Tech Safety Canada

Submitting Evidence in Court

A Note on Language

In this toolkit, we will sometimes use the word woman/women and feminine pronouns for simplicity and to recognize the significant impact technology-facilitated violence has on women and girls. We recognize that TFGBV also impacts trans, non-binary, and Two-Spirit people. We hope that all people impacted by TFGBV will find these documents useful.

Part 1: Evidence Law and Gathering Evidence for Court

This document provides general information and uses clear, plain language wherever possible. It is intended to support evidence submission for civil and family proceedings, as well as criminal proceedings. If any of the words or phrases used in this document are not clear, you can consult Definitions of Legal Terms: Civil and Family Law or Definitions of Legal Terms: Criminal Law for clarification.

What is Evidence and What is it Used for?

In a trial, each side is responsible for telling their story about what happened. These two versions of events will likely differ from one another. Evidence is the information presented in court to convince the judge or jury that one version of events is true. Most evidence in a trial is "testimony," meaning people ("witnesses") are called before the court to explain what they saw or experienced. Sometimes physical evidence, including digital evidence and other documents, will be shown to the judge or jury for them to consider as well. After listening to all of the witnesses and viewing all of the evidence, the judge or jury will determine the outcome of the case.

The law of evidence can often be complicated. There are rules about when evidence can be admitted in court. Just because you want to use something as evidence does not mean that the court will allow you to do so. It is important to make sure that the evidence you plan to use in court will be accepted by the court. If possible, you should consider contacting a lawyer for assistance with this process. For a list of legal information and resources across Canada, see Legal and Victim Service Supports and Resources. You can also consult the Canadian Judicial Council's Civil Law Handbook for self-represented litigants.

When is Evidence Not Required?

Evidence is only required to prove facts that you and the other party do not agree on. It is not necessary to present evidence of facts that you both agree are true. If you and the other party agree, a statement of agreed facts can be filed with the court. This will save you time in court since you will not have to prove these facts.

Types of Evidence

Evidence can come in many forms. You may not use all types in your case. Not all forms of evidence will be relevant or necessary in every case. Below is a list of common types of evidence that may be used in court. Be aware that the court will keep the evidence that you submit. If you want to keep a copy of the evidence for yourself, you should make a copy before you give it to the court.

Testimonial Evidence

Testimony, or words spoken in court by a witness, is the most common form of evidence. When an individual shares their knowledge of certain facts or events by telling the court what they know, it can be used as evidence to support one's case. This type of evidence is called testimonial evidence.

> *Example:* You are trying to prove that Brian ran a red light. If you saw Brian run the red light, you have knowledge of this fact and can tell the court that you saw Brian run the red light. The information that you give to the court would be considered testimonial evidence. If you didn't see Brian run the red light but your friend Linda did, you can call Linda as a witness to tell the court what she saw.

An individual who presents testimonial evidence in a case is called a "witness." Witnesses usually tell the court about the things they have done, seen, or heard. In civil or family cases, you can be a witness and ask others to be witnesses. In criminal cases, Crown counsel will decide who to call as witnesses and will likely require you to act as a witness and give testimony if you are the victim in a case.

There are two key types of testimonial evidence: oral evidence and affidavit evidence. They both consist of the knowledge that a witness has regarding relevant facts or events. The main difference between oral evidence and affidavit evidence is how a witness's knowledge is presented to the court. Oral evidence involves the witness going to court and speaking in court while affidavit evidence is a written statement and does not require the witness to be in court.

Oral Evidence

Oral evidence, also known as *viva voce* evidence, is the information that a court hears from witnesses who are speaking in the courtroom. Oral evidence is presented to the court through a process called "direct examination," where the witness answers questions in court. In civil cases, you or your lawyer will question your witnesses. If you are your own witness and do not have a lawyer who can ask you questions, you can just tell the court about what you know. In criminal cases, Crown and defence counsel question their own witnesses. As you would likely be a witness for the Crown in a criminal case, Crown counsel would conduct your direct examination.

After a witness tells their story through direct examination, the opposing party will conduct a "cross-examination." This is when the other side has a chance to question you and/or your witnesses (in a civil case) or when you will be questioned by defence counsel (in a criminal case). The cross-examining lawyer will likely be trying to undermine your credibility or create doubt about your version of events during cross-examination, so it can be a very stressful experience.

A witness is usually physically present in court to give oral evidence. However, a witness may ask permission to give their evidence by video if they have a good reason why they are unable to make it to court (for example, if they are out of the country).

Affidavit Evidence

Affidavit evidence is information that is presented to the court as a written statement. Affidavits are generally only used in civil or family law proceedings, not in criminal proceedings. If you are preparing an affidavit, after you have written your statement you must find someone who has the authority to take oaths and swear to them that your statement is true. You can only swear to the truth of your statement if you can personally verify that everything you have said in it is true. Your written statement (i.e. the affidavit) is then submitted to the court as evidence. You must also send a copy of the affidavit to all the parties in your lawsuit or legal proceeding.

Documents

Documents are records of information, facts, or events. Documents can be presented to the court as evidence to help a party prove their version of events. It would be helpful for you to locate and save any documents that might be related to your case so that they are available if you need to use them.

Paper Documents

Paper documents include any information that has been recorded on paper. Common examples of paper documents are receipts, diary pages, bank statements, and doctor's notes. When submitting a paper document to the court, it is acceptable to submit either the original paper document or a copy of the original document. However, the original is preferred. Recall that the court will keep these documents, so you should be sure to retain a copy or the original for your own records.

Electronic Documents

Electronic documents include any information that is recorded digitally. Common examples of electronic documents are text messages, emails, and social media posts. You can present digital evidence to the court by printing out screenshots, emails, etc., or by presenting it in digital format on a CD, DVD, or USB drive. If you plan to rely on non-paper documents in a court proceeding, it is important that you check with the Court Registry where your matter is being heard to determine whether the necessary technology to display this evidence will be available. You will either have to request equipment from the court or ask for permission to bring your own device, such as a laptop. You will most likely not be allowed to display digital evidence on your phone in court unless the court approves.

***V*ideos and Photos**

Photos and videos of information or events that are related to your case may be useful as evidence. This can include video screen recordings of information displayed on your digital device. For more information on using videos as evidence, see Preserving Video Recordings as Digital Evidence.

***A*udio Recordings**

Audio recordings of information or events that are related to your case may be useful as evidence. This can include voicemails or audio recordings from your phone. For more information on using audio recordings as evidence, see Preserving Audio Recordings as Digital Evidence.

Improperly Obtained Evidence

Improperly obtained evidence can include:

- Videos or audio recordings made secretly[1]
- Stolen documents
- Hacked phone messages or emails

If your evidence has been improperly obtained, whether by you or police officers (in criminal cases), there is a good chance that the court will not accept the evidence because they do not want to encourage bad behaviour. When improperly obtained evidence is accepted, it is usually because the evidence is very reliable despite the fact it has been obtained improperly, and is very important to the case. Even if you think a piece of improperly obtained evidence is central to your case, be prepared for the possibility that the judge will not accept it.

Relevance

The most basic rule of evidence is that evidence must be relevant.

Relevant evidence *is information that makes a material fact more probable.*[2]

A material fact is a fact that will affect the outcome of the case, such as one that helps prove a legally required element of the case. There must be a connection between the evidence that a party presents, and the material fact they are trying to prove by showing that evidence to the court. Evidence that is irrelevant will not be accepted by the court.

> *For example, if you are trying to prove that Brian ran a red light, any evidence that makes it more or less likely that Brian did run a red light would be relevant. Eyewitness testimony from someone who saw him run a red light would be highly relevant, as would dashcam footage of him running a red light. Evidence that Brian cheats on his taxes and is therefore a bad person and therefore might be more likely to have run a red light would likely not be considered relevant.*

Preparing Your Evidence with Relevance in Mind

As mentioned above, only relevant evidence is accepted in court. When preparing for court, it is important to make sure you have not overlooked relevant evidence that could help your case. In criminal cases, it is Crown counsel's responsibility to turn over all relevant evidence to an accused person. You should ensure that the police and/or the Crown have all relevant evidence that you possess about your case in a criminal proceeding. In civil proceedings, it will be your responsibility to turn over all relevant evidence that you are hoping to rely on to the other party.

It is important to avoid getting sidetracked by irrelevant evidence. There might be evidence or information that you feel is relevant to the case but is, legally speaking, not relevant. In civil cases, if you put forward irrelevant evidence it can distract you and the judge from the real issues in the case, making the case more complicated and time-consuming than it needs to be. In criminal cases, you will not have a say in what evidence gets presented to the court, as Crown counsel will make this determination. It is best for you to turn over all potentially relevant evidence that you have to the police or Crown counsel so they can decide what is and is not legally relevant.

Below are some things to consider when determining the relevant evidence in your case.

1. What are the material facts of your case?

To figure out the material facts, you must first understand the law that applies to your case. The law will require you to prove the basic elements of your case in order to win. The elements that you must prove will depend on what your case is about. For general information about what laws may apply to your case of technology-facilitated violence, see: Legal Protections for TFGBV: What Laws Apply to You?; Legal Remedies for Image-Based Sexual Abuse; Legal Remedies for Online Stalking, Harassment, Spying, and Threats; and Peace Bonds and Protection Orders for Victims of TFGBV.

> *Example: I*f you wish to obtain a protection order against a family member, the law requires you to prove that you are a family member who is at risk of family violence. Thus, the basic elements of your case that you must prove are (1) that you are a family member and (2) that you are at risk of family violence.

Once you have determined the basic elements that must be proved, you can start identifying the material facts of your case. Material facts are facts that will help you prove the basic elements of your case.

> *Example: To* obtain a protection order, the key element that must be proved is that you are at risk of family violence. Material facts are facts that help prove the risk of family violence. This could include evidence of threats made against you. You could demonstrate this by testifying that you have been threatened, or by presenting a copy of a text message in which your family member threatened you. A copy of a text message in which the family member was rude to you, on the other hand, would probably not be considered relevant as it does not assist in proving whether or not you are at risk of violence.

2. After figuring out the material facts of your case, what evidence are you going to use to establish the material facts?

Think about the information that is available that could help prove the material facts. This includes information in your possession and the possession of other people. If other people have relevant knowledge or documents regarding a material fact, you will want to call them as a witness for your case.

Evidence that you think will help establish the material facts of your case is relevant evidence that should be presented to the court. However, be aware that even though you believe that a piece of evidence is relevant, the court may not always agree with you.

3. You should try to limit the amount of irrelevant evidence that you present in court.

Evidence that does not help establish a material fact is irrelevant and will not be accepted by the court. As you prepare your evidence for court, keep in mind that you should not be bringing up everything the other party has ever done wrong. All you need to do is bring up evidence that establishes the material facts of your case. It can be tempting to show the court evidence of all the ways the other party has wronged you. However, unless this evidence also helps prove the material facts of your case, it is likely not relevant.

Hearsay

Evidence that is hearsay is generally not admissible in court. Hearsay is a statement made by a person who is not giving testimony to the court. The statement is used to prove that what that person said was true.

Hearsay is a complicated subject. It can be difficult to determine what is hearsay in the first place, and there are many exceptions to the general rule that hearsay is inadmissible. Further, hearsay will sometimes be admitted on a case-by-case basis if it is highly valuable evidence.

What is Hearsay?

Hearsay is usually defined in two parts. Hearsay is (1) an out-of-court statement (2) that is being offered for the truth of its contents.[3] If your evidence is hearsay, the general rule is that it will not be accepted by the court.

An out-of-court statement is something someone said before the trial that you or another witness want to repeat to the court. This can be through testifying as to what was said, playing a recording of the person making a statement, or tendering a document written by another person or containing a statement by them. If you want to rely on something someone else said in court, **you should always try to have that person come and testify in person**.

> *Example: Linda told you that she saw Brian run a red light. If you were to testify that Linda told you she saw Brian run a red light, this would be hearsay and would likely not be admissible. Instead, you should call Linda as a witness so that she can testify that she saw Brian run a red light.*

If the person who made the out-of-court statement does not want to be a witness, they may be subpoenaed by the Crown in a criminal case. In civil matters, if a person does not wish to testify, you may be able to issue a subpoena to have them testify as a witness.

To be hearsay, a statement must be offered for the truth of its contents. This means that the reason you are putting this evidence before the court is because you want the judge or jury to be convinced that what the person said was true.

> *Example: If you tell the court Linda told you she saw Brian run a red light because you want to prove that Brian ran a red light, hitting your car, you would be relying on this statement for the truth of its contents, making it hearsay. If you tell the court Linda told you she saw Brian run a red light because you want to prove that Linda is a liar (for example, if you know Linda was sleeping at the time Brian ran the red light), this evidence would not be hearsay. You would not be relying on it* to show that Brian ran a red light (the truth of its contents), but rather another reason (to show Linda is a liar).

Exceptions to the Hearsay Rule

It might seem like the hearsay rule will exclude a lot of relevant evidence. However, there are many exceptions to the general rule against hearsay. One important exception is that **hearsay is allowed if you are making an interim application.** You will likely not have to worry about hearsay if you are going to court for an interim application, as hearsay will be admitted if you can identify the person who made the statement.

There is also something called **the "principled approach"** to hearsay, which may allow for hearsay evidence to be accepted by the court on a case-by-case basis if it is highly useful and won't unfairly disadvantage the other party. To be admitted under the principled approach, the evidence must be necessary and reliable, the person who made the statement must be unavailable (e.g. deceased or impossible to locate), and the statement must either have been made in a trustworthy setting (e.g. a recorded interview with police officers) or in circumstances indicating the statement is likely to be genuine. If a piece of evidence is important to your case but contains hearsay, you should still attempt to have it admitted but be prepared for the possibility that it may not be admissible.

Other exceptions include:

- **Statements by a party**. If the statements you want to rely on were made by the opposing party (or the accused in a criminal matter), they will generally not be considered hearsay. So, if the opposing party (or the accused) is your ex-partner, any emails, text messages, etc., they sent to you, or anything they said to you, will not be considered hearsay.
- **Business r**ecords. Many documents fall under the business records exception. This includes documents such as telephone records, hospital records, receipts, etc. Even though these records were created by someone who is not testifying before the court, they can be relied on if they were created in the ordinary course of business. Not all records created during the course of business will fall within this exception. It may need to be determined by the judge whether a particular record meets this exception or is properly considered hearsay.
- **Statements against interest**. If a person makes a statement that is likely to cause them harm, such as acknowledging that they committed a crime, you can sometimes get these statements admitted as exceptions to the rule against hearsay. These statements will only be allowed if the person is **unavailable** to testify (meaning they cannot be located, are deceased, or cannot testify for some other valid reason). If you wish to rely on a statement an opposing party or the accused made that is against their interest, you may do so under the "statements by a party" exception (above).
- **Spontaneous utterances**. In some circumstances, if a person makes a statement that is clearly spontaneous and relates to a matter that is relevant to the case, you may rely on these statements. This might include someone witnessing a shooting and immediately yelling "Mike just shot someone!" There are specific requirements for spontaneous utterances and they are assessed by the court on a case-by-case basis. As with the "statements against interest" exception, the person who made the statement must be **unavailable** to testify (meaning they cannot be located, are deceased, or cannot testify for some other valid reason).

Hearsay in Family Law Cases

In family law cases, there is a possibility that the court will accept hearsay as evidence even if it does not fall under an exception. However, once hearsay evidence is admitted, the judge may decide to give the evidence little to no weight because hearsay is usually unreliable evidence. This means that hearsay will probably not be very persuasive evidence even if it is admitted.

Opinion Evidence

When witnesses testify, their evidence is supposed to be about the facts of the case. When witnesses start to talk about their own opinions, it is considered opinion evidence, which is generally not admissible.

> *Example: A witness testifies "I definitely think Brian is guilty and should go to prison." This is inadmissible opinion evidence.*

This does not mean that a witness is never allowed to include opinion in their testimony. People regularly express opinions without even noticing. Witnesses are allowed to talk about their "lay opinions." Lay opinion generally means an opinion that an ordinary person would naturally incorporate into their story.

> *Example: I*t would likely be acceptable for a witness to say, "Brian was slurring his words, stumbling a lot, and drinking from a large bottle of vodka. He seemed drunk." *While the witness does not know for a fact that Brian was intoxicated, the opinion that the witness reached that Brian seemed drunk is acceptable evidence as these are the kinds of judgements people regularly reach in their day-to-day lives. A reasonable person observing Brian would likely come to the same conclusion based on his behaviour.*

Witnesses do not need to worry about accidentally including their opinions in their testimony. The line between opinion and fact can often be blurry. The purpose of this section is to remind you that evidence is about facts, not opinions. Do not start talking about why you should win your case when giving evidence. You, your lawyer, or Crown counsel will have an opportunity to do this during the closing arguments after all your evidence has been presented.

Privileged Information

Certain forms of communications are "privileged," meaning they do not need to be disclosed during litigation and are generally not admissible at trial. Privilege only applies to communications (e.g. conversations, emails, and letters), not facts.

> *Example: I*magine a situation where you cannot remember whether you ran a red light on Friday night. Your lawyer then tells you that they found surveillance footage showing that you did run a red light. This conversation with your lawyer is a communication. However, from this conversation, you now know that you ran a red light. It is a fact that you ran a red light. Depending on other factors, your communications (i.e. the conversation) with your lawyer could potentially be privileged. Let us assume for the example that the conversation is privileged. This means that you have a right to keep the conversation a secret. If you are asked in court to repeat what your lawyer said to you, you do not have to repeat the conversation for the court. However, if somebody asks you in court whether you ran a red light on Friday night, you would have to answer truthfully and say yes. You do not have a right to stay silent when someone asks you to tell them about a fact that you have knowledge of. Your conversation with your lawyer is privileged, but the fact that you ran a red light is not privileged.

Solicitor/Client Privilege

If you have a lawyer, most communication between you and your lawyer is considered privileged and the opposing party (including an accused in criminal cases) does not have a right to see these communications or hear testimony about what was said in them. Neither you nor your lawyer can be compelled to share this information in court.

It is important to remember that privilege also applies to communications with a lawyer that was not formally retained (hired). For example, even if you only had one meeting/consultation with a lawyer and did not retain that lawyer for your case, privilege still applies to that consultation.

Solicitor-client privilege can be waived by the client, meaning that a client can decide to disclose the contents of their communications with their lawyers. This should only be done in the rarest of circumstances, and only if they are fully aware of the risks of waiving this privilege.

There are some other exceptions to solicitor-client privilege. In certain cases, if there is a risk to public safety or if someone will be wrongfully convicted of a crime, the parties can share this information in court.

It is important to note that if you are a victim in a criminal case, Crown counsel is not your lawyer and as such solicitor-client privilege **does not apply to your communications with Crown counsel**. For more information on the differences between the civil and criminal systems, see Legal Protections for TFGBV: What Laws Apply to You?

Litigation Privilege

Documents or communications that were created by a lawyer when planning for a case (or in contemplation of litigation), that were meant to be confidential and where privilege has not been waived, are inadmissible.

Once the case has ended, these documents and communications are no longer protected by this privilege.

Matrimonial Communications Privilege

Communications between married spouses during their relationship are privileged, meaning one spouse cannot be compelled to disclose the contents of these communications if they do not wish to. However, this form of privilege can be waived (meaning it no longer applies) by either spouse. For example, if you wish to rely on text messages sent to you by an ex-husband while you were married, you may do so, as you would be waiving privilege in these messages.

Settlement Privilege

When you and an opposing party have a legal dispute, the two of you may try to settle your disagreement outside of court. Settlement privilege is the right to keep any communications regarding a potential settlement private. This means that if you end up going to court, you cannot use settlement communications from the opposing party as

evidence, and they cannot use these communications against you. Settlement communications are not limited to oral communications. Written communications such as emails and text messages are also covered by settlement privilege.

Both parties can agree to waive this privilege, but it cannot be done by one side. Examples of settlement discussions include mediation, settlement proposals, and responses to those proposals (which are often marked "without prejudice"). They also include Judicial Case Conferences, Family Case Conferences, and Settlement Conferences. Exceptions to this rule are the orders which were made at those conferences.

There are a few exceptions to settlement privilege including:

- When the communication is a threat or involves something illegal
- When you and the opposing party disagree on whether or not a settlement was reached

Settlement communications can be used in court as evidence under these circumstances.

Therapy Records, Psychiatric Records, and Other Health Records

It is worth noting that many communications are surprisingly **not automatically privileged**, including communications between you and your therapist, you and your doctor, you and your Victim Service Worker, etc.

A court may find these communications to be privileged on a case-by-case basis, but these findings are not automatic. If you are discussing matters relevant to a criminal case or litigation with a care provider, you may want to ask if they will refrain from taking notes and let them know that they may be called to testify about their discussions with you.

For a court to find communications between you and a third party (other than a lawyer or spouse, as set out above) to be privileged, the communications must meet the "Wigmore test," which requires that:

- The communication was made in confidence that it would not be shared;
- This confidence is essential between the two parties and their relationship;
- The relationship must be one that the community fosters (for example, between a religious leader and one of their followers, a doctor and their patient, etc.); and
- The injury to the relationship that would occur, if the information were shared, outweighs the benefit it would give to the case.

Weight

After all of the evidence from both parties to a case has been admitted, the judge or jury (called the "trier of fact") will determine how much weight to give each piece of evidence. The trier of fact will determine the reliability and trustworthiness of the evidence. Evidence that is given more weight will have a greater impact on the outcome of your case. Evidence that is given little to no weight will not affect the outcome of your case very much.

Credibility

Credibility is a fundamental issue for any testimonial evidence presented in court. Credibility is whether the person testifying is believable. Credibility is central to the judge's analysis. If a witness is found to be credible, their testimony will carry much more weight than if they are found not to be credible. Factors that impact the credibility of a witness include:

- **The ability of the witness to remember events accurately.** For example, was the witness intoxicated when they witnessed the event in question? Since the event, did something occur that impacted the witness's memory of the event?
- **Biases that the witness may have toward one party.** For instance, if your mother acts as a witness in your case, her testimony may be perceived as biased given her connection to you.
- **Whether the witness's testimony conflicts with other pieces of evidence.** For instance, if the witness tells the court that they have never been to Hawaii, but the other party shows the court Facebook photos of the witness vacationing in Hawaii, the witness's credibility will suffer.

The judge will listen carefully to what each party says in court or submits in written documents. You can help establish your credibility by telling the truth in court, including admitting when you do not know or cannot remember certain facts, and being as accurate as possible when providing information and answering questions. If you do not understand a question, you can ask for the question to be repeated or rephrased before answering to make sure you understand it correctly. Only provide answers to the question asked. If you do not know the answer to a question, tell the court. Your credibility will also be enhanced if you are clear and direct when testifying, avoid contradictions and arguments, and act courteously to all parties. While this can be very difficult in highly-charged emotional situations such as family court proceedings, remaining calm and clear will impress the judge and should increase your chances of getting the outcome you desire in court.

Part 2. Presenting Evidence in Court

Giving Testimonial Evidence

Testimonial evidence can be either oral evidence or affidavit evidence. What type of evidence will be used will depend on the court and the type of proceeding. Affidavits are usually only used in certain civil applications. Most testimonial evidence will be delivered through oral testimony (i.e. a witness speaking in court).

Providing Evidence Through an Affidavit

An affidavit is a written statement of facts regarding the issues of your case. In some civil cases and applications, oral evidence (i.e. testimony) will not be required. Instead, you must work with each of your witnesses to prepare written affidavits. Affidavits will be used as evidence in court. If you are a witness for your case, you will also have to prepare an affidavit. The rules of evidence discussed in the first section of this document all apply when a witness writes their affidavit statement.

There are certain forms that you must fill out and several procedural requirements when you prepare an affidavit. These will vary depending on the type of application or case, the particular court (provincial court, superior court) and your province or territory. For example, each witness must find someone who has the authority to take an oath and then swear that their affidavit is true. The Canadian Judicial Councill's Civil Law Handbook for self-represented litigants contains some general information about preparing affidavits.

Giving Oral Evidence in Court

Oral evidence is given by witnesses in court. A witness who is giving evidence will tell the court about the things that they have done or witnessed. They will do this during direct examination, and then a lawyer for the other side or the opposing party themself will ask the witness questions during cross-examination. In a civil trial, you can call your own witnesses and act as a witness in your own case. In criminal trials, if you are the victim of an offence, Crown counsel will probably require you to give oral evidence as a witness.

The process of acting as a witness involves you speaking in court. In criminal matters, Crown counsel will ask you questions during direct examination. In civil matters, if you have a lawyer, your lawyer will ask you questions during direct examination and you will give your evidence by answering those questions. If you do not have a lawyer, you can just tell the court about the things that you have done or witnessed related to your case. Just make sure that you are aware of the different rules that may apply to your evidence. These can be found in the previous section of this document and in Objections to Evidence.

When speaking in court, make sure that your story is easy to follow and that you are not sidetracked by irrelevant evidence. You should also try to be as detailed as possible when giving evidence. Always clearly state the date and time when each event occurred so that you can present a clear timeline. When giving your evidence, it usually makes the most sense to talk about the events in chronological order. This means that you should start with the earliest events and end with the most recent events. You will not be allowed to read from a script in court. It is a good idea to outline your testimony so that you do not forget any important points.

When you talk about events that you and the other party disagree on, you do not need to explain to the judge why the other side's version of the story is wrong. If you and the other party disagree on how an event occurred, you only need to give a detailed description of your version of the event.

> *Example: You and Alex disagree about the details of a conversation. You remember asking Alex to stop following you, while Alex claims that you told him you wanted him to walk you home. During your testimony, you should only focus on telling the court the details of the conversation as you remember them. Do not argue that your version of the conversation is the correct one. In a criminal case*, it will be the Crown's job to make this argument while in a civil case, you or your lawyer will have a chance to make closing submissions where you can address this.

Questioning Other Witnesses

In criminal trials, you (as the victim) may be the only witness for the Crown, or there may be others who will give testimony just as you did. In civil matters, after you have given your evidence, you or your lawyer can call other witnesses to give their evidence. If you have a lawyer, your lawyer will ask each witness questions. The witness will give evidence by answering the questions. If you do not have a lawyer, you will have to ask the questions yourself. The process of questioning a witness is called a "direct examination" or an "examination-in-chief."

If you are the one conducting the direct examination, it is a good idea to start by asking your witness simple, direct questions. These are questions about things that are facts. This will help the witness get used to answering questions in front of the judge. Examples of questions to start with could include:

- Do you live at X address with the applicant/plaintiff?
- Do you work at X with the respondent/defendant?
- How many years have known the applicant/plaintiff?

Once you finish asking the context questions, you can ask questions about the events that are important to establish material facts in your case. These questions will relate to the issues that are being contested. The answers that your witness gives will act as evidence for your case. Usually, it is a good idea to ask about the events in chronological order.

One important rule to remember when questioning your witnesses is that you are not allowed to ask leading questions. Leading questions are questions that suggest an answer, and can usually be answered "yes" or "no."

> *Example: "Didn't you hear* James yelling threats?" is a leading question, as it suggests to the witness that James yelled threats.

If you ask a leading question, the other party can object to the question and if the judge agrees with the objection, your witness will not be allowed to answer the question (for more information on objections, see Objections to Evidence). It is best to ask non-leading questions and let the witness testify in their own words. A non-leading question is usually an open-ended question that does not suggest the answer.

> *For example: "What did James say?" and "How did James seem when he said that?" are examples of non-leading question*s that can result in the same evidence as the leading question above.

To illustrate leading questions, consider an example where you are trying to get your witness to tell the court that they saw the respondent (Alex) following the applicant (you) home.

A series of leading questions would be:

Q1: On October 3rd, did you walk home from work on First Street at 2 pm?
A1: Yes.

Q2: While you were walking home, did you see the applicant walking on the same street?
A2: Yes.

Q3: Was Alex following the applicant in his car?
A3: Yes.

Q4: Did the applicant ask Alex to stop following her?
A4: Yes.

A series of non-leading questions would be:

Q1: When did you leave work On October 3rd?
A1: 2 pm.

Q2: What street did you take?
A2: I took First Street.

Q3: What did you see on that street?
A3: I saw the applicant walking while Alex was following her in his car.

Q4: What did the applicant do?
A4: She told Alex to stop following her.

It can be hard to predict the answer to open-ended questions. For example, Q3 ("What did you see on that street") could result in numerous possible answers, such as:

- *I saw the applicant walking on the street.*
- *I saw the applicant and Alex together.*
- *There was a traffic jam and there was a band playing on the sidewalk.*

None of these answers mentions Alex following the applicant. You would have to ask more questions to get the witness to tell the court that she saw Alex following the applicant.

Because non-leading questions are so open-ended, it is a good idea to prepare your witnesses for what to expect in court, and what questions you will ask. When preparing a witness, you cannot ask the witness to give certain answers. Saying to a witness, "you should tell the court that you saw Alex following me home" is inappropriate. However, to prepare your case, you could ask the witness if they saw Alex following you home that day. If the witness does remember seeing Alex following you home, then you can ask them to testify about it. If they do not remember seeing this, then their testimony may not be relevant to your case.

Refreshing a Witness' Memory

Even if you spend time preparing a witness, it is possible that when they give evidence in court they will suddenly forget to mention details that are important to your case. For example, your witness previously told you they heard Alex yelling threats at you while he followed you home from work. During your witness's testimony, you ask them what they saw and heard, but they do not mention that Alex threatened you. You are not allowed to ask a leading question such as "Didn't you hear Alex yell threats?" So how do you get your witness to tell the judge that they heard Alex yell threats? If your witness prepared e a document about the incident, then that document can be used to refresh their memory. The document could be almost anything. Text messages, diary entries, and sketches are all examples of documents that can be used. However, the document must have been created by the witness while their memory of the event was still fresh.

The steps to refreshing a witness's memory are quite simple:

1. "Exhaust" the witness's memory. Ask your witness if they can remember anything else from the event in question.
2. If they say no, ask the judge if you could refresh your witness's memory with a document.
3. Pass the document to your witness.
4. Ask the witness if they recognize the document, and how the document was created. For example, "Are these text messages that you sent to me after you saw Alex following me on October 3rd?"
5. Confirm that the document was made when your witness's memory was still fresh. You could ask, "Did you text me these messages right after you saw Alex following me?"

Objections

During the questioning of your witness, the other party can object if they think that you have asked an improper question. The other party will say "objection" and then explain why they are objecting. You then have a chance to respond to the objection. The judge will decide if the objection is justified or not. If the objection is justified, then the witness cannot answer your question and you will have to ask another question.

You are also allowed to make objections when the opposing party is questioning their witnesses or seeking to admit evidence. For instance, if you think the other party is asking their witness a question that has no relevance to the case, you can object. The steps to making an objection are:

1. Stand up after the other party has asked their question and before the witness has started answering the question.
2. Address the judge and state what your objection is.

There are many bases on which you or the opposing party can object to evidence. For detailed information about objections to evidence, see Objections to Evidence.

Cross-Examination

Every time a witness finishes giving evidence in court, the other party will get an opportunity to ask them questions. This process is called "cross-examination." The other party will ask you (if you testified) or your witness about the evidence that they have given.

The purpose of cross-examination is generally to poke holes in the witness's version of events or otherwise undermine their credibility. It is usually the most stressful part of giving testimony. You can set yourself up for a successful cross-examination by fully explaining your evidence (including details of your evidence that may cast you in an unfavourable light) during your direct examination, and remaining calm and collected during cross-examination.

If you have a lawyer, your lawyer will conduct the cross-examination for you and ask the other party's witnesses questions. If you do not have a lawyer, you will have to conduct the cross-examination yourself. The Canadian Judicial Councill's Civil Law Handbook for self-represented litigants contains a useful guide to conducting cross-examination.

Presenting Documents and Photos

Before you go to court, you should organize all the documents and photos you intend to present to the court. See Preserving and Storing Evidence of TFGBV: Best Practices for information on how to collect and store your digital evidence.

In criminal cases, Crown counsel will be responsible for submitting all evidence to the court. You are not responsible for organizing or presenting evidence before the judge in a criminal matter.

In civil cases, if you have a large number of physical documents, it may be a good idea to organize all the documents in a binder. You can use numerical divider tabs to separate each document. You should also number the pages of each document. Afterwards, make three copies of the binder so that you can provide the judge, the other party, and your witness with a document from the binder if necessary. This way you can easily show the court the document or photo by asking them to go to a tab and page number in your binder. Then everyone can easily look at the same thing.

The process of presenting documents and photos to the court is called "entering an exhibit" or "introducing an exhibit." A witness must "introduce" the document to the court before it can be accepted by the court as evidence. Once a document is accepted as evidence, it becomes an exhibit.

When are Documents Introduced?

If a witness is giving oral evidence in court, then documents must be introduced orally by the witness during this time. If evidence is being provided through an affidavit, then documents are introduced as attachments to the affidavit. In either case, each document must come in through the evidence of a witness, either you or one of the other witnesses in your case. The witness who introduces the evidence should be someone who can authenticate that document, meaning someone who can explain what the document is and how it came to be. For more information, see Authentication of Digital Evidence. If you can confirm that the document is what it purports to be, then you can act as a witness and introduce the document yourself. If you cannot confirm that the document is what it purports to be, then you are not a suitable witness for introducing the document.

Re-examination

Re-examination is an opportunity to ask your witness questions after they have been cross-examined. Sometimes the cross-examination of your witness may result in issues or inconsistencies with their story. The purpose of re-examination is to give you a chance to clear up those issues. When you are re-examining your witness, you can only ask them questions related to issues brought up during cross-examination. You are not allowed to ask them questions about things that were not mentioned during cross-examination.

Presenting Video and Audio Recordings

The process of presenting video and audio recordings in court is similar to the process of introducing documents or photos. However, there are some important differences.

If you plan to rely on video or audio recordings as evidence in a court proceeding, you must check with the Court Registry where your matter is being heard to determine whether the necessary technology to play these recordings will be available. You will either have to request equipment from the court or ask for permission to bring your own device, such as a laptop, to play the video recording in court. You will most likely not be allowed to play a recording on your phone in court unless the court approves. You may need to transfer the video recordings onto DVDs or consider other ways of presenting the videos.

It is recommended that you or someone else make a transcript of the video recording. It can be helpful for the court to be able to read what was said in the recording, as it saves time and may be clearer than listening to the recording's audio. Additionally, there may be situations where you are not allowed to play a video recording in court. In these situations, a transcript may be allowed as evidence instead. For example, if there is a lot of irrelevant background noise or interruptions in your recording, a judge may prefer the transcript to the recording. In these cases, you might still be able to use a transcript of the relevant portions of your recording as evidence.

If it is safe to do so, and you have Internet access, there are helpful online transcription tools such as www.descript.com or Google Voice Transcription through Google Docs. If you use a secondary transcription service, you will want to double-check all transcriptions to ensure that the transcript is correct by reading it and listening to the audio recording. You can correct any mistakes so the transcript is accurate.

In criminal cases, Crown counsel will be responsible for preparing all relevant evidence and for ensuring there is a way to play any video or audio recordings in court.

Introducing Audio and Video Recordings through a Witness in Court

The witness who introduces the evidence should be someone who can authenticate that recording, meaning someone who can explain what the recording is and how it came to be. Ideally, it should be the person who captured the recording. For more information, see Authentication of Digital Evidence. If you can confirm that the document is what it purports to be, then you can act as a witness and introduce the document yourself. If you cannot confirm that the document is what it purports to be, then you are not a suitable witness for introducing the document.

Technology-Facilitated Gender-Based Violence (TFGBV) is part of a continuum of violence that can be both online and in-person. If you or someone you know is experiencing TFGBV, you are not alone. You can use sheltersafe.ca to find a shelter/transition house near you or call/text the Kids Help Phone to discuss options and create a safety plan. You don't need to stay in a shelter to access free, confidential services and support.

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Adapted with permission from BCSTH's Technology Safety project, based on their resource Submitting Evidence in Court.

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1. In Canada, it is legal to secretly record a conversation you are a part of. You must be the person who does the recording –you cannot ask a friend to record a conversation that you are involved in unless they are involved in the conversation a well. It is illegal to record a conversation that you are not a part of (i.e. eavesdropping or wiretapping

2. Sopinka, Lederman & Bryant,The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada Inc., 2014)
3. Sopinka, Lederman & Bryant, The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada Inc., 2014)

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