



Criminal Law: Evidence

JENNIFER A. MACLELLAN, KC
ACTING DEPUTY DIRECTOR
NOVA SCOTIA PUBLIC PROSECUTION SERVICE,

The Basics

- Presumption of Innocence
 - Burden on the Crown
 - Proof Beyond a Reasonable Doubt
 - On ultimate question of the guilt of the accused
 - Burden does not apply piecemeal to individual pieces of evidence, only to the final evaluation of whether the Crown has proven the essential elements of the offence beyond a reasonable doubt.
- **R. v. Downey**, 2018 NSCA 33, at para 100: ...Proof to the requisite criminal standard does not require that every piece of evidence is subjected to a standard of proof beyond a reasonable doubt. On the contrary. What the trier of fact (whether judge or jury) is obliged to do is have regard to the whole body of evidence in its totality and decide whether the essential elements of the offence have been proven beyond a reasonable doubt. It is a serious error of law for the decision-maker to isolate every particular piece of evidence and examine it forensically through the lens of criminal proof beyond a reasonable doubt.

Admissibility

- ▶ Evidence is admissible if it is:
 - ▶ Relevant to a live, material issue in the case
 - ▶ Its admission does not offend any other exclusionary rule of evidence
 - ▶ Its probative value exceeds its prejudicial effect
 - ▶ *R. v. Calnen*, 2019 SCC 6, at para 107; *R. v. Schneider*, 2022 SCC 34 at para 36.

Relevance

- ▶ Relevance refers to the logical relationship between the proposed evidence and the fact it is tendered to establish.
- ▶ Not a high threshold
- ▶ Evidence is relevant if it has “some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence”.
- ▶ Relevance does not require a minimum probative value. The question is whether a piece of evidence makes a fact in issue more or less likely to be true.
 - ▶ *R. v. Calnen*, 2019 SCC 6, at para 108; *R. v. White*, 2011 SCC 13, at para 36; *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38.

Materiality

- ▶ *R. v. Calnen*, 2019 SCC 6, at para. 109:
 - ▶ To establish materiality, the evidence must be relevant to a *live* issue; if it is not relevant to a live issue, it must be excluded or the jury should be instructed that the evidence is of no probative value
 - ▶ Does the fact sought to be proven bear any relation to the case

The absence of an exclusionary rule

- ▶ Once you show relevance and materiality, you must show that the evidence does not run afoul of an exclusionary rule of evidence.
- ▶ Example: Expert evidence. The admission of expert opinion evidence is an exception to the general exclusionary rule regarding opinion evidence, but to be admitted, there must be no other exclusionary rule it offends.
 - ▶ R. v. Shafia, 2016 ONCA 812 at para 252; Gottardi, MacLellan, Lacy and Flumerfelt, **Qualifying and Challenging Expert Evidence** (Toronto: Emond, 2022)

Prejudice vs Probative Value

- ▶ Probative value is concerned with proof of an issue. Prejudicial effect with the fairness of the trial: *R. v. Fucile*, 2020 ABCA 189, at paras 30 - 32.
- ▶ Prejudicial effect is about whether the trial will be rendered unfair or the jury will misuse the evidence. Prejudicial effect does not refer to the evidence's tendency to prove the accused guilty: *R. v. Tran*, 2001 NSCA 2 at para 28.
- ▶ In a jury trial, the trial judge must consider whether the prejudice associated with the evidence can be attenuated by appropriate jury instructions about the permitted use of the evidence: *R. v. Schneider*, 2022 SCC 34, at para. 61.

Types of evidence: Direct Evidence

- ▶ Direct evidence
 - ▶ Direct evidence is evidence based on personal knowledge or observation that, if true, proves a fact without inference or presumption. It includes both inculpatory and exculpatory evidence: *R. v. Greenwood*, 2022 NSCA 53, at paras 162-163.
 - ▶ What the witness saw or heard.

Types of evidence: Circumstantial Evidence

- ▶ Circumstantial evidence allows the fact finder to draw particular inferences relying on logic, common sense and experience.
 - ▶ **R. v. Calnen**, 2019 SCC 6, paras 111-112; *R. v. White* [1998] 2 S.C.R. 433, at para. 21; *R. v. White*, 2011 SCC 13, at para. 22;
- ▶ Any testimony not from an eyewitness
- ▶ In a criminal case the guilt of the accused must be the only reasonable inference to be drawn from evidence.
 - ▶ **R. v. Villaroman**, 2016 SCC 33, at para. 30.

Drawing Inferences

- ▶ The inferences that may be drawn will be based on the:
 - ▶ Nature of the conduct
 - ▶ What is sought to be inferred from the conduct
 - ▶ The position of the parties
 - ▶ Totality of the evidence
 - ▶ **R. v. Calnen**, 2019 SCC 6, para 112;

Drawing Inferences

- ▶ In most cases, it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them. "It is for the trier of fact to choose among reasonable inferences available from the evidence of after-the-fact conduct":
 - ▶ **R. v. Calnen**, 2019 SCC 6, para 112; **R. v. Ritch and Sparks**, 2022 NSCA 52. para. 145.
- ▶ “Multiple available inferences” does not mean “equally probable” inferences.

Drawing Inferences

- ▶ The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it
- ▶ Not every possible conjecture no matter how fanciful or irrational constitutes a reasonable inference
- ▶ Inferences consistent with innocence do not have to arise from proven facts. Can arise from an absence of evidence.
 - ▶ *R. v. Villaroman*, 2016 SCC 33 at paras 35 - 38.

Voir Dires

- ▶ If evidence is contentious, its admissibility should be determined by the trial judge at a voir dire in advance.
- ▶ Trial within a trial.
- ▶ Done in absence of the jury.
- ▶ Some examples of when voir dire will be required regarding admissibility of evidence:
 - ▶ Bad character
 - ▶ Prior sexual history
 - ▶ Similar fact evidence
 - ▶ Hearsay
 - ▶ Expert evidence
 - ▶ Voluntariness/*Charter* Compliance of Accused's statement to police.

Objections

- ▶ If the evidence should not be admitted: object.
- ▶ Rise right away, tell the judge you are going to make an objection. If it is an objection that the jury should not hear argued, advise the judge and the jury will be instructed to withdraw.
- ▶ Tell your witness during preparation that if there is an objection they should wait to answer the question until instructed to do so by the trial judge.

Affidavits

- ▶ Not as common in criminal law
- ▶ Are used in various situations, such as at the Court of Appeal level on fresh evidence applications
- ▶ Evidence the witness would give as direct testimony goes in by way of affidavit. The affiant must be made available for cross examination unless there is an agreement.
- ▶ The affidavit can be elaborated on in court by the witness in a brief direct examination, but such further direct testimony should not range significantly beyond what is in the affidavit.