Publisher's Note

2019 — Release 1

Previous release was 2018-4

From Your Library:

☐ _____

☐ _____

☐ _____

☐ _____

☐

Peter J. Sankoff

Witnesses

In this release the material in Chapter 5 Competence and Compellability is being moved to new Chapter 6 and the chapter title remains "Competence and Compellability". The material in Chapter 6 Witness Testimony: Evidentiary Rules is being moved to new Chapter 5 Out-of-Court Preparation of Witnesses and Chapter 7 Witness Testimony: Evidentiary Rules. The release updates the following chapters: 1 (Foundational Principles of the Law of Evidence); 5 (Out-of-Court Preparation of Witnesses); 6 (Competence and Compellability); 7 (Witness Testimony: Evidentiary Rules); 9 (Witness Misconduct: Refusing to Give Evidence or Committing Perjury); 11 (Examining your Own Witness); 14 (Hearsay); and 18 (Public Interest Immunity).

Highlights

Witness Testimony: Evidentiary Rules — Calling Witnesses: Obligations and Limitations — The Crown in Criminal Cases — Oblique Motive/Abuse of Process — In this release the author reviews the calling of witnesses with a review of *R. v. Cheveldayoff*, 2018 ONSC 4329. The author reviews this case and compares it to *R. v. Hillis*, 2016 ONSC 451. In that case, Akhtar J. expressed reservations about the order made in *Hillis*. *Cheveldayoff* is not entirely analogous to *Hillis*, as it was clear from the facts that the witness whom the Crown chose not to call suffered from significant reliability shortcomings, despite having been present for events that were critical to a resolution of the case. Still, defence counsel requested that the Crown be directed to call the witness, arguing that the Crown had originally agreed to call the witness — before a partial recantation occurred — and it was "the Crown's primary duty to present the case fairly and ... secure a just result". In the author's view, the approach taken in *Cheveldayoff* is preferable to that adopted in Hillis. The choice to not call a witness would seem to be one that is at the very heart of the Crown's

THOMSON REUTERS CANADA Customer Support

1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
Fax 1-416-298-5082 (Toronto)
Fax 1-877-750-9041 (Toll Free Canada Only)
Email CustomerSupport.LegalTaxCanada@TR.com

discretion, as explained in *Cook*. Absent exceptional circumstances akin to an abuse of process, the better course is for the trial judge to decide whether the court should call the witness itself, an event that should only occur on rare occasions.

Witness Testimony: Evidentiary Rules — Calling witnesses: Obligations and Limitations — The Trial Judge's Role — Calling Witnesses — A good balancing of the various interests at stake in this area occurred in *R. v. Owens*, 2018 MBCA 94 where the accused was charged with murdering one of her sisters by beating her severely and then driving over her with a truck. The incident followed a night of drinking and smoking marijuana with a third woman, while two of the accused's younger sisters were also present in the house. At trial, the Crown did not call any of these witnesses, relying exclusively on eyewitness testimony from a neighbour. The trial judge was asked by the defence to call all three of the women. The trial judge ultimately decided to call the woman who had been drinking and smoking with the accused and her deceased sister but declined to call the two other sisters. This decision was upheld on appeal. In addition to the sisters' testimony suffering from clear shortcomings, the evidence the sisters could potentially provide was less critical. This was not a situation where "absent the testimony of the witness, there would have been a complete lack of relevant evidence", especially considering the fact that the main witness to what had gone on between the two sisters was being called by the trial judge. Finally, the Court noted that this was not a situation in which the witness was likely to have been hostile. Though there were problems with their evidence, "there is no general requirement for the court to call a witness who is potentially difficult and unpredictable".

Competence and Compellability — Basic Prerequisites — Mental Capacity — In reviewing mental capacity, the author looks at *R. v. Tracey*, 2018 ONSC 1721, where the defence objected to testimony from a 47-year-old witness with Down's Syndrome. The witness was clearly able to communicate, but her recollection of past events was sorely lacking. She could not say what year it was, relate specific events of any type and was clearly confused by the questions being posed by the Court. The trial judge concluded that she was "incapable of perceiving events, remembering events or relating those events to the court". The author noted that *Tracey* might be a situation in which a different sort of inquiries might have led to a different conclusion. There is no question that the witness had difficulty responding to questions like "do you remember the summer of last year", and she could not tell when her parents had died. But she mentioned on several occasions that "the bad boy did take my clothes off me", and seemed able to relate that incident, at least in preliminary form. What is unclear from the decision is how long ago the events before the court were believed to have happened, and whether timing was a matter of importance. At the end of the day, absent confirmatory evidence, a conviction would likely have been difficult to obtain, but it is unclear why the competence inquiry should have been the reason why. The witness's ability to perceive and recall were not particularly strong, but in relation to the specific incident they may well have been satisfactory enough to pass the minimal requirements of the competence inquiry.