

**Write Your Exam Code Here:** \_\_\_\_\_

Return this exam question paper to your invigilator at the end of the exam before you leave the classroom.

**Attachments:**

1. Course Outline (4 pages)
2. Table of Contents (11 pages)
3. Canada Evidence Act (8 pages)

**THIS EXAMINATION CONSISTS OF 3 PAGES  
PLEASE MAKE SURE YOU HAVE A  
COMPLETE EXAM**

**THE UNIVERSITY OF BRITISH COLUMBIA  
PETER A. ALLARD FACULTY OF LAW  
FINAL EXAMINATION – SPRING 2019**

**LAW 476 / 507  
EVIDENCE**

**Professor Harris**

**TOTAL MARKS: 100**

**TIME ALLOWED: 3 HOURS, 10 minutes reading time**

**NOTE:**

**1. This is a closed book examination, but students may bring to the exam two double sided, or four single sided, letter-sized pieces of paper with notes. This exam has 3 pages and make sure you have all 3 pages.**

**2. THIS EXAMINATION CONSISTS OF 3 QUESTIONS.  
ANSWER ALL 3 QUESTIONS.**

LAW 476/507

**Question 1 (60 Marks)**

Alan Accused is charged with the murder of Vince Victim. Accused and Victim were both dealing drugs in the same area, and Victim was found shot to death in an alley in that area on the evening of August 7, 2018. One 22 caliber bullet was found in Victim's heart.

On August 5, 2018, Vince Victim was at a dentist appointment and his dentist noticed that a number of his teeth were chipped. The dentist asked Victim how his teeth got chipped, and Victim said as follows:

I am involved in drug dealing because I am a drug addict, and selling drugs is the only way that I can afford to buy drugs. I am on a waiting list for a drug treatment program but a spot is still months away. I am having a dispute over drug selling territory with a major drug dealer, Alan Accused. Yesterday, Accused beat me up over the territory dispute, and my teeth got chipped when he punched me repeatedly. I am going to meet Accused in an alley in a couple of days to try and settle the territory dispute, but I am really worried about this meeting because I overheard Accused talking on his phone yesterday saying something about me and "being dealt with soon".

There is a video camera which covers the entrance to the alley where Victim was found shot to death, but it frequently malfunctions. The only footage recoverable from the evening of August 7, 2018 is a short clip which shows Accused running out of the alley and throwing something down a storm drain. A police officer viewed the video clip on August 8, 2018 and went that afternoon to the storm drain and found a handgun in the drain. The police officer knew that this type of gun uses 22 caliber bullets and she therefore determined that it had likely been used in the Victim's murder.

After viewing the video and finding the gun, the police officer decided to arrest Accused. She found him on a street in the neighborhood and arrested him for the murder of Victim. The police officer told Accused that he had the right to contact a lawyer. Accused stated he did not wish to talk to a lawyer and said he preferred to say nothing right now. The police officer then told Accused that they had clear video evidence that he had killed Victim and that she was surprised he had done this because she did not view Accused as a violent person. She said there might be a lot more to this story than she knew right now. Accused then said:

Okay I did have a meeting with Victim in the alley so we could discuss a problem we were having. Victim suddenly started attacking me. I tried to shoot above him to scare him away, but somehow a bullet hit him. I then immediately left the alley because I thought that Victim might be able to still come at me.

At Accused's jury trial for Victim's murder, the Crown wishes to call all of the evidence described above, including testimony from the dentist regarding what Victim said to him, the video, the handgun found in the alley and the police officer's analysis of it, and the statement of Accused to the police officer.

LAW 476/507

**(Question 1 continued)**

**Do you think that the defence can make any reasonable arguments to exclude any of the evidence in Question 1, and do you think those arguments will be successful? Further, if this evidence is found to be admissible, should the trial judge give the jury any instructions about it?**

**Question 2 (30 Marks)**

In 2014, William Worker was in his fifth year of employment at an investment firm where he managed large client accounts. Brenda Boss, the head of the firm, told Worker to start taking small amounts of money out of client accounts and place the money in her personal account. Worker resisted for a couple of months, but then gave into the pressure from Boss and started diverting client money to Boss's personal account. Worker eventually felt bad about what he was doing, and went to the police and told them what was happening at the firm. Boss and Worker were arrested for theft and both ended up pleading guilty.

In 2018, Worker was running a small landscaping business which was doing well but started getting less business. Worker was having trouble paying his employees, so he is alleged to have started charging existing customers for work that was never done. Worker is alleged to have raised so much money from this scheme that he was able to keep the business going. Worker has been charged with fraud based on evidence of his customers that he charged for work that was not done. Worker plans to testify at his fraud trial and say that there may have been some bills for customers which included work that was not done, but that it was just a mistake because he is not good at doing paperwork and he must have billed them in error.

The Crown wishes to call Boss to testify at Worker's fraud trial. Boss intends to testify that Worker successfully managed complex accounts at her investment firm for years and testify how she eventually convinced him to help her steal money from client accounts.

**Do you think Boss's testimony will likely be admissible at Worker's fraud trial? Please explain why or why not.**

**Question 3 (10 Marks)**

**Comment on the accuracy of the following comment:**

The rules for corroborative evidence are similar for different areas of evidence.

**END OF EXAMINATION**

## Lecture I

### Introduction to Evidence

- A Qualified Search for the Truth: pp. 3-8

PBS Frontline Documentary “Death By Fire” found at <http://www.pbs.org/wgbh/pages/frontline/death-by-fire/>

## Lecture II-III

### Critical Contexts for Determining Evidentiary Issues

- The Adversarial System of Trial: pp. 1-3, 11-15
- Disclosure: pp. 3-4
- Judicial Notice: *R. v. Daley*

### The Probative Prejudicial Balance All Evidence Must Meet

- pp. 179-185; *R. v. Arp*; *R. v. Cuadra*; *R. v. Rogers*; pp. 320-324

## Lecture III-IV

### Types of Evidence

- Direct / Circumstantial: *Dhillon*, pp. 80-85
- Real Evidence: Objects, Photos, Videos, Documents: pp. 810-824 (*R. v. Penney*; *R. v. Kinkead*)

## Lecture V- VI

### Extrinsic Misconduct Evidence: Bad Character of the Accused

- General Inadmissibility: pp. 232-236
- Evidence of Habit and Similar Acts: pp. 210-216, 261-273; *R. v. Dent*

## **Lecture VII-VIII**

### **Bad Character of the Witness**

- Bad Character of Witnesses: *Canada Evidence Act (CEA)*, Section 12; pp. 1020-1022; *R. v. Cullen*; *R. v. Hankey*
- The *Vetrovec* Witness: *R. v. Murrin*; pp. 1068-1078

## **Lecture XIX**

**Post Offence Conduct:** *White v. The Queen*; *R. v. Peavoy*; *R. v. S.B.C.*; pp. 86-90

## **Lecture X**

**Identification Evidence:** *R. v. Gonsalves*; *R. v. Hay*; pp. 120-122

## **Lectures XI-XII**

### **Opinion Evidence**

- **Statutory Rules:** pp. 668-670
- **Common Knowledge:** pp. 561-565
- **General Rules for Experts:** 572-584
- **Expertise:** *R. v. Robertson*
- **Necessity:** *R. v. Pearce*
- **Ultimate Issue:** pp. 603-605; *R. v. Lucas*

## **Lectures XIII-IX**

### **Witnesses**

- **Assessing Credibility and Reliability:** *R. v. Parent*, *R. v. Perley*

### **Ability to Testify**

- **Competence, Oaths, and Compellability of Witnesses:** *CEA*, Sections 13-16.1

## **Direct Examination**

- Leading Questions: pp. 924-931
- Refreshing a Witness's Memory: pp. 931-938

## **Lecture X-XI**

**Cross-Examination:** *CEA*, Section 10; pp. 946-950, 965-969

**Re-Examination:** *R. v. Sipes*

**Collateral Facts / Rebuttal Evidence:** *R. v. Fenton*

## **Lectures XII-XIII**

### **Statement Evidence**

- Prior Inconsistent Statements and Prior Consistent Statements: *CEA*, Section 10; pp. 1038-1042, 1045-1047; *R. v. Murray*
- Attacking Credibility of Own Witness: *CEA*, Section 9(1) and 9(2); pp. 992-998; *R. v. Milgaard*; *R. v. Cassibo*; *R. v. Malik*

## **Lectures XIX-XX**

### **Hearsay**

- What is Hearsay: pp. 350-356
- Non Hearsay Uses: *R. v. Baltzer*

### **Traditional Hearsay Exceptions**

- Declarations Against Interest, Dying Declarations, Declarations in Course of Duty: pp. 436-446
- Spontaneous Declarations: 467-472
- State of Mind, Statements of Intent: *R. v. Panghali*; pp. 462-465
- Oral History in Aboriginal Title Cases: pp. 37-40

**The Principled Approach:** pp. 366-378, 381-399

### **Statutory Exceptions**

- Business Records: *CEA*, Section 30; *R. v. Wilcox*
- Prior Testimony

## **Lectures XXI-XXII**

### **Admissions and Confessions**

**Formal Admissions:** pp. 767-771

### **Informal Admissions**

- **Documentary “David and Me”:**  
<http://tvo.org/video/documentaries/david--me-feature-version>
- Probative Value: pp. 417-418; 188-190
- Voluntariness Rule: 492-505; *R. v. C.T.*
- Revisiting Probative Value: 523-542
- Admissions of Co-Accused: *R. v. Grewall*

## **Lecture XXIII**

### **Exclusion of Evidence Under *the Charter***

- Section 24(2) of the *Charter*: *R. v. Grant*

## **Lectures XXIV-XXV**

### **Privilege Against Self-Incrimination**

- Police Custody: pp. 510-515
- Out of Custody: pp. 904-910
- Witnesses: pp. 891-896
- Statutory Obligations: pp. 901-904; *Application Under Section 83.28 of the Criminal Code*

### **Privilege Based on Confidential Relationships**

- Class Privilege - Solicitor-Client: pp. 677-683; Spousal, Section 4, *CEA*
- Other Confidential Relationships: pp. 673-677
- Exceptions: pp. 706-713

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We are deeply indebted  
meticulous work in so

Don Stuart  
David M. Tanovich  
Lisa Dufraimont  
May 1, 2018

## TABLE OF CONTENTS

<i>Preface to Twelfth Edition</i> .....	iii
<b>Chapter 1 INTRODUCTION</b> .....	1
1 THE ADVERSARY SYSTEM.....	1
(a) Not a Scientific Inquiry .....	1
(b) Truth and Justice: Competing Goals? .....	3
<i>Imperial Oil v. Jacques</i> .....	5
<i>R. v. Mullins-Johnson</i> .....	8
<i>Lisa Dufraimont, Evidence Law and the Jury</i> .....	10
(c) The Role of the Trial Judge.....	11
<i>R. v. Stuckey</i> .....	12
<i>R. v. Lawes</i> .....	15
(d) The Role of Lawyers .....	18
<i>R. v. Felderhof</i> .....	18
<i>Groia v. Law Society of Upper Canada</i> .....	22
<i>R. v. Hillis</i> .....	25
2 SOURCES .....	28
<i>R. v. Salituro</i> .....	28
3 CODIFICATION.....	31
Arguments for a Comprehensive Statement.....	31
Arguments Against a Comprehensive Statement .....	33
4 APPLICABILITY OF LAWS OF EVIDENCE.....	34
(a) Proceedings before Courts and Tribunals.....	34
(b) Aboriginal Rights Cases .....	37
<i>Delgamuukw v. British Columbia</i> .....	37
<i>Mitchell v. Minister of National Revenue</i> .....	39
<b>Chapter 2 BURDENS OF PROOF AND PRESUMPTIONS</b> .....	41
1 BURDENS OF PROOF .....	41
(a) Terminology .....	41
(b) Allocation of Burdens.....	43
(i) Civil Cases.....	44
<i>Fontaine v. Insurance Corp. of British Columbia</i> .....	44
<i>Peart v. Peel (Regional Municipality) Police Services</i> <i>Board</i> .....	46
(ii) Criminal Cases .....	50
Expediency .....	51
Facts Peculiarly Within Knowledge of Accused .....	53
(c) Measure of Burden of Persuasion .....	53
(i) Balance of Probabilities Standard for Civil Cases.....	53



	<i>F.H. v. McDougall</i> .....	54
(ii)	Reasonable Doubt Standard for Criminal Cases .....	61
	<i>R. v. Lifchus</i> .....	61
	<i>R. v. Starr</i> .....	63
(iii)	Choosing Between Competing Versions .....	64
	<i>R. v. W. (D.)</i> .....	65
	<i>R. v. S. (J.H.)</i> .....	66
	<i>R. v. G.W.</i> .....	70
	<i>R. v. Nyznik</i> .....	73
	PROBLEM .....	76
(iv)	Considering Individual Pieces of Evidence .....	77
	<i>R. v. Morin</i> .....	77
(v)	Direct and Circumstantial Evidence .....	80
	<i>R. v. Munoz</i> .....	80
	<i>R. v. White</i> .....	86
	<i>R. v. Angelis</i> .....	94
	<i>R. v. Jack</i> .....	95
	<i>R. v. Hanemaayer</i> .....	99
(vi)	<i>Hodge's Case</i> .....	104
	<i>R. v. Villaroman</i> .....	105
(vii)	Preliminary Findings of Facts .....	113
	<i>R. v. Evans</i> .....	113
	<i>R. v. Arp</i> .....	114
(d)	Measure of Evidential Burden .....	114
(i)	Criminal Cases .....	114
	<i>U.S.A. v. Shephard</i> .....	115
	<i>R. v. Arcuri</i> .....	115
	PROBLEM .....	119
	Lisa Dufraimont, <i>R. v. Hay</i> .....	120
	<i>R. v. Cinous</i> .....	123
(ii)	Civil Cases .....	127
	<i>Hryniak v. Mauldin</i> .....	127
	<i>FL Receivables Trust v. Cobrand Foods Ltd.</i> .....	132
2	PRESUMPTIONS .....	134
(a)	Introduction .....	134
(b)	False Presumptions .....	136
	<i>R. v. Nicholl</i> .....	138
(c)	True Presumptions .....	140
(d)	Presumption of Innocence and <i>Charter</i> .....	144
	<i>R. v. Whyte</i> .....	144
	<i>R. v. Chaulk</i> .....	145
	Chapter 3 RELEVANCE AND DISCRETION TO EXCLUDE .....	149
1	RELEVANCE .....	149
(a)	Tests .....	149

	<i>Morris v. R.</i>
(b)	Materiality..
(c)	Multiple Rel
(d)	Relevance ar
	<i>R. v. Laval</i>
	<i>R. v. S. (R)</i>
2	DISCRETION
(a)	Introduction
(b)	Discretion to
(i)	Discreti
	<i>Cort</i>
	<i>R.</i>
(ii)	Balanci
	<i>R.</i>
	<i>R.</i>
	<i>R.</i>
	<i>R.</i>
	<i>And</i>
(iii)	Assessir
	<i>R.</i>
(iv)	Bringin
	24(2))...
	<i>R.</i>
	<i>R.</i>

## PROBLEMS...

## Chapter 4 EXCLUS

A	Character Evide
1	HABIT .....
	<i>Belknap v. A</i>
	<i>R. v. Wats</i>
	<i>Devgan v. C</i>
	<i>R. v. B. (I</i>
2	CHARACT
(a)	Admiss
	<i>R.</i>
	<i>R.</i>
	<i>R.</i>
(b)	Underl
	<i>R.</i>
(c)	Charac
	<i>Ran</i>
	<i>Ples</i>
(d)	Charac
(i)	(i)

..... 54  
 l Cases ..... 61  
 ..... 61  
 ..... 63  
 ..... 64  
 ..... 65  
 ..... 66  
 ..... 70  
 ..... 73  
 ..... 76  
 e ..... 77  
 ..... 77  
 ..... 80  
 ..... 80  
 ..... 86  
 ..... 94  
 ..... 95  
 ..... 99  
 ..... 104  
 ..... 105  
 ..... 113  
 ..... 113  
 ..... 114  
 ..... 114  
 ..... 114  
 ..... 115  
 ..... 115  
 ..... 119  
 ..... 120  
 ..... 123  
 ..... 127  
 ..... 127  
 ls Ltd. .... 132  
 ..... 134  
 ..... 134  
 ..... 136  
 ..... 138  
 ..... 140  
 ..... 144  
 ..... 144  
 ..... 145  
 XCLUDE ..... 149  
 ..... 149  
 ..... 149

*Morris v. R.* ..... 151  
 (b) Materiality ..... 154  
 (c) Multiple Relevance ..... 155  
 (d) Relevance and Social Context ..... 155  
     *R. v. Lavallee* ..... 156  
     *R. v. S. (R.D.)* ..... 158

2 DISCRETION AND LAW OF EVIDENCE ..... 168  
 (a) Introduction ..... 168  
 (b) Discretion to Exclude ..... 170  
     (i) Discretion to Exclude Read In to a Statute under the *Charter* 171  
         *Corbett v. R.* ..... 171  
         *R. v. Potvin* ..... 177  
     (ii) Balancing Probative Value and Prejudicial Effect ..... 179  
         *R. v. Seaboyer* ..... 179  
         *R. v. Grant (2015)* ..... 181  
         *R. v. Hart* ..... 186  
         *R. v. Hunter* ..... 188  
         *Anderson v. Maple Ridge (District)* ..... 190  
     (iii) Assessing Trial Fairness ..... 194  
         *R. v. Harrer* ..... 194  
     (iv) Bringing Administration of Justice into Disrepute (*Charter*, s. 24(2)) ..... 200  
         *R. v. Grant (2009)* ..... 201  
         *R. v. Harrison* ..... 201

PROBLEMS ..... 204

Chapter 4 EXCLUSIONARY CANONS ..... 209

A Character Evidence ..... 209  
 1 HABIT ..... 209  
     *Belknap v. Meakes* ..... 210  
     *R. v. Watson* ..... 211  
     *Devgan v. College of Physicians & Surgeons (Ontario)* ..... 214  
     *R. v. B. (L.)* ..... 216  
 2 CHARACTER OR DISPOSITION ..... 217  
     (a) Admissible as Directly Relevant to Material Issue ..... 217  
         *R. v. W. (L.)* ..... 218  
         *R. v. Johnson* ..... 219  
         *R. v. Brissard* ..... 220  
     (b) Underlying Assumptions Grounding Character Evidence ..... 225  
         *R. v. Clarke* ..... 226  
     (c) Character of Parties in Civil Cases ..... 226  
         *Rawdah v. Evans* ..... 227  
         *Plester v. Wawanesa Mutual Insurance Co.* ..... 228  
     (d) Character of Accused in Criminal Cases ..... 229  
         (i) Good Character Evidence ..... 229

*R. v. Profit* (Ont. C.A.) ..... 230  
*R. v. Profit* (S.C.C.)..... 231  
(ii) Bad Character Evidence..... 231  
    *R. v. Handy* ..... 232  
(iii) When Does an Accused Put His or Her Character in Issue?..... 234  
    *R. v. P. (N.A.)*..... 237  
    *R. v. A. (W.A.)*..... 238  
(iv) How Character May be Proved ..... 239  
    *R. v. Levasseur* ..... 241  
    *R. v. Brown* ..... 243  
(v) Warnings to Jury ..... 245  
PROBLEMS..... 245  
(e) Similar Facts ..... 247  
    (i) Need for Connection Between Previous Acts and Accused ..... 250  
        *R. v. Millar* ..... 250  
    (ii) How are Similar Facts Relevant? ..... 252  
        *R. v. B. (C.R.)* ..... 252  
        *R. v. Arp* ..... 257  
        *R. v. Handy* ..... 261  
        *R. v. Blake* ..... 274  
        *R. v. Titmus*..... 275  
        *R. v. Shearing*..... 276  
PROBLEMS..... 281  
    (iii) Civil Cases..... 283  
        *Johnson v. Bugera* ..... 283  
        *S. (R.C.M.) v. K. (G.M.)*..... 285  
PROBLEM ..... 287  
(f) Character of Third Party/Co-Accused..... 287  
    *R. v. Khan* ..... 289  
(g) Character of Victim ..... 292  
    (i) Self-defence..... 292  
    (ii) Sexual Assault ..... 294  
        Common Law..... 296  
        *Charter of Rights* ..... 299  
        *R. v. Seaboyer* ..... 299  
        New Legislation — Bill C-49 ..... 314  
        *R. v. Crosby* ..... 316  
        *R. v. Darrach*..... 320  
        *R. v. A.* ..... 325  
        *R. v. Temertzoglou*..... 326  
        *R. v. L.S.*..... 329  
        *R. v. Ghomeshi*..... 335  
        *R. v. Barton*..... 336  
        Bill C-51 ..... 340

PROBLEM  
B Hearsay .....  
    1 THE RULE  
        (a) History  
        (b) Reason  
        (c) Identify  
            *R.*  
            *R.*  
PROBLEM  
        (d) Approa  
            *R.*  
            *R.*  
            *R.*  
            *R.*  
            *R.*  
            *R.*  
PROBLEM:  
        (e) Establis  
            *R.*  
            *R.*  
PROBLEM  
            *Dodg*  
    2 EXCEPTIO  
        (a) Admissi  
            (i)  
            (ii)  
            (iii)  
            (iv)  
            (v)  
        (b) Exceptic  
            (i)  
            (ii)  
            (iii)

..... 230  
 ..... 231  
 ..... 231  
 ..... 232  
 or Her Character in  
 ..... 234  
 ..... 237  
 ..... 238  
 ..... 239  
 ..... 241  
 ..... 243  
 ..... 245  
 ..... 245  
 ..... 247  
 Previous Acts and  
 ..... 250  
 ..... 250  
 ? ..... 252  
 ..... 252  
 ..... 257  
 ..... 261  
 ..... 274  
 ..... 275  
 ..... 276  
 ..... 281  
 ..... 283  
 ..... 283  
 ..... 285  
 ..... 287  
 ..... 287  
 ..... 289  
 ..... 292  
 ..... 292  
 ..... 294  
 ..... 296  
 ..... 299  
 ..... 299  
 ..... 314  
 ..... 316  
 ..... 320  
 ..... 325  
 ..... 326  
 ..... 329  
 ..... 335  
 ..... 336  
 ..... 340

PROBLEMS..... 341

**B Hearsay** ..... 345

1 THE RULE ..... 346

(a) History ..... 346

(b) Reason for Rule ..... 349

(c) Identifying Hearsay ..... 350

*R. v. Khelawon* ..... 353

*R. v. Baldree*..... 356

PROBLEMS..... 362

(d) Approaches to Hearsay..... 364

*R. v. Khan* ..... 366

*R. v. B. (K.G.)* ..... 370

*R. v. Devine*..... 379

*R. v. Khelawon* ..... 381

*R. v. Bradshaw* ..... 393

*R. v. Blackman* ..... 399

*R. v. Baldree*..... 401

PROBLEMS..... 404

(e) Establishing Necessity..... 406

*R. v. Smith* ..... 406

*R. v. Parrott* ..... 407

PROBLEM ..... 413

*Dodge v. Kaneff Homes Inc.* ..... 413

2 EXCEPTIONS ..... 416

(a) Admissions ..... 417

(i) Generally..... 417

*R. v. Phillips*..... 418

*R. v. Streu*..... 420

(ii) Confessions..... 423

(iii) Implied Admissions ..... 424

*R. v. Scott* ..... 424

(iv) Statements Authorized by Party..... 428

*R. v. Strand Electric Ltd.*..... 428

(v) Statements of Person with Common Purpose..... 428

*R. v. Mapara*..... 430

(b) Exceptions where Declarant or Testimony Unavailable ..... 436

(i) Declarations Against Interest..... 436

*R. v. Demeter* ..... 437

*R. v. Lucier* ..... 438

(ii) Dying Declarations..... 439

*R. v. Aziga* ..... 440

(iii) Declarations in Course of Duty ..... 443

    General..... 443

*R. v. Larsen*..... 444

    Business Records ..... 446



..... 448  
 ..... 451  
 ..... 454  
 ..... 455  
 ..... 458  
 lity of Declarant ..... 459  
 sation ..... 459  
 motional State ..... 460  
 ..... 462  
 ..... 465  
 ed Utterances) ..... 466  
 ..... 466  
 ..... 467  
 ..... 472  
 ..... 474  
 ..... 476  
 ..... 476  
 ..... 483  
 ..... 483  
 ..... 492  
 ..... 492  
**ND**  
 ..... 507  
 ..... 507  
 ..... 510  
**RATIONS** ..... 523  
 ..... 523  
 ..... 543  
 ..... 549  
 ..... 551  
 ..... 551  
 ..... 551  
 ..... 554  
**ATORY**  
 ..... 558  
 ..... 558  
 ..... 560  
 ..... 560  
 ..... 561  
 ..... 565  
 ..... 568  
 ..... 569  
*t and Haliburton Co.* ..... 572  
 ..... 586  
 ..... 596

*R. v. Trochym* ..... 599  
*R. v. Sekhon* ..... 603  
*R. v. Bingley* ..... 606  
*Moore v. Getahun* ..... 614  
 (b) Examples ..... 620  
     *R. v. Terceira* ..... 620  
     *R. v. McIntosh* ..... 624  
     *R. v. Marquard* ..... 628  
     *R. v. D. (D.)* ..... 631  
     *R. v. Talbot* ..... 638  
     *R. v. G. (P.)* ..... 642  
     *R. v. Dimitrov* ..... 644  
     *R. v. Klymchuk* ..... 645  
     *R. v. Perlett* ..... 647  
     *R. v. Osmar* ..... 650  
     *R. v. Pearce* ..... 653  
     *R. v. Melaragni* ..... 655  
     *Nassiah v. Peel Regional Police Services Board* ..... 656  
**PROBLEM** ..... 660  
 3 **EXPERT OPINION BASED ON HEARSAY** ..... 660  
     *R. v. Jordan* ..... 660  
     *R. v. Worrall* ..... 663  
     *Mizzi v. Debartok* ..... 664  
 4 **EXAMINING EXPERT** ..... 664  
     (a) Hypothetical Questions ..... 664  
     (b) Use of Textbooks ..... 666  
         *R. v. Marquard* ..... 666  
 5 **EXCHANGE OF EXPERTS' REPORTS** ..... 668  
     *Criminal Code* ..... 668  
     *Westerhof v. Gee Estate* ..... 670  
**E Privilege** ..... 673  
 1 **PRIVILEGED COMMUNICATIONS** ..... 673  
     (a) Introduction ..... 673  
         *R. v. Gruenke* ..... 673  
     (b) Solicitor-Client Privilege ..... 677  
         (i) Generally ..... 677  
             *Descôteaux v. Mierzwinski* ..... 678  
             *Canada (Privacy Commissioner) v. Blood Tribe*  
             *Department of Health* ..... 684  
             *Goodis v. Ontario (Ministry of Correctional*  
             *Services)* ..... 686  
             *Minister of National Revenue v. Newport Pacific*  
             *Financial Group SA* ..... 688  
             *Blank v. Canada (Minister of Justice)* ..... 690

(ii) Exceptions ..... 696  
 Inadvertent Disclosure ..... 696  
*Airst v. Airst* ..... 696  
 Public Safety — Future Harm Exception ..... 699  
*Smith v. Jones* ..... 699  
 Innocence at Stake Exception ..... 706  
*R. v. McClure* ..... 706  
 Legal Advice About Police Legality ..... 710  
*R. v. Shirose and Campbell* ..... 710  
 The Common Interest Exception ..... 713  
*Pritchard v. Ontario (Human Rights Commission)* ..... 713  
 (c) Marital Communications ..... 715  
*R. v. Nero* ..... 716  
 (d) Privilege for Without Prejudice Communications ..... 721  
*Middelkamp v. Fraser Valley Real Estate Board* ..... 721  
 2 PUBLIC INTEREST IMMUNITY ..... 724  
 (a) Statutory Provisions ..... 724  
 (b) Identity of Informers ..... 726  
*R. v. Durham Regional Crime Stoppers Inc.* ..... 726  
 3 CASE-BY-CASE PRIVILEGE ..... 731  
 4 BALANCING CHARTER VALUES ..... 732  
*R. v. Mills* ..... 736  
*R. v. Shearing* ..... 748  
*R. v. McNeil* ..... 758  
 Bill C-51 ..... 759  
*M. (A.) v. Ryan* ..... 760  
**Chapter 5 MECHANICS OF PROOF** ..... 767  
**A Matters Not Requiring Proof** ..... 767  
 1 FORMAL ADMISSIONS OF FACT ..... 767  
*R. v. Falconer* ..... 767  
*R. v. G. (D.M.)* ..... 772  
 2 JUDICIAL NOTICE ..... 774  
 (a) Introduction ..... 774  
 (b) Disputed Boundaries of Judicial Notice ..... 775  
*R. v. Lavallee* ..... 781  
*R. v. Malott* ..... 784  
*Moge v. Moge* ..... 787  
*Rowe v. Gibson* ..... 791  
*Cronk v. Canadian General Insurance Co.* ..... 795  
 (c) *Spence*: Revised Standards ..... 799  
*R. v. Spence* ..... 799  
*CTV Television v. The Queen* ..... 807  
**PROBLEMS** ..... 809

**B Real Evidence**.....  
 1 AUTHENTIC  
*R. v. Nikolo*  
*R. v. Andali*  
 2 DOCUMENT  
 3 BEST EVIDE  
*R. v. Cotron*  
*R. v. Hirsch*  
 4 DEMONSTR  
*R. v. MacD*  
*McCutcheon*  
*R. v. Collins*  
 5 VIEWS.....  
**C Witnesses** .....  
 1 COMPETEN  
 (a) Introduc  
 (b) Oath .....  
*R.*  
*R.*  
 (c) Age.....  
*R.*  
 Nick  
 Witne  
*R.*  
*R.*  
*R.*  
 (d) Mental C  
*Canac*  
*R.*  
*R.*  
 (e) Interest..  
 Evide  
 (f) Spousal C  
 (g) Compelle  
 (i) 1  
 (ii) 1  
 (iii) 1  
**PROBLEMS.**  
 (iv) 1  
 (v) 1  
 (vi) 1  
 (vii) 1

..... 696  
 ..... 696  
 ..... 696  
 n Exception ..... 699  
 ..... 699  
 ..... 706  
 ..... 706  
 equality ..... 710  
 ell ..... 710  
 ion ..... 713  
 an Rights  
 ..... 713  
 ..... 715  
 ..... 716  
 nications ..... 721  
 state Board ..... 721  
 ..... 724  
 ..... 724  
 ..... 726  
 pers Inc. .... 726  
 ..... 731  
 ..... 732  
 ..... 736  
 ..... 748  
 ..... 758  
 ..... 759  
 ..... 760  
 ..... 767  
 ..... 767  
 ..... 767  
 ..... 767  
 ..... 772  
 ..... 774  
 ..... 774  
 ..... 775  
 ..... 781  
 ..... 784  
 ..... 787  
 ..... 791  
 e Co. .... 795  
 ..... 799  
 ..... 799  
 ..... 807  
 ..... 809

**B Real Evidence** ..... 810  
 1 AUTHENTICATION ..... 810  
     *R. v. Nikolovski* ..... 813  
     *R. v. Andalib-Goortani* ..... 818  
 2 DOCUMENTS ..... 825  
 3 BEST EVIDENCE RULE ..... 826  
     *R. v. Cotroni* ..... 827  
     *R. v. Hirsch* ..... 828  
 4 DEMONSTRATIVE EVIDENCE ..... 835  
     *R. v. MacDonald* ..... 835  
     *McCutcheon v. Chrysler Canada Ltd.* ..... 841  
     *R. v. Collins* ..... 844  
 5 VIEWS ..... 846  
  
**C Witnesses** ..... 848  
 1 COMPETENCE AND COMPELLABILITY ..... 848  
     (a) Introduction ..... 848  
     (b) Oath ..... 848  
         *R. v. Kalevar* ..... 850  
         *R. v. J. (T.R.)* ..... 852  
     (c) Age ..... 854  
         *R. v. W. (R.)* ..... 856  
         Nick Bala et al., Bill C-2: A New Law for Canada's Child  
         Witnesses ..... 859  
         *R. v. Levogiannis* ..... 868  
         *R. v. L. (D.O.)* ..... 872  
         *R. v. F. (C.)* ..... 873  
     (d) Mental Capacity ..... 876  
         *Canada Evidence Act*, s. 16 ..... 876  
         *R. v. I. (D.)* ..... 877  
         *R. v. Parrott* ..... 883  
     (e) Interest ..... 885  
         Evidence Acts ..... 886  
     (f) Spousal Competence and Compellability ..... 887  
     (g) Compellability of Accused ..... 888  
         (i) History of Privilege Against Self-incrimination ..... 888  
         (ii) *Canada Evidence Act* ..... 889  
         (iii) Sections 11(c) and 13 of *Charter* ..... 891  
             *R. v. Nedelcu* ..... 894  
 PROBLEMS ..... 899  
     *Knutson v. Registered Nurses Assn. (Sask.)* ..... 900  
     (iv) Pre-trial Right to Silence: *Charter*, s. 7 ..... 901  
     (v) Principle Against Self-incrimination: *Charter*, s. 7 ..... 901  
     (vi) No Adverse Inference from Pre-trial Silence ..... 904  
         *R. v. Turcotte* ..... 904  
     (vii) No Adverse Inference from Trial Silence ..... 910



	<i>R. v. Noble</i> .....	912	
	(viii) Comments on Accused's Failure to Testify .....	917	
	<i>R. v. Prokofiew</i> .....	919	(c) Character
2	MANNER OF QUESTIONING .....	923	(i)
	(a) Leading Questions .....	924	(ii)
	<i>R. v. Rose</i> .....	927	(iii)
	(b) Refreshing Memory/Past Recollection Recorded .....	931	
	<i>R. v. Wilks</i> .....	931	
	<i>R. v. B. (K.G.)</i> .....	937	
	<i>R. v. Mattis</i> .....	938	
	PROBLEMS .....	941	
	(c) Adoption .....	942	(d) Defects i
	<i>R. v. McCarroll</i> .....	942	4 SUPPORTIN
	(d) Cross-examination .....	945	(a) General
	<i>R. v. Lyttle</i> .....	946	<i>R.</i>
	<i>R. v. R. (A.J.)</i> .....	950	<i>R.</i>
	<i>R. v. Osolin</i> .....	955	(b) Exceptio
	<i>R. v. Mills</i> .....	956	(i)
	<i>R. v. Shearing</i> .....	956	
	<i>R. v. Schmaltz</i> .....	957	
	(e) Duty to Cross-examine (Rule in <i>Browne v. Dunn</i> ) .....	965	(ii)
	<i>R. v. McNeill</i> .....	965	
	(f) Collateral Facts Rule .....	969	(iii)
	<i>R. v. R. (D.)</i> .....	971	
	<i>R. v. MacIsaac</i> .....	973	
	<i>R. v. A.C.</i> .....	977	(iv)
	<i>R. v. D.S.</i> .....	977	
	PROBLEMS .....	978	(v)
3	IMPEACHMENT .....	979	
	(a) Prior Inconsistent Statements .....	979	5 DEMEANO
	<i>Canada Evidence Act</i> , ss. 10, 11 .....	980	<i>R. v. Norma</i>
	(i) Impeaching One's Own Witness .....	981	<i>R. v. S. (N.</i>
	<i>Anderson v. Flying Saucer Drive-in Ltd.</i> .....	982	<i>R. v. Santh</i>
	<i>R. v. Malik</i> .....	984	6 CORROBOI
	<i>R. v. Osa</i> .....	987	(a) When R
	(ii) <i>Canada Evidence Act</i> , s. 9(1) .....	989	(i)
	<i>R. v. Figliola</i> .....	989	(ii)
	(iii) <i>Canada Evidence Act</i> , s. 9(2) .....	992	(iii)
	<i>R. v. S. (C.L.)</i> .....	992	
	PROBLEM .....	998	
	(b) Bias .....	999	(iv)
	<i>R. v. Ghorvei</i> .....	1001	
	(i) Motives of Accused and Complainants .....	1003	(v)
	<i>R. v. Jackson</i> .....	1003	
	<i>R. v. D.S.</i> .....	1003	(vi)
	<i>R. v. Ellard</i> .....	1005	(vii)

..... 912  
 re to Testify ..... 917  
 ..... 919  
 ..... 923  
 ..... 924  
 ..... 927  
 Recorded ..... 931  
 ..... 931  
 ..... 937  
 ..... 938  
 ..... 941  
 ..... 942  
 ..... 942  
 ..... 945  
 ..... 946  
 ..... 950  
 ..... 955  
 ..... 956  
 ..... 956  
 ..... 957  
*re v. Dunn*) ..... 965  
 ..... 965  
 ..... 969  
 ..... 971  
 ..... 973  
 ..... 977  
 ..... 977  
 ..... 978  
 ..... 979  
 ..... 979  
 ..... 980  
 ss ..... 981  
*rive-in Ltd.* ..... 982  
 ..... 984  
 ..... 987  
 ..... 989  
 ..... 989  
 ..... 992  
 ..... 992  
 ..... 998  
 ..... 999  
 ..... 1001  
 plainants ..... 1003  
 ..... 1003  
 ..... 1003  
 ..... 1005

*R. v. Laboucan* ..... 1006  
 (c) Character of Witness ..... 1012  
     (i) Extrinsic Evidence ..... 1012  
         *R. v. Clarke* ..... 1012  
     (ii) Evidence Elicited on Cross-examination ..... 1014  
     (iii) Accused as Witness ..... 1015  
         *Canada Evidence Act*, s. 12 ..... 1016  
         *R. v. McFadyen* ..... 1020  
         *Hutton v. Way* ..... 1022  
         *Ontario Evidence Act*, s. 22 ..... 1024  
         *R. v. Underwood* ..... 1024  
 (d) Defects in Capacity of Witness ..... 1026  
 4 SUPPORTING OR REHABILITATING CREDIBILITY ..... 1028  
 (a) General Rule ..... 1028  
     *R. v. Béland* ..... 1028  
     *R. v. Tash* ..... 1034  
 (b) Exceptions ..... 1038  
     (i) To Rebut Allegation of Recent Fabrication ..... 1038  
         *R. v. Stirling* ..... 1038  
         *R. v. Ellard* ..... 1041  
     (ii) Prior Identification ..... 1042  
         *R. v. Tat* ..... 1042  
     (iii) Part of Narrative ..... 1043  
         *R. v. Dinardo* ..... 1043  
         *R. v. Curto* ..... 1045  
     (iv) Exculpatory Arrest Statement ..... 1047  
         *R. v. Edgar* ..... 1047  
     (v) Recent Complaint ..... 1052  
         *R. v. O'Connor* ..... 1054  
 5 DEMEANOUR AS GUIDE TO CREDIBILITY ..... 1057  
     *R. v. Norman* ..... 1058  
     *R. v. S. (N.)* ..... 1059  
     *R. v. Santhosh* ..... 1066  
 6 CORROBORATION ..... 1068  
 (a) When Required? ..... 1068  
     (i) Treason ..... 1069  
     (ii) Forgery ..... 1069  
     (iii) Accomplices ..... 1070  
         *Vetrovec v. R.* ..... 1071  
         *R. v. Khela* ..... 1074  
     (iv) Informers ..... 1078  
         *R. v. Brooks* ..... 1078  
     (v) Primary Witnesses in Sex Cases ..... 1081  
         *R. v. S. (F.)* ..... 1083  
     (vi) Unsworn Evidence of Children ..... 1083  
     (vii) Miscellaneous Provisions ..... 1084

# Canada Evidence Act

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

An Act respecting witnesses and evidence

## Short Title

**Marginal note:**Short title

**1** This Act may be cited as the *Canada Evidence Act*.

- R.S., c. E-10, s. 1.

## Part I

Application

**Marginal note:**Application

**2** This Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.

- R.S., c. E-10, s. 2.

Witnesses

**Marginal note:**Interest or crime

**3** A person is not incompetent to give evidence by reason of interest or crime.

- R.S., c. E-10, s. 3.

**Marginal note:**Accused and spouse

- **4 (1)** Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

- **Marginal note:**Spouse of accused

**(2)** No person is incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused.

- **Marginal note:**Communications during marriage

**(3)** No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

- **(4) and (5)** [Repealed, 2015, c. 13, s. 52]

- **Marginal note: Failure to testify**

(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

- R.S., 1985, c. C-5, s. 4;
- R.S., 1985, c. 19 (3rd Supp.), s. 17;
- 2002, c. 1, s. 166;
- 2014, c. 25, s. 34, c. 31, s. 27;
- 2015, c. 13, s. 52.

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**Marginal note: Expert witnesses**

7 Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding.

....

**Marginal note: Adverse witnesses**

- 9 (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

- **Marginal note: Previous statements by witness not proved adverse**

(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

- R.S., 1985, c. C-5, s. 9;
- 1994, c. 44, s. 85.

**Marginal note: Cross-examination as to previous statements**

- 10 (1) On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it

is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

- **Marginal note:Deposition of witness in criminal investigation**

(2) A deposition of a witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer shall be presumed, in the absence of evidence to the contrary, to have been signed by the witness.

- R.S., 1985, c. C-5, s. 10;
- 1994, c. 44, s. 86.

**Marginal note:Cross-examination as to previous oral statements**

11 Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

- R.S., c. E-10, s. 11.

**Marginal note:Examination as to previous convictions**

- **12 (1)** A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the Contraventions Act, but including such an offence where the conviction was entered after a trial on an indictment.

- **Marginal note:Proof of previous convictions**

(1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

- **Marginal note:How conviction proved**

(2) A conviction may be proved by producing

- (a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if it is for an offence punishable on summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if on indictment, was had, or to which the conviction, if summary, was returned; and

- o (b) proof of identity.

....

#### Oaths and Solemn Affirmations

##### **Marginal note: Who may administer oaths**

**13** Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before that court, judge or person.

- R.S., c. E-10, s. 13.

##### **Marginal note: Solemn affirmation by witness instead of oath**

- **14 (1)** A person may, instead of taking an oath, make the following solemn affirmation:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

- **Marginal note: Effect**

**(2)** Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath.

- R.S., 1985, c. C-5, s. 14;
- 1994, c. 44, s. 87.

##### **Marginal note: Solemn affirmation by deponent**

- **15 (1)** Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, does not wish to take an oath, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit the person to make a solemn affirmation in the words following, namely, "I, , do solemnly affirm, etc.", and that solemn affirmation has the same force and effect as if that person had taken an oath.

- **Marginal note: Effect**

**(2)** Any witness whose evidence is admitted or who makes a solemn affirmation under this section or section 14 is liable to indictment and punishment for perjury in all respects as if he had been sworn.

- R.S., 1985, c. C-5, s. 15;
- 1994, c. 44, s. 88.

##### **Marginal note: Witness whose capacity is in question**

- **16 (1)** If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
  - (a) whether the person understands the nature of an oath or a solemn affirmation; and
  - (b) whether the person is able to communicate the evidence.
- **Marginal note:Testimony under oath or solemn affirmation**

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.
- **Marginal note:Testimony on promise to tell truth**

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.
- **Marginal note:No questions regarding understanding of promise**

(3.1) A person referred to in subsection (3) shall not be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
- **Marginal note:Inability to testify**

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.
- **Marginal note:Burden as to capacity of witness**

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.
- R.S., 1985, c. C-5, s. 16;
- R.S., 1985, c. 19 (3rd Supp.), s. 18;
- 1994, c. 44, s. 89;
- 2005, c. 32, s. 26;
- 2015, c. 13, s. 53.

Previous Version

**Marginal note:Person under fourteen years of age**

- **16.1 (1)** A person under fourteen years of age is presumed to have the capacity to testify.
- **Marginal note:No oath or solemn affirmation**

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

- **Marginal note: Evidence shall be received**

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

- **Marginal note: Burden as to capacity of witness**

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

- **Marginal note: Court inquiry**

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

- **Marginal note: Promise to tell truth**

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

- **Marginal note: Understanding of promise**

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

- **Marginal note: Effect**

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

- 2005, c. 32, s. 27.



## **Business records to be admitted in evidence**

- **30 (1)** Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.
- **Marginal note: Inference where information not in business record**

**(2)** Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.
- **Marginal note: Copy of records**

**(3)** Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

  - **(a)** an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or
  - **(b)** a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.
- **Marginal note: Where record kept in form requiring explanation**

**(4)** Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is

  - **(a)** an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or
  - **(b)** a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.
- **Marginal note: Court may order other part of record to be produced**

(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.

• **Marginal note: Court may examine record and hear evidence**

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

• **Marginal note: Notice of intention to produce record or affidavit**

(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

• **Marginal note: Not necessary to prove signature and official character**

(8) Where evidence is offered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

• **Marginal note: Examination on record with leave of court**

(9) Subject to section 4, any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

• **Marginal note: Evidence inadmissible under this section**

(10) Nothing in this section renders admissible in evidence in any legal proceeding

- (a) such part of any record as is proved to be
  - (i) a record made in the course of an investigation or inquiry,
  - (ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,
  - (iii) a record in respect of the production of which any privilege exists and is claimed, or
  - (iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be,