.C.).

evidence is presented, the evidence itself may be inherently weak, due, for example, to the insincerity, imperfect recollection or perception of witnesses.

1. Unreliable Evidence

§1.39 In an attempt to limit these frailties, many of the rules of evidence are concerned with ensuring the reliability or accuracy of the evidence that the court receives. For example, the exclusionary hearsay rule seeks to keep out evidence of out-of-court statements of a person where they are offered to prove the truth of the contents of the statements and there is no ability by counsel to test the credibility of the declarant and the reliability of the statements.

§1.40 Prior consistent statements are generally excluded because they are self-serving, unreliable and easily fabricated.[38]

§1.41 Concern about unreliable evidence gave rise in part to the "confession rule". Voluntariness is a requirement of admissibility of a confession because of fear that people may confess for reasons unrelated to the truth if it is coerced.[39]

§1.42 Expert evidence, if not properly scrutinized, can be unreliable. That is so particularly when novel theories are advanced without their underlying bases being subjected to proper testing.[40]

2. Unreliable Witnesses

§1.43 In addition to our concern about unreliable evidence, witnesses themselves may not be reliable. They may lie or be mistaken. So counsel are given great latitude in cross-examining them. Counsel can ask about and prove prior convictions and prior inconsistent statements to show a lack of credibility. Counsel can even suggest things to the witness in cross-examination without having the proof to contradict him or her so long as the counsel has some good faith basis for putting the question.[41]

§1.44 Some witnesses, like accomplices or jailhouse informants, are inherently suspect and unreliable. Accordingly, evidence law tells judges that they should give *Vetrovec* warnings to a jury about accepting their evidence without some confirmatory evidence.[42]

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38 See Chapter 7, Self-Serving Evidence.
39 See Chapter 8, Confessions.
40 See Chapter 12, Opinion Evidence.
41 See Chapter 16, The Examination of Witnesses, § 16.129 ff.
42 See Chapter 17, Corroboration.

B. Ensuring an Accused Receives a Fair Trial

§1.45 In criminal cases in particular, there is a very great concern with the fairness of the trial process. The rules of evidence can assist in striking an appropriate balance between the power of the state and the individual. Thus, disclosure obligations are imposed on the Crown and it must produce to the accused all relevant information in its possession or under its control.[43] The broad principle of protection against self-incrimination for an accused and the rules and discretion restricting the use of evidence of the accused's bad character, and cross-examination of an accused witness on his or her prior criminal convictions, with appropriate cautions on the use to be made of such evidence, are examples of controls to ensure fairness.

C. Efficiency of the Trial Process

§1.46 Some rules of evidence are designed to enhance the efficiency of the trial process itself. The fundamental principle that the evidence presented to the court must be relevant to the facts in issue ensures that the court is not distracted by collateral matters. Examples of such rules are the collateral fact rule which limits the scope of the evidence that can be presented in impeaching the credibility of a witness; rules governing the process for examining witnesses to ensure that it is an orderly process; principles of *res judicata*, issue estoppel and abuse of process to ensure that there is some finality to litigation; and judicial notice[44] so that evidence is not required to prove the obvious.

D. Goals Outside of the Trial Process

§1.47 Rules limiting the evidentiary use of privileged communications are concerned with the maintenance of certain relationships considered special in society. Also, the settlement of disputes is to be encouraged. So, there is a privilege which protects the confidentiality of failed settlement negotiations or mediation. In recognition of other societal interests, an individual's privacy in personal records is sought to be protected. There are rules which govern the

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43 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83 (S.C.C.).

44 In *R. v. Spence*, [2005] 3 S.C.R. 458, [2005] S.C.J. No. 74 (S.C.C.), Binnie J. attempted to rationalize the principles applicable to taking judicial notice of "adjudicative" facts which are so notorious or generally accepted to be beyond debate on the one hand, and the looser approach to taking judicial notice of policy-oriented "legislative" facts and "social" facts on the other. The Court held that courts must be cautious about taking judicial notice even with respect to legislative and social facts if they are reasonably open to dispute and if such facts relate to an important substantial issue in the case. In such cases, it will be incumbent to prove such facts through experts rather than reliance on judicial notice.

production of documents belonging to or in the possession of the government when issues of national security or the identity of police informants are involved.[45]

E. Preserving the Integrity of the Administration of Justice

§1.48 The rule governing the admissibility of confessions made to persons in authority is an example of importance of this objective. Ensuring the voluntariness of such statements is not only an attempt to ensure their accuracy, but also restrains the use of certain interrogation procedures by the police. It is the strength of the police inducement, having regard to the particular individual and that person's circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement.[46]

§1.49 Under the old common law, courts wanted the truth and were not interested in the propriety of police conduct in obtaining evidence.[47] Today, both the modern common law and s. 24(2) of the *Charter* allow a judge to preserve the integrity of the courts by giving the court the discretion to exclude illegally obtained evidence thereby dissociating the administration of justice from such police misconduct. These values are emphasized in *R. v. Hart*,[48] wherein the Supreme Court of Canada created a new common law rule of evidence to determine the admissibility of confessions made in the course of a "Mr. Big" investigation.

IV. WHEN OBJECTIVES CLASH

§1.50 When these goals or objectives conflict with each other, there is a greater challenge in articulating the foundational principle. It has led to considerable judicial and scholarly debate as to which objective should prevail in the circumstances.[49]

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45 See, for example, *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45, [2017] S.C.J. No. 45 (S.C.C.).

46 *R. v. Oickle*, [2000] 2 S.C.R. 3, [2000] S.C.J. No. 38 (S.C.C.); *R. v. Spencer*, [2007] 1 S.C.R. 500, [2007] S.C.J. No. 11 (S.C.C.).

47 *R. v. Wray*, [1971] S.C.R. 272, [1970] S.C.J. No. 80 (S.C.C.).

48 [2014] 2 S.C.R. 544, [2014] S.C.J. No. 52 (S.C.C.). For further discussion of "Mr. Big" investigations, see Chapter 8, Confessions.

49 See David M. Paciocco, "Evidence About Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof: Part I" (2001) 80 Can. Bar Rev. 433 and "Part II" (2002) 81 Can. Bar Rev. 39; Richard C.C. Peck, "The Adversarial System: A Qualified Search for the Truth" (2001) 80 Can. Bar Rev. 456.