CHAPTER 1

The Basic Concepts of the Law of Evidence

I. THE IMPORTANCE OF UNDERSTANDING THE PRINCIPLES OF EVIDENCE [§1.1]

Counsel should appreciate the importance of the law of evidence when preparing and presenting its case.

It is essential the practitioner understand the precise status of evidence they intend to introduce at trial and whether to object to the other side introducing it. As early as practicable, counsel should satisfy themselves of the elements of the case, then determine what evidence

they will need to prove or disprove those elements and anticipate any potential admissibility or evidentiary concerns. There are also procedural rules and informal practices that counsel should be familiar with that address the mechanics of how to introduce or object to evidence.

The basic conceptual building blocks of evidence are:

- materiality;
- relevance;
- prejudice;
- exclusionary rules; and
- weight or probative value.

These concepts are of practical importance whatever the procedural context. All counsel will benefit from an understanding of these basic principles as well as the specific evidentiary rules discussed in subsequent chapters of this publication, regardless of whether the evidence is sought to be admitted in a criminal or civil trial.

Counsel should consider a number of sources when preparing to introduce evidence at trial. For both admissibility and procedure, there are important general statutes to consider, such as the British Columbia *Evidence Act*, R.S.B.C. 1996, c. 124 and *Canada Evidence Act*, R.S.C. 1985, c. C-5; rules of the particular court; particular legislation that applies to this subject area (such as the *Criminal Code*, R.S.C. 1985, c. C-46); and conventions that set out how to apply those rules in different legal settings. In addition, there are many common-law rules that speak to the admissibility of evidence. Counsel should consider these sources of evidentiary rules and prepare as much as possible in advance of a trial so that the introduction of evidence at trial is as straightforward as possible.

Some of the many questions that counsel must consider include:

- Is the evidence presumptively admissible?
- Is there a burden on the party that must be satisfied before the trier of fact receives the evidence?
- Do documents prove the truth of their contents?
- How is the truth of the contents proven?
- Are witnesses necessary and, if so, which witnesses?
- What if documents contain opinion evidence?
- Do the rules relating to the admission of expert evidence apply?

- When does the party have to notify the other party of its intention to rely on this evidence?
- How can the party describe to the trier of fact the precise use to be made of the evidence being introduced?
- Is the evidence admissible for one purpose but not another?
- Is a jury instruction required?

A practitioner securely grounded in the legal principles that apply and the mechanics of introducing evidence at trial can prepare their cases more confidently and present them more persuasively. The checklist of initial considerations for proving the case set out at "Checklist of Initial Considerations for Proving the Case" in this chapter is a good starting point for counsel. There is also a list of further reading material included at the end of this chapter with many of the leading textbooks that consider the rules of evidence in more depth.

II. CONSIDER EVIDENCE IN THE LEGAL CONTEXT [§1.2]

Different legal settings have different characteristics, having to do with the balancing of formality and informality, arguments about admissibility, and attention to the danger of prejudice. As a result, the approach to evidence needs to be highly contextual—counsel should tailor their approach to the context, whether of a criminal jury trial, a child protection hearing, a bail hearing, a sentencing hearing, or a civil trial without a jury.

The criminal jury trial is the setting in which the rules relating to admissibility are most vigorously applied. For example, the exclusionary rule on hearsay will be applied rigorously. In contrast, in a firearm prohibition proceeding, hearsay has been held to go to weight rather than admissibility (*R. v. Zeolkowski*, 1989 CanLII 72 (SCC)). There has been more openness to hearsay in child protection hearings (*Winnipeg Child and Family Services v. L. (L.)*, 1994 CanLII 16657 (MB CA)) than in criminal trials. Evidence doctrine in aboriginal cases is *sui generis*, with the courts being required to "approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims" (*R. v. Van der Peet*, 1996 CanLII 216 (SCC) at para. 68).

It is important to remember that not every issue to do with evidence is, or needs to be, contested. There is usually room for agreement on how facts can be proven at trial. Admissions of fact may avoid the need for proof. Document agreements covering at least such matters as authenticity and even *prima facie* evidence of the truth of the contents

are common and good practice. But, of course, handling these matters requires a thorough grounding in the rules of evidence.

So the first practical question for counsel faced with an evidence issue is, "What is the legal setting?" The context will influence the way in which the basic concepts of the law of evidence will be used to deal with the issue.

III. CONSIDER MATERIALITY OF EVIDENCE [§1.3]

The primary rule of evidence is that evidence must be relevant to a fact in issue—a proposition material to the particular case. One of counsel's first steps in any legal dispute is to determine the material issues—those "within the range of the litigated controversy" (J.W. Strong (Ed.), *McCormick on Evidence*, 5th ed., vol. 1 (West Group, 1999), at 637). Material issues or facts are explained in *Jones v. Donaghey*, 2011 BCCA 6 at para. 18 as:

> … the ultimate fact, sometimes called "ultimate issue", to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put "in issue" by the pleadings. Facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or "relevant" facts.

Information is material if it is linked to an issue in the case. The substantive law, pleadings, and procedural rules will answer the question of whether an issue is material. In criminal matters, counsel should examine all of the required elements of an offence or defence, as well as any procedural issues, to determine the material issues or facts. In civil matters, counsel should examine the legal elements of the claim—for example, negligence or breach of contract—as well as the pleadings filed in the action.

Material issues include credibility, competence, and the requirements of the rules of evidence, such as preconditions for the admissibility of a confession, or the question of whether there was a settled expectation of death when considering whether a statement is admissible under the dying declaration exception to the hearsay rule.

IV. CONSIDER RELEVANCE OF THE EVIDENCE [§1.4]

The Supreme Court of Canada considered the general legal framework for the admissibility of evidence at a criminal trial in *R. v. Schneider*, 2022 SCC 34, with a description on relevance that applies in the civil context.