

**Evidence 101 – A Primer on Evidence Law**

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## **A. Introduction:**

This paper serves as an introduction to the fundamentals of evidence law, which will hopefully serve as a useful primer, or refresher, for junior lawyers confronted with various evidentiary issues from the outset of a proceeding to its conclusion at trial. The law of evidence can be intricate and complex. However, when confronted with such complexities, counsel must consider carefully the application of legal principals to these facts. That analysis falls outside the scope of this paper.

### **Sources:**

The law of evidence is primarily rooted in the common law. Even though there is legislation enacted both at the federal and provincial levels, the legislation does not provide a complete code of the law of evidence. As such, resorting to the common law is needed.<sup>2</sup> In Ontario, the provincial *Evidence Act* and *Rules of Civil Procedure*<sup>3</sup> apply to the vast majority of all civil proceedings. In the federal domain, the *Canada Evidence Act*<sup>4</sup> applies to criminal matters, federal courts, and in civil matters in which the federal government has jurisdiction.<sup>5</sup>

## **B. Relevance and Materiality:**

The basic rule of evidence which forms the starting point for all else is, “all evidence relevant to a fact in issue is admissible unless there is a legal reason for excluding it”.<sup>6</sup>

There are three elements to this initial analysis:

1. *Is the evidence relevant?* The evidence must be logically probative of the fact for which it is tendered, i.e. the evidence must increase or decrease the probability of the truth of the fact. The

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<sup>2</sup> David Paciocco & Lee Stuesser, *The Law of Evidence*, 2d ed (Toronto: Irwin Law, 1999) at 7 [Paciocco].

<sup>3</sup> *Evidence Act*, RSO 1990, c E 23 [*Evidence Act*]; *Rules of Civil Procedure*, RRO 1990, Reg 194 [*Rules of Civil Procedure*].

<sup>4</sup> *Canada Evidence Act*, RSC 1985, c C-5 [*Canada Evidence Act*].

<sup>5</sup> Paciocco, *supra* note 2 at 7.

<sup>6</sup> Hamish Stewart, et al, *Evidence: A Canadian Casebook*, 3d ed (Toronto: Emond Montgomery, 2012) at 3 [Stewart].

standard for relevance is fairly low and only requires some movement towards proving or disproving the fact in question.<sup>7</sup>

2. *Is the evidence material?* The evidence must address a fact in issue in the case, i.e. the fact must have legal significance arising from the pleadings or indictment, or the credibility of the witness.<sup>8</sup>

3. *Does the evidence fall under any legal rule that excludes it?* Some of the different legal rules for excluding evidence will be laid out below in this paper e.g. hearsay.

### **C. General Discretionary Power: Probative Value and Prejudicial Effect:**

Even if the evidence meets the requirements of the initial analysis that is set out above, the court retains the general discretion to exclude evidence based upon the balancing of the evidence's probative value and prejudicial effect.<sup>9</sup>

*Probative value* represents the court's estimate of how valuable and important the evidence will be at trial. *Prejudicial effect* is how likely it is that the jury, even if properly instructed, will use the evidence for an improper purpose e.g. the evidence may arouse the jury's emotions, cause unfair surprise, or consume an undue length of time, etc.<sup>10</sup>

There are two variations of the balancing test. If the prejudicial effect of the evidence exceeds the probative value, the evidence may be excluded. The standard for the *accused in a criminal trial* is: if the prejudicial effect substantially exceeds the probative value, the evidence may be excluded.<sup>11</sup> While this general discretion has the potential to render all other rules of evidence obsolete, in practice, it is exercised with restraint.<sup>12</sup>

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<sup>7</sup> *Morris v The Queen* (1983), 1 DLR (4<sup>th</sup>) 385, 7 CCC (3d) 97, (SCC) ; *R v Watson* (1996), 30 OR (3d) 161, 108 CCC (3d) 310, (Ont. C.A.).

<sup>8</sup> Andrew W. Bryant et al, *The Law of Evidence in Canada*, 3d ed, (Toronto: LexisNexis, 2009) at 693 [Bryant].

<sup>9</sup> Paciocco, *supra* note 2 at 26 – 29.

<sup>10</sup> *R v Seaboyer*, [1991] 2 SCR 577, 4 OR (3d) 383 [Seaboyer] ; *R v Clarke* (1998), 129 CCC (3d) 1, 18 CR (5<sup>th</sup>) 219 at 34 [Clarke].

<sup>11</sup> *Seaboyer*, *ibid.*

<sup>12</sup> Paciocco, *supra* note 2 at 31.

## **D. Common Exclusionary Legal Rules:**

### **1. Hearsay:**

Hearsay is any out-of-court statement offered for the truth of its contents.<sup>13</sup> The general rule is that hearsay is inadmissible. Hearsay includes verbal and non-verbal statements, and implied statements.<sup>14</sup>

### **Exceptions to the Hearsay Rule – The Principled Approach:**

Hearsay statements may still be admissible provided they fall under an exception to the hearsay rule. Historically, the exceptions to hearsay were rigid categories known as the traditional hearsay exceptions. In *R. v Khan*, the Supreme Court of Canada adopted a new approach to hearsay.<sup>15</sup> In order for hearsay evidence to be admissible, the evidence must be necessary and reliable, and is subject to the trial judge’s general discretion in balancing the probative value and the prejudicial effect of the evidence.<sup>16</sup>

The consideration of “necessity” requires that the hearsay statement be reasonably necessary to prove a fact in issue. The consideration of “reliability” requires that the circumstances of the hearsay statement suggest that the statement is trustworthy. This new approach, called the principled approach, has changed the approach to hearsay; however, it appears that as long as the traditional exceptions to hearsay meet the standards of the principled approach, the exceptions remain intact.<sup>17</sup>

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<sup>13</sup> Stewart, *supra* note 6 at 129.

<sup>14</sup> The availability of physical conduct as hearsay has been interpreted narrowly as only conduct that is in itself an expression e.g. nodding or shaking one’s head: *R v McKinnon* (1989), 70 CR (3d) 10, 7 WCB (2d) 333 (Ont CA) ; *R v Baldree*, 2013 SCC 35, 2 SCR 520 at para 5 rejects the distinction between express and implied hearsay.

<sup>15</sup> *R v Khan*, [1990] 2 SCR 531, 59 CCC (3d) 92.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid* ; *R v Starr*, 2000 SCC 40, 2 SCR 144.

## The Eight Most Common Exceptions to the Hearsay Rule:

<p>1. <i>Prior Inconsistent Statements</i> – the <i>Evidence Act</i> provides: “a witness may be cross-examined as to previous statements made by him or her in writing, or reduced into writing, relative to the matter in question”. If the statement is inconsistent, the recording of the prior inconsistent testimony may be required to be produced to the judge.<sup>18</sup></p>
<p>2. <i>Prior Identifications</i> – out-of-court identifications made by a witness may be admissible if: a) the witness repeats the identification in-court; or, b) if the witness does not repeat the identification, but is available to be cross-examined.<sup>19</sup></p>
<p>3. <i>Prior Testimony</i> – evidence given in a prior proceeding by a witness is admissible for its truth in a later proceeding provided:</p> <ul style="list-style-type: none"><li>a. the witness is unavailable;</li><li>b. the parties are substantially the same;</li><li>c. the material issues to which the evidence relates are substantially the same; and,</li><li>d. the person against whom the evidence is proffered had an opportunity to cross-examine the witness at the earlier proceeding.<sup>20</sup></li></ul>
<p>4. <i>Prior Convictions</i> – are admissible for the purpose of establishing prima facie that the person committed the offence. If the witness denies the convictions, proof may be presented of the convictions.<sup>21</sup></p>
<p>5. <i>Admissions of a Party</i> – a helpful rule is that “anything the other side ever said or did will be admissible so long as it has something to do with the case”.<sup>22</sup> This may include verbal statements, acts, statements of others adopted by the opposite party, and statements by co-conspirators in furtherance of a conspiracy. Admissions may be formal (pleadings, agreed statements of fact, etc.) or informal (conduct, silence, etc.)<sup>23</sup></p>
<p>6. <i>Statement Against Interest by Non-Parties</i> – in order to qualify for this exception, the statement: a) must have been contrary to the declarant’s proprietary or pecuniary interests when</p>

<sup>18</sup> *Evidence Act*, *supra* note 3 at ss 20 – 21; The equivalent federal legislation is: *Canada Evidence Act*, *supra* note 4 at s 9 ; For further details in the criminal context, see: *R v B (KG)*, [1993] 1 SCR 740, 79 CCC (3d) 257.

<sup>19</sup> Paciocco, *supra* note 2 at 87.

<sup>20</sup> *Ibid* at 90.

<sup>21</sup> *Evidence Act*, *supra* note 3 at ss 22(1) – 22.1(1) ; *Canada Evidence Act*, *supra* note 4 at s 12.

<sup>22</sup> Paciocco, *supra* note 2 at 96 citing I. Younger, “An Irreverent Introduction to Hearsay”, Address to the American Bar Association Annual Meeting, in Atlanta, 11 August 1976.

<sup>23</sup> Paciocco, *ibid.* ; see also Rule 51 of the *Rules of Civil Procedure*, *supra* note 3 which deals with admission in civil proceedings.

it was made; b) the declarant must be unable to testify; and, c) the declarant must have personal knowledge of the facts stated.<sup>24</sup>

7. *Declarations in the Course of Duty* – at common law, such declarations, verbal or written, are admissible for their truth where the declaration are: a) made reasonably contemporaneous; b) in the ordinary course of duty; c) by persons having personal knowledge of the matter; d) who are under a duty to make the record or report; and, e) there is no motive to misrepresent the matters recorded.<sup>25</sup> This exception has been incorporated into provincial and federal legislation.<sup>26</sup>

8. *Res Gestae or Spontaneous Utterances* – the statement is made by the declarant in such circumstances that allow some truth-value to be assigned to the statement. The statement must be made at the precise time of the event or sensation that the declarant is commenting on, and not after e.g. present sense of impression or physical condition.<sup>27</sup>

## 2. Opinion Evidence:

Opinion evidence is generally inadmissible, subject to two exceptions.

1. The *Lay Opinion* exception allows non-experts to provide opinion evidence that is “within common knowledge and based on multiple perceptions that can best be communicated in compendious format” e.g. if something looks worn or new.<sup>28</sup>
2. In order for *Expert Opinion* to be admissible, the information must be:
  - a. *Reasonably necessary*- considered as likely to be outside the experience and knowledge of a judge or jury.
  - b. *Relevant*
  - c. The expert must be *properly qualified* as having a special or peculiar knowledge through study or experience in respect to matters on which he undertakes to testify.
  - d. Must not infringe on another *exclusionary rule*.<sup>29</sup>

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<sup>24</sup> Paciocco, *ibid* at 105 ; The rule for statements against penal interests may be found: *Lucier v The Queen*, [1982] 1 SCR 28, 65 CCC(2d) 150.

<sup>25</sup> *Ares v Venner*, [1970] SCR 608, 73 WWR (NS) 347 ; Paciocco, *supra* note 2 111.

<sup>26</sup> *Evidence Act*, *supra* note 3 at ss 31- 35 ; *Canada Evidence Act*, *supra* note 4 at ss 29 -31.

<sup>27</sup> Paciocco, *supra* note 2 at 116-124.

<sup>28</sup> Stewart, *supra* note 6 at 261 ; *Graat v R* (1980), 30 OR (2d) 247, 116 DLR (3d) 143.

<sup>29</sup> *R v Mohan*, [1994] 2 SCR 9, 18 OR (3d) 160 ; *R v Abbey*, 2009 ONCA 624, 97 OR (3d) 330.

### **3. Character Evidence:**

Character evidence is evidence of a person's traits, propensities, and dispositions to behave in a particular way, which is not to be confused with habit.<sup>30</sup> In the civil context, good character evidence is generally inadmissible. The exception will be where the character of the party is directly in issue e.g. a defamation action.<sup>31</sup>

On the other hand, evidence of bad character may be admissible as circumstantial proof of a fact where the probative value of the evidence outweighs the prejudicial effect. The weighing of probative value and prejudicial effect in this context is called the similar fact evidence rule. The formal iteration of the rule is found in *R. v Handy*. However, there are fewer cases for how similar fact evidence should be interpreted in a civil context.<sup>32</sup>

### **E. Credibility and Evidence:**

Determining credibility is the process of deciding if the evidence comes from a source that is likely to be truthful. Credibility is an essential element of evidence because it will affect how much weight the trier of fact gives to a piece of evidence. The basis for how credibility is determined is helpfully set out by Justice Estey:

It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.<sup>33</sup>

However, in a recent summary judgment motion, Justice Karatkasanis (as she then was) held that:

Courts have long recognized that demeanour can be misleading and is but one factor in assessing credibility. Credibility is best tested against common sense,

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<sup>30</sup> Stewart, *supra* note 6 at 395.

<sup>31</sup> Paciocco, *supra* note 2 at 65.

<sup>32</sup> *R v Handy*, 2002 SCC 56, 2 SCR 908 ; Paciocco, *supra* note 2 at 65 ;

<sup>33</sup> *White v The King*, [1947] SCR 268.

inherent consistency and consistency with contemporaneous and undisputed documents.<sup>34</sup>

Evidence to bolster one's own credibility is generally excluded (see Evidence Law Pitfall 4 below).

## **F. Evidence Law Pitfalls:**

### *1. Evidence on Motions – Direct Evidence is Best*

Direct evidence is adduced from a source that has first-hand knowledge of the facts. The importance of direct evidence underlies many of the exclusionary rules of evidence, such as hearsay and opinion evidence. The justification is that direct evidence is the most reliable. The importance of leading direct evidence is illustrated in a recent Ontario Superior Court decision of *Johnson v Futerman*. In this case, in response to the Defendant's motion for summary judgment, the Plaintiff, Ben Johnson, failed to file affidavits from anyone that had direct knowledge of the material events in the lawsuit. Instead, the Plaintiff responded to the motion by filing an affidavit from a friend that he had met some 15 years after the material events took place that formed the subject matter of the litigation. The claim was summarily dismissed, in part, because the Plaintiff omitted to advance direct evidence to refute that there was no genuine issue requiring a trial.<sup>35</sup>

Rule 4.06(2) of the *Rules of Civil Procedure* provides that an affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where the *Rules* provide otherwise. An affidavit to be utilized on a motion may contain statements of the deponent's information and belief, *if the source of the information and the fact of the belief are specified in the affidavit*.<sup>36</sup>

However, on a motion for summary judgment, Rule 20.02(1) permits an affidavit on information and belief as provided in subrule 39.01(4), but the court may draw an adverse inference from *the failure of a party to provide the evidence of any person having personal knowledge of **contested***

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<sup>34</sup> *TD v Cuthbert*, 2010 ONSC 830 (CanLII) at para 42

<sup>35</sup> *Johnson v Futerman et al.*, 2012 ONSC 4092.

<sup>36</sup> *Rules of Civil Procedure*, *supra* note 3 at s 39.01(4).

*facts. Accordingly, where direct evidence is not provided, a judge may draw an adverse inference against the party.*<sup>37</sup>

## *2. Expert Evidence – The Expert Must Provide their own Affidavit*

Justice Strathy set out the requirement nicely, as follows: “[o]pinion evidence can only be tendered through the evidence of a properly qualified expert. Expert evidence is inadmissible unless presented through such an expert”.<sup>38</sup> This means that another witness cannot introduce the opinion of an expert. In *Schick v Boehringer Ingelheim*, the Plaintiffs attempted to introduce expert evidence through another witness’ affidavit. This is not permitted; the expert must provide her own affidavit.<sup>39</sup>

## *3. Hearsay – Out-of-Court Statements that are not Hearsay*

Not all out-of-court statements are hearsay. An out-of-court statement must be offered for its truth in order to be considered hearsay. A statement may be offered to support the fact that it was made, rather than for the truth of its contents e.g. a statement could be offered to explain how the witness acquired some specific knowledge.<sup>40</sup>

## *4. Credibility – No Oath-Helping*

Generally, evidence of good character for the purpose of bolstering the credibility of a party’s own witness is inadmissible. This practice is called oath-helping.<sup>41</sup> If the evidence is relevant to a matter in issue other than credibility, then the evidence may be admitted. The narrow exception to this rule is that a party may call members of the witness’ community to comment on the witness’ reputation for veracity within the community. This exception is rarely used today.<sup>42</sup>

## *5. Similar Fact Evidence – Does Not Need to be Similar*

The similar fact evidence rule is actually a misnomer because the evidence does not need to be

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<sup>37</sup> *Rules of Civil Procedure*, *supra* note 3 at ss 20.02(1), 39.01(4).

<sup>38</sup> *Schick v Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 1942 at para 14.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Wildman v R*, [1984] 2 S.C.R. 311.

<sup>41</sup> *Bryant*, *supra* note 8 at 664.

<sup>42</sup> *Clarke*, *supra* note 10.

similar. Similar fact evidence is considered a branch of character evidence. Character evidence is generally excluded in civil cases unless character is directly in issue. A narrow exception is made for prior bad acts that are relevant to a matter in issue.<sup>43</sup>

#### 6. *Remember to Disclose*

In complicated actions, there may be thousands of pieces of evidence. It is very important to remember to disclose every document relevant to any matter in issue that is in the power and control of the party, subject to exclusions of privileged documents.<sup>44</sup> Not only is this required by the *Rules of Civil Procedure*, but if a piece of favourable evidence is not disclosed, then the party may not use the document, except with leave of the trial judge. If a piece of unfavourable evidence is not disclosed, the court may make any order as is just, such as revoking the party's right to continue examination for discovery, dismissing the action, or striking out the statement of defence.<sup>45</sup> Failure to disclose relevant documents could also result in disciplinary sanctions with the Law Society of Upper Canada and cost consequences against the litigants, and in exceptional circumstances, the litigant's solicitors.<sup>46</sup>

#### 7. *Don't Forget About Privilege*

This may seem like a trite tip, however, it is easy to think about privilege as its own separate branch of law. Privilege is very important in the context of evidence law. It is a dense area of the law and there are various ways in which evidence may qualify as privileged. Without delving too deeply into the complexities, a list of some of the different types of privileges may be helpful: 1) Solicitor-Client Privilege; 2) Litigation Privilege; 3) Informer Privilege; and, 4) Spousal Privilege.<sup>47</sup> The Supreme Court has also recognized case-by-case privilege, which encompasses communications that do not fall under a categorical exception and can be established on a case-by-case basis through the application of a balancing test.<sup>48</sup>

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<sup>43</sup> *Halsbury's Laws of Canada*, "Character as Circumstantial Evidence, Civil Cases", at para HEV-172.

<sup>44</sup> *Rules of Civil Procedure*, supra note 3 at s 30.02(1).

<sup>45</sup> *Ibid* at ss 30.08(1) - 30.8(2).

<sup>46</sup> *Ibid* at s 39.01(4), Rule 57.07(1).

<sup>47</sup> Stewart, supra note 6 at 615, 647, 658, 691,

<sup>48</sup> *Ibid* at 615.

## **G. Evidence Law Practice Tips:**

### *1. How to Mark an Exhibit*

Exhibits are physical pieces of evidence that are introduced at trial. In Ontario, the *Rules of Civil Procedure* require that exhibits be marked and numbered consecutively.<sup>49</sup> On a motion, exhibits may be tendered as an attachment (properly commissioned) to an affidavit that refers to the exhibit.<sup>50</sup> Exhibits may also be tendered during oral examination of a witness, which is a formulaic process that establishes: a) the witness' testimonial capacity; and, b) the authenticity of the exhibit.<sup>51</sup>

First, one would draw the attention of the opposing counsel and the judge to the exhibit and inform them of where the exhibit may be found in the materials. Next, one will ask the witness some questions about the exhibit, such as:

- a) "Do you recognize this document?"
- b) "Please tell us about this document?"<sup>52</sup>

Where the relevance of an exhibit must be established, this can be achieved by asking the witness questions about the exhibit that adduces how the exhibit is relevant to a matter in issue.<sup>53</sup> Finally, the document is tendered as an exhibit and marked.

### *2. How to Impeach a Witness*

There are several ways to impeach the credibility of a witness. The most common method is to use a witness' prior inconsistent statements to demonstrate the trier of fact should not give much weight to the evidence provided by the witness. The prior statement may be from an earlier trial, examination for discovery, an interview with the police, etc.<sup>54</sup> The *Evidence Act* and the *Canada Evidence Act* govern the use of prior inconsistent statements at trial. Both pieces of legislation

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<sup>49</sup> *Rules of Civil Procedures*, *supra* note 3 at s 52.04(1).

<sup>50</sup> *Ibid* at s 4.06(3).

<sup>51</sup> Andrew M Shaughnessy, "How to Introduce Evidence at Trial" (2012) Canadian Bar Association at 9 [Shaughnessy].

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid*.

<sup>54</sup> Bryant, *supra* note 8 at 1147.

require that if the prior inconsistent statement is being used to contradict the witness, the prior statement must be produced and shown to the witness.<sup>55</sup>

The steps to impeach a witness' credibility by using a prior inconsistent statement are: a) confirm the present testimony and the prior testimony; b) confront the witness with the inconsistency; and, c) demonstrate the contradiction.<sup>56</sup> Below is an example of impeaching a witness through the use of these steps.

Witness: The floor was dry that day.

Counsel: The floor was dry, are you sure?

Witness: Yes. The floor was definitely dry.

Counsel: Mr. Witness, you were examined for discovery in this action on July 4<sup>th</sup>, 2013, were you not?

Witness: Yes.

Counsel: You were under oath at this time, were you not?

Witness: Yes.

Counsel: Please read the marked sentence and let me know when you've finished.

Witness: I'm done.

Counsel: In the examination for discovery were you asked these questions and did you give these answers?

Witness: Yes.

Counsel: In the examination for discovery you stated that the floor was slippery.

Witness: Yes.

Counsel: And you would agree that your recollection at the time of the discovery two years before the trial would likely be more accurate?

Witness: Yes.

When done effectively, the inconsistency between the statements is made clear and the

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<sup>55</sup> *Evidence Act*, *supra* note 3 at s 20 ; *Canada Evidence Act*, *supra* note 4 at s11.

<sup>56</sup> *Paciocco*, *supra* note 2 at 274 – 279.

credibility of the witness is damaged.

### 3. *How to Correctly use the rule in Browne v Dunn*

If a party is going to contradict a witness' testimony, the party must make the contradiction clear through questioning in cross-examination and allow the witness a chance to respond.<sup>57</sup>

The rule set out in *Browne v Dunn* is as follows:

My lord, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.<sup>58</sup>

In plain language, this means that contradictions and impeachment cannot be implicit and must be straightforwardly presented. In *Browne v Dunn*, counsel waited until his closing statement to question the credibility of witnesses that he never cross-examined.<sup>59</sup>

### 4. *How to Refresh a Witness' Memory*

Testifying is a stressful experience and can cause many individuals to experience memory lapses. The two most common ways of helping refresh a witness' memory are: a) counsel may draw the witness' attention to transcripts and depositions or their own earlier testimony or deposition; and b) with leave of the court, a witness may consult a document that she created near the time of the event.<sup>60</sup>

Police officers and expert witnesses regularly consult documents when testifying.

## **H. Conclusion:**

The law of evidence is scattered between the common law, and federal and provincial legislation. The task of making some sense of the various components can seem daunting at first. This paper attempts to provide a basic overview of some key principles concerning the law of evidence, and some helpful tips and warnings to avoid some common pitfalls. The content of this paper will

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<sup>57</sup> Paciocco, *supra* note 2 at 264.

<sup>58</sup> *Browne v Dunn*, (1893), 6 R 67 at 70 (HL).

<sup>59</sup> *Ibid.*

<sup>60</sup> Paciocco, *supra* note 2 at 255.

hopefully assist as a reference in your practice to deal with evidentiary issues that arise from the outside of the proceeding to the completion at trial.