RULES OF EVIDENCE

Resources: *Canada Evidence Act*: http://laws.justice.gc.ca/en/C-5/

INTRODUCTION

Evidence Defined

One useful, but general definition is: The testimony - whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute.

TYPES OF EVIDENCE

Evidence falls basically into two categories:

1. **Direct evidence** is something you actually see taking place. For instance, you catch a person breaking into a grocery store.
2. **Indirect evidence** is evidence that is not direct, the vehicle of the accused was seen in the area of the crime at the time of the offence. Also called circumstantial evidence.

CIRCUMSTANTIAL EVIDENCE

Definition: Any item of evidence other than the testimony of an eye witness to a material fact, from which an inference may be drawn.
Admissibility: Same rules regarding relevance and admissibility apply as for real evidence.
Relevance: Relevant if a reasonable deduction or inference can be drawn to the material fact, from the fact proven by circumstance.
Application: Mainly used for purpose of identification. Does not apply to issue of intent, Doctrine of Recent Possession, or where there is direct evidence of identity.

Jurisprudence: *Hodge's Case* (1838), 168 E.R. 1135:
"In a case made up entirely of circumstantial evidence, before the accused could be found guilty, the jury must be satisfied, not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion, than that the prisoner was the guilty person."

INTRODUCING EVIDENCE IN COURT

Evidence can be introduced into court in one of three ways. It is important to remember that all evidence is introduced through a witness. These formats are;

1. **Oral Testimony**: Under questioning, the witness makes a verbal statement of evidence pertaining to the facts in issue.
2. **Documentary**: It is the written content of a document submitted to the court as evidence. When the documents are accepted by the court, the contents are "read in" to the court record, i.e. Breathalyzer Certificate, etc.

DOCUMENTARY EVIDENCE

Definition: A document adduced in evidence to prove the truth of its contents. Original must whenever possible be produced (Best Evidence Rule).

Authority: Statutory provisions to admit various types of commercial and public documents: Sec's. 19-36 - Canada Evidence Act.
Admissibility: Same rules apply as for other evidence.
Relevance: Subject to same rules as other evidence.
Application: Depends on rules of admissibility, i.e. hearsay and opinion evidence rules.

3. **Real Evidence**: A physical item that appeals directly to the senses of the court, such as a knife, torn clothing, or other exhibits.

REAL EVIDENCE
Definition: Any item of evidence, other than testimony of persons, including objects or places (or sketches thereof) which is observed by the jury either in or out of court.
Examples: photographs, sketches, surveys, observations of persons or things in court, articles found in possession of accused, articles found at the scene of the crime, articles connecting accused with the crime, videotapes/tape recordings, documents, etc. This includes DNA evidence which is gaining wider acceptance by the courts.
Admissibility: Must be relevant to one or more of the facts in issue.
Relevance: Must be proved.

PRESENTATION OF TESTIMONY
Evidence, in the form of testimony, from each witness is presented in four stages, under the control of the respective counsel. These are:
1. **Examination-In Chief**: Conducted by the side calling the witness.
Purpose: to bring out all the evidence the witness has, regarding the facts in issue.
2. **Cross-Examination**: By the side not calling the witness.
Purpose:
a) to weaken, qualify or destroy the evidence given by that witness;
b) to establish the party's own case;
c) to test or attack the credibility of the witness.
3. **Re-Examination**: Conducted by the side who first called the witness.
Purpose: to clear up any ambiguity or confusion as a result of the cross-examination.
4. **Re-Cross-Examination**: By the Counsel not calling the witness.
Purpose: to clear up any confusion resulting from the Re-examination.

REBUTTAL OF EVIDENCE
This is a separate category of evidence, presented by the prosecution, when required, to refute or disprove some aspect of the defence case. Four criteria must be adhered to when presenting rebuttal evidence.
These criteria for presenting Rebuttal Evidence are that it must be presented:
a. At the conclusion of the defence.
b. When defence presents unforeseen evidence.
c. With permission of the court.
d. To "rebut" or disprove new or other defence evidence.

RULES OF EVIDENCE
Our Rules of Evidence have evolved over many years, predominantly through decisions

of judges in specific cases. Occasionally these have been influenced by changes in public attitudes, but they are mainly Judge made.
The law of criminal evidence has its origins in the British Common Law, as stated in Sub-section 8(2) of the Criminal Code.

It is clear, under our system, that the rules of evidence must be followed in substance and spirit. Every rule is enforced to ensure the fairness of the trial and if they are broken, the trial results may be overturned.
The sanctity of these evidence rules is established in *R. v. Barnes* (1970).

R. v. Barnes
It is often better that one guilty man should escape, than that the general rules, evolved by the dictates of justice for the conduct of criminal prosecutions, should be disregarded and discredited. *(R v. Barnes*, 1970)
Generally speaking, neither the prosecution nor defence can waive the rules of evidence.

RELEVANCE AND ADMISSIBILITY
Before evidence is accepted by the court, it must be;
Relevant: Of such a nature to afford evidence tending to prove or disprove the facts in issue.
Admissible: Entitled or worthy to be admitted, allowed or conceded according to the rules of evidence.
The general rule is that all evidence that is relevant to the issue is admissible, unless specifically excluded.

Sub-section 24(2) Charter of Rights
The admissibility of evidence is also addressed in Sub-section 24(2) of the Canadian Charter of Rights and Freedoms. It states that evidence obtained in a manner that infringed or denied any rights guaranteed under the Charter, should be excluded, if there is a chance its acceptance would bring the administration of justice into disrepute.
On the other hand, some recent higher court rulings, including the Supreme Court of Canada, have accepted real evidence which had been obtained after individual rights were infringed to a minor degree.
Other rulings have admitted real evidence obtained in advance of a Charter violation, especially when the evidence was seized during the preliminary stages of an investigation.

Seriousness of Violation
In some cases the courts have ruled that there was a greater possibility of the administration of justice being brought into disrepute, by rejecting the evidence, than by accepting it. In all cases though, the courts have compared the seriousness of the offence with the seriousness of the Charter violation.

R. v. Harrison http://scc.lexum.org/en/2009/2009scc34/2009scc34.html (The cocaine case)

SOURCES OF RULES OF EVIDENCE

Our Rules of Evidence emanate from a variety of sources including;

1. Case Law: The greatest source of our rules. Decisions handed down by judges as to admissibility and application of evidence.
2. Canada Evidence Act: This is the Statute which codifies the Rules of Evidence.
3. Provincial Rules of Evidence: Where these are not inconsistent with the Canada Evidence Act.
4. Statutes: Various statutes contain Rules of Evidence to be acted upon by the courts.

WHAT DOES EVIDENCE TRY TO PROVE?

Facts in Issue

These are the facts that must be proved to constitute a charge. They represent the elements of the offence, or the points of the Information that must be proved in order to find the accused guilty. It is the responsibility of the Crown to ensure all the points are covered. Consider this example.

Example: Elements of Dangerous Driving, Sub-section 249(1) C.C.

vehicle driven on a road; manner dangerous to the public; considering nature, condition and use; amount of reasonably expected traffic.

These are the facts in issue. To find the accused guilty of Dangerous Driving, you would have to prove each of these points.

PRESUMPTIONS

There are some instances, permitted by the Rules of Evidence, when the court must make presumptions about a case. These fall into two categories which are:

1. Presumption of Fact - Common sense conclusions drawn from the circumstances of the case and the evidence presented.
2. Presumption of Law - Once it is shown that a person did commit an offence, in some cases, the court will presume intent.

Example: Break and Enter is an example of this presumption. When the evidence shows an accused broke into a place, the law presumes there was an intent to commit an indictable offence. Similar presumptions appear in other statutes.

When you are identifying witnesses to present evidence, you must ensure they are both **COMPETENT** and **COMPELLABLE**. These terms are important to understand, because they dictate the usefulness of a witness.

COMPETENT AND COMPELLABLE

For our purposes we can define these terms as:

Competent: Witness CAN testify. Anyone legally able to give evidence. Testimony has weight and MAY be accepted by the Court. Unless specifically excluded for some legal reason, it is assumed that everyone is a competent witness.

Compellable: Witness MUST testify. Anyone who can be legally compelled to attend and give evidence. There is a general assumption that a witness who is competent to give evidence is also compellable.

Spouses Not Competent

There is a common-law rule that spouses are not competent or compellable to give testimony against their married partner. This means that even if a wife wants to give evidence voluntarily against her husband, the court will not accept it. *R. v. Marchand*) (1980), 55c.c.c. (2d) 77.

In the case of *R. v. Lonsdale*, (1973), 15c.c.c.(2d) 201, (ALTA S.C. APP. DIV.), the Court stated that the common-law rule applies even if the marriage takes place after the alleged offence, but before the trial.

This protection does not apply to common-law relationships, where both spouses are competent and compellable. *R.. v. Coffin*, (1955) 21 C.R. 333 (QUE. C.A.)

Sub-section 4(1) CEA, elaborates further on this question of spousal competence. Note the specific reference in this Section to the Defence. This means that husbands and wives are not competent or compellable for the prosecution.

There are exceptions to this common law rule, however, when a spouse is competent to testify for the prosecution. This is addressed in Sub-section 4(2).

Husbands and Wives Competent

In specified cases, a husband or wife can be compelled to testify against the other. Sub-section 4(5) expands this list of exceptions to include other circumstances. It states that the married spouse of a person charged, may give evidence where the "Common-Law" so permits. It actually refers to cases where a husband or wife commits an offence that threatens the person, liberty or health of their partner. Under the Common-Law the wife can testify, because her health is threatened. Other offences that fall into this category are:

Section 237 (Infanticide)
Section 239 (Attempted Murder)
Sections 266-268 (Assaults - Various Degrees)
Section 279 (Kidnapping)

This list is not meant to be definitive, but merely to illustrate the intent of Sub-section 4(5) of the Canada Evidence Act.

Victim Under 14

The final exception to the spousal competence rule is covered in Sub-section 4(4) CEA. This establishes the competence and compellability of a spouse whose married partner is charged with an assault type offence, where the victim is under fourteen years of age.

Privileged Communication

The law recognizes the private nature of certain types of communication and exempts them from court testimony. These include communication between married couples and between lawyer and client. Sub-section 4(3) details this privilege for spouses. Note the emphasis here on "during the marriage". This section raises a number of questions that need to be clarified based on court rulings. Keep these points in mind!

1. Sub-section 4(3) applies only as a witness for the defence. When a spouse is compellable under Sub-section 4(2), as a prosecution witness, marital communication is not privileged. The spouse must answer all question relevant to the case. (*R. v. St. Jean* (1976), 32 C.C.C. (2d) pg. 438, QUE. C.A.)

2. Communication privilege extends only to the person receiving it. The person giving the communication may reveal that information on their own volition. (*R. v. Kanester*, (1966), 4 C.C.C. 231, (BCCA) Approved by SCC 1967, 1 C.C.C. 97.)

3. Privilege ends when the marriage ends in divorce or death.

Lawyer/Client Communication
Professional communication between a solicitor and client, for the purpose of obtaining legal advice, is privileged.

Doctor/Patient Communication
There is no privilege of communication between a physician and his or her patient recognized in Common-Law.

Priest/Penitent Communication
The privilege for confessions made to a priest has been almost universally denied for over 300 years. However, there is a general reluctance to enforce compellability in these cases. This privilege is recognized by statute in both Quebec and Newfoundland.

Public Interest - Sec. 37 CEA
Police Informants
Common-Law holds that the names of persons who are channels through which crime is detected, should not be disclosed. This protects police officers from revealing the names of their informants, and witnesses from being asked if they are informers.
In these cases, the Court may compel the disclosure, if it is deemed necessary to show the innocence of an accused.

Responding to Questions
When giving testimony in court, under what circumstances can the witness refuse to answer a question? This is defined in Sub-section 5(1) CEA: a witness MUST answer all questions posed. There are no circumstances in the Canada Evidence Act when a witness may refuse to answer a question.

Must Answer
Sub-section 5(2) provides protection to those who object to answering because their answer might incriminate them in criminal or civil litigation. It goes on to state that in those cases, the evidence will not be admissible in any subsequent proceedings.
This protection is also guaranteed by Section 13 of the *Canadian Charter of Rights and Freedoms*. The only exception to this protection is where the evidence presented leads to a prosecution for perjury.

Previous Convictions
There is also a stipulation in Section 12 of the Canada Evidence Act for the witness to be questioned about previous convictions. The main point of Section 12 is that if the witness denies the conviction or refuses to answer, the other party may prove their assertion.

AGE AND MENTAL CAPACITY

Occasionally you will encounter a witness who is either very young, or whose mental capacity is questionable. Sub-section 16(1) CEA describes the two criteria used by the Court to determine the competence of such a witness:

1. Ability to understand the nature of an oath or solemn affirmation, and
2. Ability to communicate the evidence. Assessment of these criteria creates three possibilities in respect to testifying. These are identified below.

a. The witness understands the nature of the oath and is able to communicate the evidence. Sub-section 16(2)

b. The witness does not understand the nature of an oath, but is able to communicate the evidence. Sub-section 16(3)

c. The witness does not understand the nature of the oath and is not able to communicate the evidence. Sub-section 16(4)

In the first possibility, the witness is competent to give testimony under oath or affirmation. In the second instance, the evidence may be taken from the witness on a promise to tell the truth. In the third case, the witness cannot testify.

DOCTRINE OF RECENT POSSESSION

Sec. 354 C.C. (Possession of Property obtained by crime)

R. V. NICKERSON

Where an accused is found in possession of goods proved to have been recently stolen, the judge or jury may infer, not only that he had possession of goods knowing them to have been stolen, but that he participated in whatever offence was committed by which the goods were stolen.

OPINION EVIDENCE

Definition: Evidence provided by professional experts who are declared so qualified by the court.

Authority: Section 7, Canada Evidence Act. - Use of experts; admitting witnesses as experts.

Purpose: The object of expert evidence is to explain the effect of facts, of which otherwise no coherent rendering can be given.

Admissibility: Expert opinion will be admitted when it will be helpful to the jury in its deliberations. It will be excluded when the jury can draw the necessary inferences from the factual evidence, without the assistance of an expert.

Relevance: History of the Rule - wherever inferences and conclusions can be drawn by the jury just as well as by the witness, the witness is superfluous. The expert opinion is received, because and whenever the lay person's facts cannot be so told, as to make the jury as able as that person, to draw the inference.

Application: Distinction between fact and law: e.g. A bystander sees an accident. Can she express an opinion that one party or the other was negligent? (Question of Law). On the other hand, whether a person's ability to drive is impaired by alcohol, is a question of fact, and does not involve the application of any legal standard.

HEARSAY EVIDENCE AND EXCEPTIONS

Definition: "Hearsay" is simply what was told to a witness by another person, or what the witness heard someone say.
Admissibility: Evidence is not admissible through the mouth of one witness, to show what a third party said, for the purpose of proving the truth of what that third party said.

Reason for the Hearsay Rule
1. The statement is not made under oath so the speaker is under no obligation to tell the truth.
2. The actual speaker cannot be cross-examined regarding the statement, so the court lacks the opportunity to assess the probable truth or otherwise of the statement.
3. Because the speaker is not present, the court can not assess any possible bias or prejudice underlying the statement.
Exceptions to the Rule
There are many circumstances where hearsay evidence may be admitted. Here are the most common ones:

1. **Dying Declaration**
Statements made by a dying person are usually accepted as being true, based on the theory that a person does not wish to die with a guilty conscience. In order to be admissible, the following conditions must be met.
a.The trial should relate to the murder or manslaughter of the dying person.
b.The statement should relate to the cause of death.
c.The speaker must have known that death was certain and near.
d.That had he lived, he would have been a competent witness.

2. **Statements made in the presence and hearing of accused**
It is a rule of law that an incriminatory statement, made in the presence of the accused, may be used as evidence against him, if it can be shown that by his words, reaction or demeanor he accepted the statement.

3. **Res Gestae (Spontaneous Declarations)**
This term may be interpreted as meaning "part of the thing itself" – "the thing" being the criminal act. The rule regarding admissibility is:
A statement, declaration, or exclamation which accompanies and explains the criminal act charged, is admissible if it is:
a.an involuntary exclamation made without time for reflection or fabrication, and
b.made either during, immediately before or immediately after the occurrence.
The statement must be spontaneous and made while influenced by the emotion of the event. It might be made by the accused, the victim or a witness. See example which follows.

SPONTANEOUS DECLARATION Example:
R. v. Wilkinson
A wife, in fear of her husband after a quarrel, took her son and fled to the house of a neighbour. The husband followed his wife to the neighbour's house where he stayed outside. A noise was heard and the son lifted the blind to look outside, whereupon the

wife yelled "Don't do that, he will shoot!" Instantly, a bullet came through the window and killed her. The husband was tried for murder, and at the trial, this statement was admitted under the Spontaneous Declaration rule.

Proof of Handwriting - Section 8 C.E.A.
By direct evidence of writer or witness; By lay witness with previous knowledge of the handwriting of the person whose writing is in dispute