Law Society of Saskatchewan

Objections Cheat Sheet: Saskatchewan Edition

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ROBERTSON STROMBERG
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Why object?

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How to Object –at trial

- Make your objection before the witness has an opportunity to answer the question.
- Stand up to get the court's attention.
- If the judge has not noticed that you are standing, you can try to get the judge's attention by saying "Your Honour (or "My Lord" or "Justice", depending on local practice), I have an objection".
- Succinctly state the grounds for your objection. Direct your submission to the judge, not opposing counsel.
- Sit down when you have finished stating the reason for your objection. The judge may give the opposing counsel a chance to respond before ruling.
- Rise again if the judge gives you a chance to respond to examining counsel's argument.
- Get the ruling on the record. If the judge's ruling is not clear, ask for clarification. This may be important on appeal.

How to Object –at questioning

Queen's Bench Rule 5-27 provides:

Objections by witness

5-27(1) If a person being questioned objects to any question or questions put to him or her, the official court reporter shall take down:

(a) the question or questions so put; and

(b) the objection of the witness to the question or questions.

(2) The questioning party shall file the questions and objections mentioned in subrule (1) with the local registrar in whose office the proceedings are pending.

(3) On application, the Court shall decide the validity of any objections.

ABUSIVE OR HARRASSING

OBJECTION: The questioning is unduly harsh and oppressive, and is designed to bully or badger, demean or ridicule.

TEST: Unnecessarily aggressive cross-examination will not be tolerated. A lawyer must not needlessly abuse or harass a witness (Rule 5.1-2(m) of The Law Society of Saskatchewan Code of Professional Conduct).

SK CASELAW: *Newbigging v. Loewen Group Inc.*, 1994 CarswellSask 171 (SKQB) cites N.W. Hullah Corp. v. Aluminum Co. of Canada, 1959 CarswellBC 54 (BCCA), at para 12, which states:

> It is true a main object of discovery examination is to secure admissions, and to obtain information regarding facts so that a party may not be taken by surprise at the trial; but this is not to sanction harassing discovery examination nor to approve of circumventions or inversions of the accepted use of the rules for discovery.

AMBIGUOUS OR VAGUE

OBJECTION: This question is vague.

TEST: A witness does not have to answer a question that is ambiguous or vague, confusing, unclear, overly broad or misleading. The court may intervene to curtail or clarify questions that are vague, wordy or repetitive.

> *The Law Society of Saskatchewan Code of Professional Conduct* s. 5.4:
>
> **Conduct During Witness Preparation and Testimony**
> 5.4-2
> A lawyer must not influence a witness or potential witness to give evidence that is false, misleading or evasive.
>
> 5.4 Commentary
>
> [2] A lawyer may prepare a witness, for discovery and for appearances before tribunals, by discussing courtroom and questioning procedures and the issues in the case, reviewing facts, refreshing memory, and by discussing admissions, choice of words and demeanour. It is, however, improper to direct or encourage a witness to misstate or misrepresent the facts or to give evidence that is intentionally evasive or vague.

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AMBIGUOUS OR VAGUE (Continued)

SK CASELAW: *Braden v Knisley*, 2010 SKQB 335 at paras. 49-55. Specifically, at para 53 the Court states:

> An examination for discovery is in the nature of cross-examination and counsel for the party being examined should not interfere except where it is clearly necessary to resolve ambiguity in a question or to prevent injustice. Rigid limitations rigidly applied can negatively affect the right to a proper examination for discovery.

APOLOGY

OBJECTION: This is an apology and an apology is inadmissible evidence as determined by ss. 23.1(3) of *The Evidence Act*.

TEST: *The Evidence Act*, SS 2006, c. E-11.2, s. 23.1(3):

> (3) Notwithstanding any other Act or law, evidence of an apology made by or on behalf of a person in connection with any event or occurrence is not admissible in any action or matter in any court as evidence of the fault or liability of the person in connection with that event or occurrence.

SK CASELAW: Section 23.1 has been cited in *Wilson v Saskatchewan Government Insurance*, 2012 SKCA 106, and *Bilan v Wendel*, 2010 SKPC 148, to illustrate the apology is inadmissible and is not evidence of fault or liability.

ARGUMENTATIVE

OBJECTION: This question is argumentative and requires the witness to accept an inference that has yet to be proven.

TEST: A question is argumentative when it requires a fact witness to accept an inference put to it by the lawyer that has not been proven. Merely asking someone to agree or disagree with a statement is not necessarily argumentative. The question must assume as true matters to which the witness has not testified and which are in dispute between the parties (*R. v. Buxbaum*, 1989 CarswellOnt 89 (ONCA), at para 18, leave to appeal refused 1989 WL 935714 (SCC))

SK CASELAW: Examiners are not to argue with a witness or put forth arguments in the guise of questioning (*EnCana Corp. v. Devon Canada Corp*., 2009 CarswellAlta 1084 (ABQB.), at para 4, as cited in *University of Regina v HTC Purenergy Inc*., 2019 SKQB 126, at para 17).

NEEDLESS REPETITION (ASKED AND ANSWERED)

OBJECTION: This question is needlessly repetitive and has already been answered by the witness.

TEST: The mere fact that something has been "asked and answered" is generally not considered a valid objection. Where a question is being repeated to the point of being abusive or berating the witness, or a waste of court time, it may be appropriate to object (*R. v. McLaughlin*, 1974, Carswell Ont 4 (ONCA), at para 22).

> *The Law Society of Saskatchewan Code of Professional Conduct* s. 5.1-2
>
> 5.1-2 When acting as an advocate, a lawyer must not:
>
> …
>
> (o) needlessly inconvenience a witness

SK CASELAW: *R v Anderson,* 2019 SKQB 304: cites *R v McLaughlin* when establishing the boundaries of cross-examinations.

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NEEDLESS REPETITION –Exception: Clarification

EXCEPTION - CLARIFICATION: Where the question is repeated because the witness's answer was vague or incomplete, the objection will be overruled. See *Braden v Knisley*, 2010 SKQB 335 at paras 52-55:

> When asked to be more precise, counsel for the plaintiff objected, stating "asked and answered". Counsel for the party who is being examined should not interfere except where it is considered clearly necessary to resolve ambiguity in a question or to prevent injustice.

AUTHENTICTY NOT ESTABLISHED

OBJECTION: This question is argumentative and requires the witness to accept an inference that has yet to be proven.

TEST: A private document or real evidence is inadmissible in court until a witness has:

- Identified the document or real evidence.
- Established its connection to the events under consideration by the court.
- Vouched for its authenticity and convinced the trier of fact that the document is what it purports to be.

R v Schwartz, 1988 Carswell Man 170 (S.C.C.), at paras. 64 to 66.

AUTHENTICTY NOT ESTABLISHED (Continued)

SK CASELAW: *R v Durocher*, 2019 SKCA 97 at paras. 74-89: The rules of authenticity requires the introduction of some evidence to establish the document is what it purports to be (citing *R v Hirsch*, 2017 SKCA 14 at paras 18 and 24).

Authentication is not onerous and may be established by direct and circumstantial evidence. The burden of proof to establish threshold authenticity for purposes of s. 31.1 of the *Canada Evidence Act*, RSC 1985, c C-5, (electronic documents) is low, and once satisfied, the document is admissible and available for use by the trier of fact (*Hirsch*, at para 18).

Moreover, the judge in *Durocher* noted that authentication does not necessarily mean the document is genuine. Evidence can be authenticated even where there is contest over whether it [the document] is what it purports to be.

AUTHENTICTY NOT ESTABLISHED (Continued)

See: Section 5-16 of *The Queen's Bench Rules* of Saskatchewan regarding admissions of authenticity of documents.

Particularly, subrule 5-16(3)(b) states a party can still object to the admission of a document in evidence when that document is presumably authentic per subrule (2)..

See also: Sections 55-59 of *The Evidence Act*, SS 2006, c E-11.2 discuss authenticity of electronic documents.

CALLS FOR LEGAL CONCLUSION

OBJECTION: The witness is drawing a legal conclusion based on facts rather than simply stating the facts.

TEST: A question that calls for a legal conclusion on a pure issue of domestic law is improper (*R. v. Graat*, 1982 CarswellOnt 101 (S.C.C.), at para 58). This is an extension on the rule that opinion is inadmissible (see Opinion). Witnesses are to present facts. Drawing legal conclusions based on those facts is the role of the judge.

EXCEPTION – NO LEGAL ANALYSIS REQUIRED: Where the conclusion can easily be drawn based on observations without requiring technical legal knowledge, it may be admissible. A conclusion that someone was intoxicated may be admissible under this standard, while a legal conclusion that someone was negligent rests solely with the judge (*R. v. Graat*).

CALLS FOR LEGAL CONCLUSION (Continued)

SK CASELAW:

R v Shepherd, 2007 SKCA 29 at paras 10-11: Citing *Graat*— A non-expert witness is entitled to give evidence that a person is intoxicated. Serious consideration should be given to a witness's opportunity for personal observation.

R v RH, 2010 SKCA 49 at para 62: Citing *Graat*—Generally, opinion of a lay witness is not admissible; however, a witness's opinion is permissible if the opinion is "merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly".

CHARACTER EVIDENCE

OBJECTION: This question calls for character evidence and it does not fall within either of the established exceptions.

TEST: Generally speaking, evidence of a party's character is inadmissible to circumstantially prove a fact in issue (Randhawa v. 420413 B.C. Ltd, 2009 CarswellBC 3512 (B.C. C.A.), at paragraph 97, leave to appeal refused 2010 CarswellBC 1205 (S.C.C.); *Saskatchewan v Racette*, 2020 SKQB 2).

Even relevant character evidence is inadmissible unless it falls into one of the limited exceptions, or if has been shown that the probative value of the evidence in question outweighs the prejudicial effect (*Saskatchewan v Racette*, 2020 SKQB 2 at para 25)

CHARACTER EVIDENCE (Continued)

SK CASELAW:

Saskatchewan v Racette, 2020 SKQB 2: As a starting point, character evidence – good or bad – is generally inadmissible in a civil action. Evidence of "bad character" is anything that tends to place someone's character in bad light (citing *R v Woods*, 2019 SKCA 84).

In keeping with the principles set out by the Supreme Court in *R v Handy*, bad character evidence may be relevant, but it is presumptively inadmissible because of the potential for prejudice, distraction, and time consumption. Moreover, at para 24, *Racette* notes that the introduction of bad character evidence may have an "even more pronounced effect in a civil trial given the reduced burden of proof".

CHARACTER EVIDENCE (Continued)

SK CASELAW:

R. v Dueck, 2011 SKCA 45: The accused appealed his conviction on the ground that the trial judge erred by failing to grant a mistrial after the Crown introduced improper character evidence. The appeal was dismissed as it was ruled the prosecutor was not attempting to elicit evidence as to the accused's bad character, but was trying to establish context. The reference to the accused as a "bullshitter" was a purely personal opinion and not reference to the accused's general reputation. The opinion would have been readily placed in proper light by the jury, the comment was brief, and the trial judge immediately advised that the comment was irrelevant. The comment did not cause a "fatal wound" to the trial process.

CHARACTER EVIDENCE (Continued)

Sections 18(1) and 19(6) of *The Evidence Act,* SS 2006, c E-11.2 discusses witness credibility:

Previous conviction of witness

18(1) A witness may be asked whether he or she has been convicted of any offence and, if the witness denies the fact or refuses to answer, the opposite party may prove the conviction.

…

Impeaching credibility of witness

19 (6) A party producing a witness shall not be allowed to impeach the witness's credibility by general evidence of bad character

CHARACTER EVIDENCE –Exception: Character in Issue

EXCEPTIONS – CHARACTER IN ISSUE

Saskatchewan v Racette, 2020 SKQB 2 outlines that bad character evidence can be admitted through cross examination relating to general reputation for untruthfulness or to prior criminal convictions or to findings of professional misconduct involving dishonesty (at para 26, citing *Deep v Wood*, 1983 CarswellOnt 400 (ONCA).

CHARACTER EVIDENCE –Exception: Similar Fact Evidence

EXCEPTIONS – Similar Fact Evidence

R v Handy, 2002 SCC 56. For similar act evidence to be admissible against a party:

- There must be a connection between the similar acts and the party.
- The similar fact evidence must be highly probative. The greater the similarity between the acts, the higher the probative value. A number of factors have been identified to establish a nexus including: proximity in time and place;
- the level of similarity;
- the surrounding circumstances of both events;
- distinctive features unifying the events; and
- any intervening factors.

See generally *R. v. Poon*, 2012 SKCA 76, for a similar fact evidence analysis

COMPOUND (DOUBLE-BARRLED)

OBJECTION: Counsel is asking two questions at once.

TEST: One question that is actually two or more questions. At trial, a witness can only be asked to answer one question at a time. The question may be objected to and, as a result, the compound question must be broken into individual questions to be asked separately.

CONFUSION

OBJECTION: The question asked is confusing.

TEST: The phrasing or structure of a question that makes it difficult to know what exactly is being asked

SK CASELAW: In *McCallum v. Coubrough*, 1983 CarswellSask 328 (SKQB), the plaintiff argued he did not understand the questions at the examination in discovery, but upon review of the questions, the court determined they were straight forward placed in the simplest language which the plaintiff should have no difficulty understanding

FACTS NOT IN EVIDENCE

OBJECTION: This question concerns facts that have not been put into evidence and is therefore irrelevant and beyond the scope.

TEST: A question may be objectionable if it assumes facts that have not already been put into evidence, where answering the question could be seen as an acceptance of the underlying unproven fact (*R. v. Elder-Nilson*, 2006 CarswellOnt 6716 (ONCA)). For example, you cannot ask a witness why they did not report an allegedly fraudulent transfer without first establishing that she actually knew that the transaction had occurred.

EXCEPTION – GOOD FAITH BASIS: A question can be put to a witness in cross-examination on matters that need not be proved independently, provided that counsel has a good faith basis for the question (*R. v. Lyttle*, 2004 CarswellOnt 510 (SCC) at para 47).

FACTS NOT IN EVIDENCE (Continued)

SK CASELAW:

R. v Anderson, 2019 SKQB 304: Citing *Lyttle*—At paras 39-40, *Anderson* states, “the fundamental importance of cross-examination is reflected in the general rule that counsel is permitted to ask any question for which they have a good faith basis, an independent evidentiary foundation is not required…However, the right to cross-examine is not unlimited... questions must be relevant and their prejudicial effect must not outweigh their probative value”.

HEARSAY

OBJECTION: The witness is giving hearsay evidence. It is not based on her personal knowledge, but is based on what she has been told. This evidence does not fit within the exceptions to the rule.

TEST: Evidence of an out-of-court statement is inadmissible where the statement is being put forward as truth of its contents and there is no opportunity to contemporaneously cross-examine the person who made the statement (*R v Bradshaw*, 2017 SCC 35 at para 1).*R. v. Khelawon*, 2006 CarswellOnt 7825 (SCC), at paras. 36 and 56.

R. v. Hawkins, 1996 CarswellOnt 4062 (SCC), at para 60: The primary concerns with hearsay are that:

- The statement was not made under oath.
- Counsel will not be able to test the credibility of the speaker and statement through cross-examination.
- There must be a connection between the similar acts and the party.
- The trier of fact will not have an opportunity to observe the demeanour of the person making the statement.
- There is no way to test whether the statement has been repeated correctly.

HEARSAY (Continued)

SK CASELAW: See generally *R v Durocher*, 2019 SKCA 97, where the Court undergoes an analysis of Facebook evidence.

See also *Good Spirit School Division No. 204 v. Christ The Teacher Roman Catholic Separate School Division No. 212*, 2016 SKQB 148, at para 16, where the Court determined Affidavits are hearsay at the time of trial – the affidavits are out of court statements tendered for the veracity of their contents. They permit the ultimate leading of a witness's testimony, something disallowed during examination-in-chief at trial.

HEARSAY –Exception: Necessary and Reliable

NECESSARY AND RELIABLE: *R. v. Khelawon*, at paragraphs 62 and 63. Under the "principled approach", hearsay is admissible where it is both:

- **Necessary**. The original speaker is not available and there is no other source for the information.

- **Reliable**. There no concern about the statement because either:
  - the statement was made in circumstances that provide a guarantee of trustworthiness; or
  - the truth or accuracy of the statement can still be tested.

SK CASELAW: See generally *R. v Nataucappo*, 2015 SKCA 28.

HEARSAY –Exception: Not Admitted For Truth of Contents

NOT ADMITTED FOR TRUTH OF ITS CONTENTS: When an out-of-court statement is relevant to something other than proof of the contents of the statement, it may be admissible.

For example, an out-of-court statement may be admissible as proof that a statement was made. The statement may be relevant to the witness' actions and state of mind, apart from the issue of whether the statement is actually true (*R. v. O'Brien*, 1977 CarswellBC 403 (SCC) at para 4).

SK CASELAW: see generally *R. v Drury*, 2006 SKCA 55; see also *R v Durocher*, 2019 SKCA 97.

HEARSAY –Exception: Admissions

ADMISSIONS: Where a party makes an out-of-court statement against its own interest, it is generally considered to be admissible. People generally do not implicate themselves, and it does not follow that their own statement is not reliable (*R. v. Evans*, 1993 CarswellAlta 111 (SCC) at para 28; *R. v. Drury*, 2006 SKCA 55).

SK CASELAW: *R v Durocher*, 2019 SKCA 97: reiterates admissions made to non-authority figures outside the court room are presumed to be admissible without the need for *voir dire*.

R. v. Big Eagle, 1994 CarswellSask 326 (SKQB): At the time of questioning, the police did not have reasonable and probable grounds to arrest accused but the statements were admissible. Accused was not detained at the time he made the statements. He was free to leave and the statements were given voluntarily.

HEARSAY –Exception: Declarations Against Interest

DECLARATION AGAINST INTEREST: The test from *R v Demeter*, 1977 CarswellOnt 15 (SCC), and *R v Starr*, 2000 SCC 40, is summarized as:

A statement may be admissible if the following criteria are present:

- The speaker must be unavailable to testify. Generally, this means the speaker must be mentally incapable of testifying, dead or missing or outside the court's jurisdiction.
- The statement must be against the speaker's interests, whether pecuniary, proprietary or penal.

SK CASELAW: *Mitchell v. Hanan*, 1943 CarswellSask 63 (SKCA): The exception to the hearsay rule which permits the reception of statements by deceased persons does not include self-serving statements but applies to statements against their pecuniary or proprietary interest.

HEARSAY –Exception: Declarations Against Interest

SK CASELAW:

R. v. Gmerek, 2017 SKQB 58: Accused made a verbal statement to a Mr. S and an investigating officer. This evidence was admissible as statement against interest under traditional exception to rule against hearsay permitting such evidence; it was likely that the accused perceived Mr. S as a person in authority because of the presence of the investigating officer, and because of investigatory tone to their interaction. It was established beyond reasonable doubt that statement was voluntarily

See generally *R. v. Demarais*, 2010 SKPC 94, for statement against penal interests

See generally *Sperling Estate v. Heidt*, 1999 CarswellSask 72, for statement against proprietary interest

HEARSAY –Exception: Dying Declarations

DYING DECLARATIONS: A statement by a person with a settled expectation of death may be admissible. This limited exception applies only in homicide cases, so is not relevant in commercial litigation (*Schwartzenhauer v R.*, 1935 CarswellBC 84 (SCC)).

SK CASELAW: *R. v. Inkster*, 1915 CarswellSask 233 (SKQB): In criminal cases, a dying declaration is only admissible in the case of homicide where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration.

HEARSAY –Exception: Business Records

BUSINESS RECORDS: Business records may be admissible under either the common law or under relevant legislation. *L. (B.) v. Saskatchewan (Ministry of Social Services)*, 2012 SKCA 38, at para 24, reiterates the legal test as established in *Setak Computer Services Corp. v. Burroughs Business Machines Ltd.*, 1977 CarswellOnt 626 (ONSC):

- The evidence must be a writing or record produced by a business…
- The writing or record must be made in the usual and ordinary course of a business…
- It must be in the usual and ordinary course of the business to make such writing or record…
- The writing or record must be made at the time of or within a reasonable time after the act, transaction, occurrence or event it is introduced as evidence of…
- Business records are not proof of the validity of any opinion expressed therein …
- Lack of personal knowledge does not affect the admissibility of the writing or record…
- To these principles Ryan-Froslie J. [in *V. (S.), Re*, 2002 SKQB 499] added an additional principle:

  31 ... The writing or record must be of an act, transaction occurrence or event; [i.e. a positive happening which is routinely recorded.]

SS. 50-52 in *The Evidence Act* discusses business records, photographs as permanent records and copies of business records.

HEARSAY –Exception: Medical Records

MEDICAL RECORDS: Related to the exception for business records, medical records will be admissible as *prima facie* proof of the facts stated in them.

Test for admissibility is set out in in s. 22(1) of *The Evidence Act,* SS 2006, c. E-11.2:

> **Evidence of professionals**
>
> 22(1) With leave of the court, a professional report purporting to be signed by a physician, chiropractor, dentist, psychologist, physical therapist or occupational therapist authorized pursuant to a statute to practise in any part of Canada is admissible in evidence in any proceeding without proof of the person's signature, qualifications or authority to practise.
>
> (2) If a member of a profession mentioned in subsection (1) has been required to give evidence orally in a proceeding and the court is of the opinion that the evidence could have been produced as effectively by a professional report in writing, the court may order the party that required the attendance of the professional practitioner to pay costs in any amount that the court considers appropriate.

HEARSAY –Exception: Medical Records

SK CASELAW: *Bird v Bird*, 2013 SKQB 157: it was a professional report per s. 22 but is inadmissible because the doctor who authored the report was not authorized to practice in Canada per s. 22.

HEARSAY –Exception: Res Gestae (Spontaneous Utterance)

RES GESTAE (SPONTANEOUS UTTERANCE): When determining whether a statement qualifies as a spontaneous utterance, judges look to a number of factors, including (*R. v. Badger*, 2019 CarswellSask 391 (SKPC) paras. 19-25):

- Contemporaneous to the event in question;
- Exact contemporaneity is not required;
- Circumstances it was made in in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event;
- What it means to be spontaneous: passage of time, intervening events;
- The statement must be "so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event";
- Required to be unsolicited in that it cannot be a response to a leading question; and
- Absence of "special features likely to result in error by the declarant, such as drunkenness"; which the court in Badger says this does need to be considered

HEARSAY –Exception: Res Gestae (Spontaneous Utterance)

SK CASELAW*:*

R v Trotchie, 2019 SKCA 43: It was agreed by accused at trial that complainant's utterances after sexual assault, when she ran into the bar crying and told her colleagues of the sexual assault, were to be admitted into evidence pursuant to *res gestae* or spontaneous utterance exception to hearsay rule.

Spontaneous utterance was part of the narrative of what transpired immediately after assault and such evidence has long been held to be exception to rule against prior consistent statements. Evidence was relevant to complainant's demeanor immediately after incident and was, therefore, relevant to her credibility.

HEARSAY –Exception: Testimony from Another Proceeding

TESTIMONY FROM ANOTHER PROCEEDINGS: The traditional concerns about hearsay do not really apply to testimony from another proceeding because the testimony was given under oath and there was an opportunity for cross-examination. There are three criteria that must be met in the context of a civil proceeding (*Walkerton (Town) v. Erdman*, 1894 Carswell Ont 22 (SCC), at para 31):

- The speaker must be unavailable to testify (necessity). Generally, this means the speaker must be mentally incapable of testifying, dead or missing or outside the court's jurisdiction;
- The parties and the subject matters of the two proceedings must be the same; and
- There must have been an opportunity to test the evidence's reliability.

HEARSAY –Exception: Testimony from Another Proceeding

The Evidence Act, SS 2006, c. E-11.2, s. 27(3):

> (3) In the absence of evidence to the contrary, a document purporting to have been made in testimony of an oath having been sworn, an affidavit having been sworn or affirmed or an affirmation or declaration made, and purporting to have been signed by a person mentioned in subsection (2), or purporting to have been signed by a person mentioned in subsection (2) and sealed with the official seal of the person or the official entity of which the person is a representative, shall be admitted in evidence without proof of the signature, seal or official character of the person

IMPROPER RE-EXAMINATION

OBJECTION: This question introduces new facts. Counsel cannot introduce new facts on re-examination.

TEST: Re-examination must be confined to matters arising on cross-examination. A party cannot split her case and introduce new facts on re-examination (*R. v. Evans*, 1993 CarswellBC 495 (S.C.C.), at para 36).

SK CASELAW: In *Pollock v. Remenda*, 1989 CarswellSask 162 (SKQB), the Court determined counsel should be permitted to re-examine his or her witness on matters which were not raised during examination-in-chief but which opposing counsel did elicit during cross-examination.

IRRELEVANT

OBJECTION: I fail to see how this evidence is relevant.

TEST: A question that is clearly irrelevant does not need to be answered. Relevance is defined by the pleadings. To be relevant, the evidence, as a matter of logic and human experience, must tend to prove or disprove a fact in issue. If the question does not relate to a matter in issue as particularized by the pleadings, then the matter is not relevant to any matter in issue. (*Canadian National Railway v. Clarke Transport*, 2013 SKQB 394)

The Queen's Bench Rules of Saskatchewan contains a variety of rules addressing the acquisition of relevant information depending on the specific court action.

IRRELEVANT (continued)

Queen's Bench Rules

People who can be questioned
5-18(1) Subject to Part 15, any party to an action or issue may:
(a) without order, be questioned before the trial about information **relevant** to any matter in issue by any party adverse in interest; and

…

Cross-examination, vexatious or irrelevant questions
9-24 The judge may, in all cases, disallow any questions put in cross-examination of any party or other witness that appear to the judge to be vexatious and **not relevant** to any matter proper to be inquired into in the cause or matter.

IRRELEVANT (continued)

SK CASELAW: *Canadian National Railway v. Clarke Transport*, 2013 SKQB 394 at 18:

> I am satisfied that when this Court moved from the words of *touching* and *relating to any matter in issue*, it intended to move away from the broad relevance test that existed under the former *Queen's Bench Rules*. Concerns existed in Saskatchewan, as in other jurisdictions, that the broad relevance test did not strike a proper balance between the considerations of efficiency, timeliness in the conduct of litigation and cost control on the one hand with the counterbalancing interests of litigants and counsel in ensuring that all potentially relevant information was known.

R. v. Bear, 2008 SKCA 172, where the Court stated comment by one witness on the veracity of another is irrelevant

IRRELEVANT –Existence of Insurance

OBJECTION: The insurance policy is not relevant to this action and my client is not required to disclose it.

TEST: Saskatchewan does not have a statutory rule compelling the disclosure of insurance policies. Rather, in order to compel the production of an insurance policy, the insurance policy has to be relevant to the action (*Ivo v. Halabura*, 1986 CarswellSask 117 (SKQB)). Factors such as whether the insurance policy was pleaded by either party or if the policy could affect a party's right to damages or the amount of damages will factor of the relevancy analysis.

IRRELEVANT –Existence of Insurance (Continued)

SK CASELAW:

Quorex Construction Ltd. v. 101036033 Saskatchewan Ltd., 2009 SKQB 467: Contractor provided construction services and management to developer for particular project, but when the developer refused to pay full amount due to offsetting damages allegedly arising from breaches of contract, the contractor brought action against developer for amount owing. The developer wished to see all budgeting, contractual, and insurance documents relating to the project so the developer brought an application for an order requiring the contractor to make further and better production of documents.

This application was granted as the requested documents were relevant to the issues raised in the pleadings: proper cost allocation as between many construction contracts, work required under contracts, and insurable losses and recoveries were at core of issues in action.

LACKS A FOUNDATION

OBJECTION: This question lacks a foundation in that it suggests facts which have not yet been proved in evidence.

TEST: Whatever the content of the witness's testimony, it is necessary to lay a foundation showing that the witness is testifying either from personal knowledge or on the basis of an acceptable substitute, as in the case of expert testimony.

LEADING THE WITNESS

OBJECTION: This question introduces new facts. Counsel cannot introduce new facts on re-examination.

TEST: Re-examination must be confined to matters arising on cross-examination. A party cannot split her case and introduce new facts on re-examination (*R. v. Evans*, 1993 CarswellBC 495 (S.C.C.), at para 36).

SK CASELAW: In *Pollock v. Remenda*, 1989 CarswellSask 162 (SKQB), the Court determined counsel should be permitted to re-examine his or her witness on matters which were not raised during examination-in-chief but which opposing counsel did elicit during cross-examination.

LEADING THE WITNESS –Exceptions

NON-CONTROVERSIAL MATTERS: A party may ask leading questions of its own witness on preliminary and non-controversial issues. This practice is seen as speeding up the trial process and does not give rise to serious concern. Where necessary, leading questions may also be used to direct the witness to a particular event or subject matter (*R. v. T. (J.A.)*, 2012 CarswellOnt 3338 (Ont. C.A.), at paragraph 93; *Maves*, at paragraphs 24 to 26).

ADVERSE/HOSTILE WITNESS: In Saskatchewan, s. 19(7) of *The Evidence Act* states:

> (7) If a court declares a witness to be adverse to a party, the party may:
>
> (a) contradict the witness by other evidence; or
>
> (b) subject to subsection (8), with leave of the court, prove that the witness has at other times made a statement inconsistent with his or her present testimony

Section 9 of the *Canada Evidence Act,* RSC 1985, c. C-5, also contains a similar provision relating to adverse witnesses.

LEADING THE WITNESS -Exceptions

SK CASELAW:

R. v. Dombowsky, 2013 SKPC 13: witness declared adverse and was cross-examined on previous inconsistent statements

MISSTATEMENT

OBJECTION: This question includes a misstatement of previous testimony

TEST: When counsel explaining or questioning the witness falsely or inaccurately re-states previous testimony

> *The Law Society of Saskatchewan Professional Code of Conduct*, s. 5.1-5(f):
>
> 5.1-2 When acting as an advocate, a lawyer must not: (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

SK CASELAW: In R. v. Metzger, 2015 SKQB 215, confusion arose out of the words used by counsel to question the witness, but the misstatement was not detrimental to the case.

OPINION

OBJECTION: The witness is not qualified to give that opinion.

TEST: A witness is to testify to facts within his or her knowledge. A witness is not to give his or her opinion or draw inferences. That is the job of the trier of fact (*R. v. Abbey*, 1982 CarswellBC 230 (SCC) at para 43).

OPINION –Exception: Lay Opinion

LAY OPINION: Test from *R v Graat* - Where opinion and fact are tied up in a witness' recollection of observations, opinion evidence may be admitted where all of the following criteria are met:

- The witness has personal knowledge.
- The witness is in a better position than the trier of fact to form the opinion.
- The witness has the necessary experiential capacity to make the conclusion.
- The opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about.

SK CASELAW: See generally *R v Parada*, 2016 SKCA 102.

See also *Kennett v Diarco Farms Ltd*, 2018 SKQB 61, where excerpts from a letter written about an employee's overall loss were found to be lay opinion and struck from an affidavit.

OPINION –Exception: Expert Opinion

EXPERT OPINION: In *R. v. Mohan*, 1994 CarswellOnt 66 (SCC), the Supreme Court of Canada set out four requirements that must be established for an expert opinion to be admissible: relevance, necessity in assisting the trier of fact, absence of an exclusionary rule and a properly qualified expert.

White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23 added independence and impartiality as factors that must be considered at the threshold as well as at the gatekeeping stages.

SK CASELAW: *R v Parada*, 2016 SKCA 102, where the Court provided general commentary on the role of expert reports. Experts perform a function of providing the judge and jury with ready-made inferences which judge and jury are unable to draw due to technical nature of subject matter. This evidence is an exception to the general rule against opinion evidence because the expert witness has specialized knowledge, skill, or experience and is needed to assist trier of fact to form proper conclusion.

PERSONAL OPINION OF COUNSEL

OBJECTION: Counsel is inappropriately expressing their personal opinion and deviating from the relevant facts.

TEST: Legal counsel's personal opinion is irrelevant to any proceeding. Counsel cannot express their personal opinion about a witness, an issue or the case in general (*R. v. Finta*, 1992 CarswellOnt 96 (Ont. C.A.), at para 410; *Hoskin v. Han*, 2003 CarswellBC 857 (BCCA) at paras. 99 to 102). The trial judge may intervene where counsel is editorializing their questions (*R. v. Snow*, 2004 CarswellOnt 4287 (ONCA) at para 25).

SK CASELAW: None found but *R v Snow* has been cited in two Saskatchewan cases: *R v. Pelletier*, 2019 SKCA 11, and *R v. Sparvier*, 2006 SKCA 139. However, the portion of *R v Snow* addressing the personal opinion of counsel was not found in reasons.

PREJUDICIAL

OBJECTION: This question is unfairly prejudicial because…

TEST: Evidence may be excluded where its prejudicial impact outweighs its probative value. Evidence may be excluded on this ground where it appears the evidence may:

- Consume an inordinate amount of time compared to its value (*R. v. Mohan*).
- Mislead the trier of fact (*R. v. Mohan*).
- Confuse the trier of fact (*R. v. Seaboyer*, 1991 CarswellOnt 109 (S.C.C.), at paragraph 238).

SK CASELAW: See generally *R. v. Little*, 2016 SKQB 184 (sexual assault case) , *R. v. N. (B.H.)*, 2013 SKPC 71 (sexual assault case), *Vigoren v. Nystuen,* 2006 SKCA 4 (negligence) where the court goes through probative value-prejudicial effect analyses.

PRIVILEGE (Solicitor-Client)

OBJECTION: The question invades solicitor-client privilege

TEST: A communication is inadmissible if it is between a client and her lawyer or the agent of either party, it originated in context of giving or receiving legal advice and was intended to be confidential (*Descôteaux c. Mierzwinski*, 1982 CarswellQue 291 (SCC)).

SK CASELAW: See generally; *Redhead Equipment Ltd. v. Canada (Attorney General)*, 2016 SKCA 115; *Law Society (Saskatchewan) v. EM & M Law Firm*, 2008 SKCA 128; and *R. v. Carriere*, 2005 SKQB 471

PRIVILEGE (Solicitor-Client) –Exception: Waiver

VOLUNTARY WAVIER: Where one expressly puts legal advice in issue, privilege is waived.

IMPLIED WAVIER: Implied waivers of solicitor-client privilege occur when the client voluntarily takes a position that is inconsistent with the maintenance of the privilege (*Perdikaris v. Purdue Pharma*, 2019 SKQB 281 at para 67). A party may impliedly waive privilege where they either:

- Puts forward evidence of reliance on legal advice to explain a course of conduct (*R. v. Shirose*, 1999 CarswellOnt 948 (SCC); or
- Client's state of mind or lawyer's actions are relevant to particular proceeding (*Sendagire v. Co-operators General Insurance Co.*, 2009 SKQB 265).

PRIVILEGE (Solicitor-Client) –Exception: Waiver

INADVERTENT WAVIER: The three-part test for inadvertent disclosure of privileged documents is set out in *Francesca v. Cava Secreta Wines & Spirits Ltd*., 2011 SKQB 387, at para 31 (citing the test from *Chan v. Dynasty Executive Suites Ltd*., 2006 CarswellOnt 4318 (ONSC)):

> 30 The mere loss of physical possession of a privileged solicitor-client communication due to an inadvertent or negligent disclosure does not automatically waive or terminate the privilege…
>
> 31 Whether or not privilege has been waived through inadvertent disclosure depends on the circumstances and requires the court to consider three factors — whether the error was in fact inadvertent and thus excusable; whether an immediate attempt has been made to retrieve the documents; and whether preservation of the privilege in the circumstances would cause unfairness to the receiving party: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*.

PRIVILEGE (Solicitor-Client) -Exceptions

COMMUNICATIONS IN FURTHERANCE OF CRIME OR FRAUD: Where a client seeks advice from her lawyer for the purpose of committing a crime or civil fraud, privilege will not attach to those communications (*Descôteaux c. Mierzwinski*, 1982 CarswellQue 291 (SCC)).

- See generally *R. v. Perverseff*, 1971 CarswellSask 110 (SK Mag. Crt).

PUBLIC SAFETY: An otherwise privileged communication may be disclosed to prevent harm. This exception applies where there is a clear risk to an identifiable individual or group; the risk is of death or serious harm and the danger is imminent (*Smith v. Jones*, 1999 CarswellBC 590 (SCC).

INNOCENCE AT STAKE: A privileged communication may be disclosed to ensure an innocent party is not unjustly convicted where the privileged information goes to the core of the issue, the information is not available from a non-privileged source and there is no other way the accused could raise a reasonable doubt (*R. v. McClure*, 2001 CarswellOnt 496 (SCC)

PRIVILEGE (Litigation)

OBJECTION: The question invades litigation privilege

TEST: If a document or communication was created for the dominant purpose of use in existing or anticipated litigation, it does not need to be produced as it was intended to be kept confidential and the privilege has not been waived (*Blank v. Canada (Department of Justice)*, 2006 CarswellNat 2704 (SCC)).

PRIVILEGE (Litigation) (Continued)

SK CASELAW: *Francesca v. Cava Secreta Wines & Spirits Ltd*., 2011 SKQB 387, at para 5 for a slightly different test for Saskatchewan:

> The test for litigation privilege was stated by Robert W. Hubbard et al. in *The Law of Privilege in Canada*, vol. 2, looseleaf (Toronto: Canada Law Book, 2010) at 12.10, which reads as follows:
>
> - the elements required in order to claim work product or litigation privilege over documents or communications are as follows:
> - the documents or communications must be prepared, gathered or annotated by counsel or persons under counsel's direction;
> - the preparation, gathering or annotating must be done in anticipation of litigation;
> - the documents or communications must meet the dominant purpose test;
> - the documents, or the facts contained in the documents, need not be disclosed under the legal rules governing the proceedings; and
> - the documents or facts have not been disclosed to the opposing party or to the court.

PRIVILEGE (Litigation) (Continued)

See also generally *R. v. Carriere*, 2005 SKQB 471, where litigation privilege, with its different underlying rationale, justifies a less onerous test than that for solicitor-client privilege.

PRIVILEGE (Litigation) –Exceptions: Litigation Has Ended

LITIGATION HAS ENDED: Litigation privilege is not a permanent privilege but lasts only for the duration of the litigation. However, litigation privilege may survive in closely related proceedings that involve the same or related parties, arise from the same or related cause of action or raise common issues and share a common purpose with the initial action (*Blank v. Canada* (SCC.), at paras. 28, 32, 33 and 39.)

Where documents are prepared in anticipation of multiple claims, or where there is the potential for both civil and criminal liability, privilege will be maintained until all proceedings that involve the same or related parties and share the same juridical source have been completed (See *SaskPower International Inc. v. UMA/B&V Ltd*. (2008), 2008 SKQB 294, and *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership (2010*), 2010 CarswellSask 884 (Sask. Q.B.)

WAIVER: See Solicitor-Client Privilege.

PRIVILEGE (Settlement)

OBJECTION: The question invades settlement privilege

TEST: All communications in furtherance of settlement are protected by privilege and inadmissible at trial. Communications need not be marked "without prejudice" for this protection to apply (*Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 CarswellNS 428 (SCC)).

SK CASELAW: *Manderscheid v. Humboldt Smiles Dental Studio Inc*., 2019 SKQB 284: A plaintiff brought an application for disclosure of the Consent to Conditions Agreement ("CAA") signed between the negligent defendant (Dr. A, dentist who supposedly caused a brain abscess on plaintiff after a dental surgery) and the College of Dental Surgeons. Application dismissed as the CCA was agreement between disciplinary committee of College and subject of disciplinary proceedings. The CCA concluded dispute between Dr. A and College and was intended to remain between College and Dr. A. Therefore, the CCA was bound by settlement privilege and should not be disclosed to plaintiff.

PRIVILEGE (Settlement) –Exception: Waiver

EXCEPTION – WAIVER: Settlement privilege belongs to both parties, so cannot be waived unilaterally. It may be waived if:

- The parties fail to keep the settlement and its conditions confidential - *Touche Ross Ltd. v. Gateway Hotels Ltd.* (1982), 41 C.B.R. (N.S.) 151 (Sask. Q.B.);
- A dispute arises about the terms of the settlement and evidence of the negotiations is necessary to resolve the issue (*Stanley v. Friend*, 2008 SKCA 53); or
- Evidence of communications fell within recognized exception to settlement privilege to explain delay. For example, in *USW, Local 1-184 v. Premier Horticulture Ltd.*, 2019 CarswellSask 24 (SK Labour Relation Board), the fact that communications occurred between union and employer, and dates on which communications occurred, were admissible.

PRIVILEGE (CASE BY CASE)

OBJECTION: The question relates to privileged matters

TEST: Where a recognized class of privilege does not apply, the court may rule that a communication is privileged where four criteria (the Wigmore test) are met:

- The communication originated in confidence that it would not be disclosed.
- Confidentiality is essential to the relationship between the parties.
- The relationship is one that the community feels should be fostered.
- The harm that disclosure would do outweighs the benefit in the litigation.

R. v. McClure, 2001 CarswellOnt 496 (SCC), at para 29.

SK CASELAW: Citing *McClure* – see generally *Perdikaris v. Purdue Pharma*, 2019 SKQB 281; *University of Saskatchewan v. Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34; and *R. v. Carriere*, 2005 SKQB 471

SPECULATIVE

OBJECTION: The question calls for speculation or a hypothetical answer, rather than facts.

RULE: A trial judge has discretion to rule questions that require a witness to guess or speculate to not be answered (*R. v. Bouchard*, 2013 CarswellOnt 4040 (Ont. C.A.), at para 2).

SK CASE LAW: At the questioning in *Knisley v. Prairie Machine & Parts Mfg*. (1978) Ltd., 2016 SKQB 198, the defendant's counsel objected to certain questions as being speculative. The plaintiff brought an application challenging the validity of the objections, and the questions objected to for being speculative were found to be irrelevant and as such the objections were maintained.

Law Society of Saskatchewan

Thank you!
Any objections?

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