

HANDOUT 1: Evidence in Court

Examining the Issues of Evidence

The trial of Robert Pickton, which began in January 2007, stems from the largest serial killer investigation in Canadian history and is “unprecedented in its magnitude”.

To make the case manageable and ensure justice gets delivered, the trial judge severed six of the 26 first degree murder counts on the basis that they are “materially different” and left the option for the Crown to pursue a trial on the remaining 20 counts at a later date. 3500 potential jurors were called for jury selection in December 2006 for the trial that is estimated to last about a year.

One can't help but wonder how one of the basic values of our justice system, as reflected in s. 11(d) of the *Canadian Charter of Rights and Freedoms*, that every citizen has a right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal” will be honoured in these circumstances. How will the accused obtain an impartial jury that is free from prejudicial attitudes when the case has such high profile in the media?

The jury selection process aims at securing a jury that is impartial at the outset. To maintain the impartiality and fairness of the jurors throughout the trial, various mechanisms ensure that the jury has access only to the evidence that is properly admissible and will not be swayed by inadmissible considerations.

The Purpose of the Rules of Evidence

The types of evidence include oral evidence of witnesses, opinion evidence of experts, real evidence such as objects found at the crime scene, and demonstrative evidence (materials created for the purpose of the trial) such as crime scene photographs. All of these types of evidence are used to prove a case.

In a typical jury trial, when an item of evidence is put forward, the judge evaluates its admissibility by a process known as *voir dire*, which is a trial about admissibility of the particular item within the main trial about the guilt of the accused. The *voir dire* is open to the public, but the jury has to leave the courtroom. The counsel for the Crown and defence put forward arguments about why this evidence should or should not be put to the jury and the judge makes a ruling.

Various rules of admissibility are contained in the common law and statutes (for example, the *Canada Evidence Act*), judicial discretion and the *Charter*. For example, the evidence will be excluded if it is irrelevant, illegally obtained, involuntary, privileged, or unduly prejudicial to the accused.

After the voir dire is complete, the jury then returns to the courtroom and the main trial resumes. If the judge decided that the evidence is inadmissible, the jury would never hear about it. If it is admitted, it will be presented to the jury. The voir dire process will be repeated when a new item of evidence is proposed to be put forward.

Section 645 of the *Criminal Code* allows the judge to address the issues which require exclusion of the jury from the courtroom before a panel of jurors is called. This process was employed in the Pickton prosecution to reduce the length of trial. Since January 2006, the voir dire portion of the trial on the admissibility of evidence was in motion. As in any trial, members of the public are able to observe the voir dire proceeding. However, to avoid tainting the impartiality of potential jurors, a publication ban was put in place. The media was prohibited from publishing any evidence heard during the voir dire; the ban serves the same purpose as excluding the jury from the courtroom.

The procedure for establishing admissibility of evidence is lengthy, but it has to be precisely followed. If the jury is by mistake exposed to evidence that it should not consider, then this may undermine the whole trial. The mistake is costly in terms of the burden on the accused, the victim, the jurors and the entire justice system.

The Use of Evidence from a Crime Scene

As it is impossible to address admissibility rules for all types of evidence, crime scene evidence will be discussed as an example. The evidence obtained from the site of the crimes played a central role in the Pickton trial. For instance, DNA evidence was being used to identify the human remains uncovered by forensic scientists and archaeology students at the Pickton farm as those of the missing women. According to the Crown spokesman, the case “set standards as far as forensic investigation” is concerned.

The crime scene analysis had to be painstaking and meticulous in order for it to withstand the challenges in court. The site had to be examined in detail. Items of evidence from the crime scene had to be photographed in context, then collected. In order to preserve the objects in the condition they were found and avoid contamination, they were packaged separately in transparent glass or plastic containers, labeled and sealed. The officers wore gloves and hair nets to avoid leaving DNA traces at the crime scene. All of the accused’s rights had to be honoured in the conduct of the search.

A violation of rights under the *Charter* may have lead to the exclusion of otherwise admissible evidence from the trial if admitting it would “bring the administration of justice into disrepute”.

Unlike witnesses giving testimony who can speak for themselves, the objects have to be introduced. Somebody will explain what they are, validate them, and express an opinion

of how genuine the object is, or relate them to the issues in the case. This process is called authentication.

The Crown has to show that the item offered to the jury in court is the same original item from the crime scene and has not been contaminated or tampered with, unless the defence admits continuity. The police officer who finds the object becomes a witness who testifies on how the object was discovered and collected. There must also be a documented continuous chain of possession of the physical evidence.

As far as the relevance of the object to the case, in some cases, the jury can rely on first-hand observation to reach its conclusions. In many other situations, the Crown will engage a properly qualified expert witness to establish the relevance. In this case, the evidence was transmitted to the expert with the details of how the evidence was collected. For example, biological specimens were analyzed by DNA experts. The experts testified in court about the significance of the specimens.



The crime scene must also be accurately photographed. Demonstrative evidence, such as photographs, casts and imprints from the crime scene, aid the jury in creating a picture of events and surroundings and complement the oral descriptions by witnesses. Although all of the formal rules of evidence may be satisfied, the trial judge may exercise his or her discretion to exclude graphic photographs (such as those of victims' remains), if s/he considers that their prejudicial effect to the accused is greater than their relevance to the trial.

In the Pickton trial the use of photographs took an even more prominent place than is typical. The prosecution and defence agreed to produce photographs of the physical evidence, rather than producing the actual exhibits in court. The trial judge ordered that the Crown provide the defence with the date, time, object depicted and its photographer. The key for the Crown was to establish that the photographs were accurate representations of the objects depicted.

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