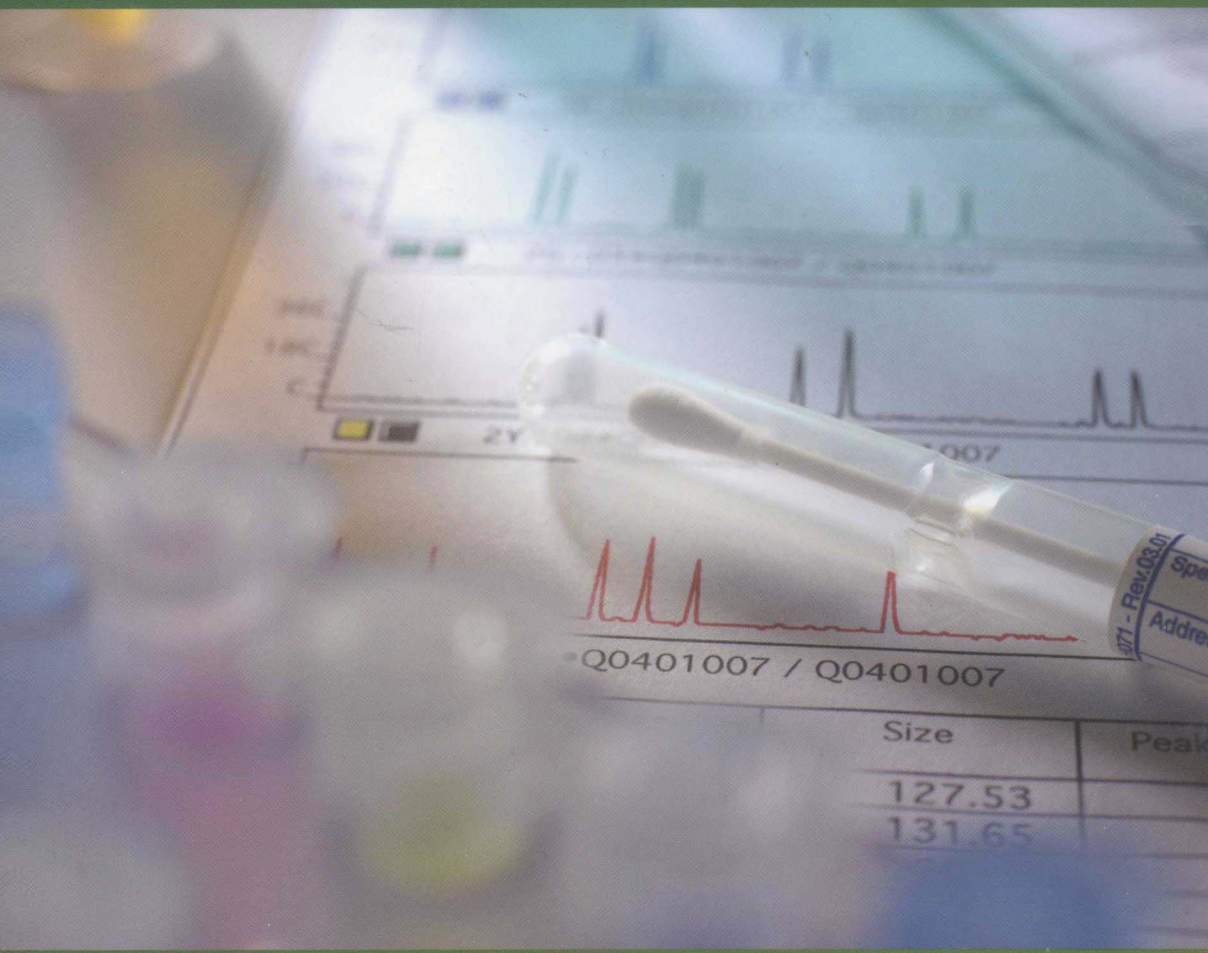
EVIDENCE

PRINCIPLES AND PROBLEMS

NINTH EDITION

RON DELISLE, DON STUART & DAVID TANOVICH



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PRINCIPLES AND PROBLEMS

Ninth Edition

by

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To Gloria, Pam and Melanie

Preface to Ninth Edition

In 1984, in the first edition of this book, Ron Delisle sought to depart from the usual casebook format of lengthy case extracts to teach evidence largely by narrative text and consideration of problems. The text throughout aimed to identify the principles of the law, their historical background, their inherent logic or lack of logic, ethical issues and attempts at reform in Canada and other jurisdictions. Another major feature of the first edition was to reflect the reality that in most trials evidence is allowed in rather than excluded. It was therefore important to address the positive part of the law of evidence as to how evidence is adduced rather than to view the law as a briar patch of exclusionary rules.

In 1989, the second edition included, at the urgings of fellow evidence teachers, a careful selection of extracts from leading evidence cases. From this time on the book became partly a text and partly a casebook. The struggle has always been not to overwhelm the original aim by including too many cases.

The Law Reform Commission of Canada in the 70s proposed that Parliament codify the principles of the law of evidence. This view was not well received by the profession who seemed concerned that the new Code would give judges too much discretion. The irony is that with reform left to the courts the unremitting trend over the last 35 years has been to allow judges more discretion as to what evidence to admit and what evidence to exclude. The central issue is how best to provide guidelines for such discretion.

Evidence is a branch of the law where lawyers, judges and those learning the law for the first time must carry a working knowledge in their heads. This can be a daunting challenge given that the principal source is ever-changing case law. We provide a detailed table of contents with many subheadings, and list the major cases to distinguish those in the text that are purely illustrative. To aid the reader we continue to divide the law of evidence into just six broad chapters.

Chapter 1 starts with relating the law of evidence to the common law commitment to an adversarial system of fact adjudication. There is an introductory section on ethics enabling us to directly confront such topical issues as the need for civility in the profession or the controversial issue of whether defence counsel can retain incriminating physical evidence, as counsel did in the *Bernardo* trial. The chapter introduces the reader to the sources of the laws of evidence. We consider views, such as those of Professor Lisa Dufraimont, as to whether the laws of evidence have a unifying purpose. We set out arguments on the controversial issue of whether rules of evidence should be codified. Finally we address their applicability to forums other than courts, such as administrative tribunals.

Chapter 2 considers burdens of proof. Special attention is given to the distinction between persuasive and evidentiary burdens, measures of proof, tests of sufficiency, and the thorny issue of presumptive devices including the presumption of innocence now entrenched in the Canadian Charter of Rights and Freedoms.

In Chapter 3, given their centrality, the topics of relevance and discretion to exclude at common law and now under the Charter are considered in detail. We assess how

courts in both criminal and civil cases have recognized a general discretion to exclude evidence where its probative value is exceeded by prejudicial effect. Under the Charter our focus is on the uncertain discretion the Supreme Court now recognizes to exclude evidence to ensure a fair trial. We concentrate less on the Charter discretion in s. 24(2) to exclude evidence obtained in violation of a Charter right. Since one of the central considerations under s. 24(2) is the nature and seriousness of the Charter breach, we are of the view that that topic is better considered in Criminal Procedure courses. See Delisle, Stuart and Quigley, *Learning Canadian Criminal Procedure*, 9th ed., (2010, Carswell). We do summarize the Supreme Court's recent bellwether ruling in *R. v. Grant,* where the Court offers a totally revised template of factors for the exercise of s. 24(2) discretion.

As in previous editions, Chapter 4 on character evidence provides a test case for consideration of principles of relevance and discretion to exclude. The courts remain active and often inconsistent on the issue of good and bad character. We pay particular attention to the decision of the Supreme Court in *Handy* and *Shearing* that similar fact evidence may exceptionally be admitted to show propensity. We focus on the impact of these decisions in the criminal and civil contexts. We explore the topic of rape shield laws, including the Supreme Court's rulings in *Seaboyer* and *Darrach*, and the controversial issue of whether evidence of the complainant's prior sexual conduct *with the accused* should be treated differently.

Chapter 5 addresses the positive side of the laws of evidence – how matters are proved by the admission of evidence. We firstly deal with situations where proof is not required: formal admissions of fact, and the controversial and still evolving doctrine of judicial notice. We focus consideration of the latter topic by comparing the broad views of Justice L'Heureux-Dube with the more cautious recent views of Justice Binnie speaking for the Court in *Spence*. The section on real evidence considers practical topics such as how to file exhibits and how to authenticate. The section on demonstrative evidence reflects growing use of such evidence by the courts, especially in civil cases. The lengthy section on witnesses now includes the current law as to the competency of young witnesses and spouses. We incorporate significant developments relating to the accused's pre-trial and trial Charter rights to silence and the privilege against self-incrimination, recently re-interpreted by Justice Binnie speaking for the Supreme Court in *Henry*. In the general section on cross-examination we include the Supreme Court of Canada's important ruling in *Lyttle* allowing cross-examination on unproven evidence subject to a requirement of good faith. Under the issue of cross-examination of prior inconsistent statements under ss. 10 and 11 of the *Canada Evidence Act* we include advocacy advice. This dimension was also added to the section concerning cross-examination on declarations of adversity under s. 9(1) and (2), using as a hard example the prosecution of domestic assault where the principal witness has recanted.

Chapter 6 covers the major exclusionary principles of hearsay, opinion, privilege and evidence obtained in violation of the Charter. The hearsay chapter focuses on how to identify hearsay and the Supreme Court's principled approach now fully developed with *Khelawon*. In the section on opinion evidence we address the fundamental ruling in *Graat* that lay witnesses may express opinions based on personal knowledge, and also the Supreme Court's "gatekeeper" approach to the admissibility

of expert opinion through the controlling authority of *Mohan* and the Court's approach to novel scientific evidence set out in *J. (J.L.)* and *Trochyn*. In the section on privilege we discuss class privileges such as that of client/lawyer, litigation and marital privilege, and the case-by-case privilege according to Wigmore's criteria. We also summarize and consider the effect of major statutory changes substantially expanding state privilege sections of the *Canada Evidence Act*, which were enacted by the Anti-Terrorist Bill C-36 in 2002 and hastily passed by Parliament in the aftermath of the 9/11 attacks. We conclude by examining the approach of the Supreme Court in *O'Connor* and *Mills,* and of Parliament, of balancing Charter rights of complainants in sexual assault cases on the issue of access to their therapeutic records. We compare the Court's controversial allowance of defence cross-examination on a diary in *Shearing*.

In this ninth edition the structure of this text and teaching book remain largely intact. We did carefully re-edit throughout to remove footnotes, text and problems that had grown out of date. We also added new problems and questions to test comprehension of the latest developments and to provoke discussion. The courts have been so active that we found it necessary to add the edited text of more than 30 new cases. We also removed much material and older cases so that the book has not increased in length. In our experience it is impossible to teach every topic and nuance of this case-driven subject in a four hour per week semester course. The subject is too vast and complex, so the teacher must be selective.

Although most of the leading decisions arise in the criminal context we continue to make a special effort to include leading civil cases and also rulings from various tribunals. In this edition we deal with the blockbuster recent ruling of the Supreme Court in *F.H. v. McDougall* that the same balance of probabilities standard applies to all civil cases. We deal with the latest law on motions for non-suit and summary judgments, and with significant differences respecting the admission of evidence of habit and character in civil cases, spousal competence rules and admitting an expert on racial profiling at a Human Rights Commission hearing.

This edition includes and considers the following major new Supreme Court rulings:

- *S. (J.H.) (W.D.* standard for reasonable doubt criticised and not to be used as magical incantation)
- *Griffin* (weighing circumstantial evidence and *Hodge's* case)
- *Stirling, Ellard and Dinardo* (prior consistent statements)
- *Couture* (spousal competency)
- *Khela* (requirements of *Vetrovec* warning)
- *Blackman and Devine* (new applications of principled approach to hearsay)
- *Singh* (right to silence subsumed by voluntary confessions rule)
- *Rojas* (*Duncan* warning not required)
- *Blood Tribe*, *Goodis* and *Pritchard* (solicitor-client privilege)
- *Blank* (litigation privilege)
- *Named Person* (informer privilege)
- *McNeil* (disclosure and access to third-party records)

These developments necessitated major changes and re-writing of the sections respecting onus of proof and the admissibility of evidence supporting credibility. We also tried to clarify our previous treatment of the notoriously difficult area of character evidence.

Important provincial court decisions are also considered. Special attention is given, for example, to the blockbuster decision of Justice Doherty for the Ontario Court of Appeal in *R. v. Abbey*. This requires a revised approach to the gatekeeper role respecting the admission of expert testimony. We ask whether it is totally consistent with the approach of the Supreme Court in *Mohan, J (J.L.)* and *Trochyn*. We have included Justice Rosenberg's careful approach to the consideration of eyewitness identification evidence in *R. v. Hanemaayer*. The Saskatchewan Court of Appeal's rejection in *R. v. Martin* of a s. 15 equality challenge to the exclusion of common law spouses from spousal competency and privilege rules is considered, as well as contrary rulings of trial judges in Ontario and Quebec.

We address Parliament's comprehensive new scheme which amended the *Canada Evidence Act* passed in 2005 to govern competence and other issues respecting young witnesses. We are grateful to Nick Bala, Katherine Duvall-Antonacopoulos, Rod Lindsay, Kang Lee and Victoria Talwar for permitting us to reproduce their article, "Bill C-2: A New Law for Canada's Child Witnesses", originally published in the Criminal Reports. This describes their interdisciplinary research, which provided the momentum for reform, and also assesses the significance of the new laws.

In our section on rape shield law we thank Dean Michelle Anderson of CUNY for granting us permission to republish her article assessing the rape shield arguments offered in the Kobe Bryant rape trial in Colorado and calling for reform.

We thank Lisa Dufraimont for her permission to re-publish portions of her insightful comments first published in the Criminal Reports and other journals.

We thank Rebecca Duncan of Carswell for her continuing support. We are deeply indebted to Claire Cheverie for so carefully reviewing our manuscript.

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Don Stuart
David Tanovich
March 1, 2010

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