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UNIFORM LAW CONFERENCE OF CANADA

WITNESS CONFRONTATION AND SECTION 9 OF THE *CANADA EVIDENCE ACT* – REPORT OF THE WORKING GROUP (2018)

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I: Introduction

Every day, in courtrooms across Canada, counsel discover during examination-in-chief that their own witness is not testifying as expected or hoped. Commonly counsel have material, usually a statement, that reveals that their witness once had relevant evidence to impart but the witness is not recounting it in court. Perhaps the witness testifies he or she now remembers nothing of a significant event. Or perhaps the witness is testifying in a way that is plainly inconsistent with what was said earlier. At the moment it happens, the Court has no idea it is hearing anything less than the witness' full evidence. If an attempt to refresh the witness' memory fails, counsel have a statement in hand that contains important information. The information relates to the facts of the case and/or to the reliability of the witness. But the trier of fact is, at that moment, blind to the information and not fully informed. What should our law allow that lawyer to do?

The current answer to this question is provided primarily in section 9 of the *Canada Evidence Act (CEA)* and a number of common law rules which have been the subject of sustained and unanimous criticism from all quarters for quite some time. In 2012, Justice

David Paciocco, writing extra-judicially, described the law dealing with confrontation and impeachment as a set of rules "clung to by inertia and force of habit. The result is an obstructionist, complex, time-consuming and confusing body of law that courts struggle to apply."[1]

At the 2017 ULCC Annual Meeting in Regina, Saskatchewan, the Criminal Section unanimously passed a resolution from Ontario (ON2017-03) to form the witness confrontation working group. The mandate was set out in the resolution as follows:

> That a working group be formed to review for possible reform the law of evidence in criminal proceedings relating to the ability of a party to confront and lead its own witness, including section 9 (Adverse witnesses) of the *Canada Evidence Act*.

As a result, volunteers were sought at the ULCC meeting and/or firmed up thereafter. The members of this working group were:

1. Catherine Cooper, Counsel, Ministry of the Attorney General, Ontario.
2. Isabelle Doray, prosecutor, Directeur des poursuites criminelles et pénales, Quebec
3. Jessyca Greenwood, Criminal Lawyers' Association, Toronto, Ontario
4. Fraser M. Kelly (chair), General Counsel, Ministry of the Attorney General, Ontario
5. Joanne Klineberg, Justice Canada, Ottawa, Ontario
6. Nadine Nesbitt, Senior Policy Counsel, Alberta Prosecution Service
7. Lorne Phipps, Crown Counsel, British Columbia Prosecution Service
8. Kevin Westell, Canadian Bar Association, Vancouver, British Columbia

The ULCC has examined witness confrontation laws before. Specifically, in 1977 the ULCC established a Federal/Provincial Task Force to examine current evidentiary rules and to attempt to come up with uniform rules of evidence. In 1982, that Task Force made a voluminous report to the ULCC which included an examination of many of the issues covered here. The majority of the task force concluded that insofar as witness confrontation was concerned, "there was a need for a uniform, comprehensive and up-to-date provision".[2] Since 1982, little has changed.

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[1] The Hon. David Paciocco, "Confronting Disappointing, Hostile and Adverse Witnesses in Criminal Cases" (2012), 59 Crim. L.Q. 301, at p. 311. We acknowledge the invaluable scholarly works of The Hon. David M. Paciocco, writing extra-judicially, in *Confronting Disappointing, Hostile and Adverse Witnesses in Criminal Cases*, [2012] 59 CLQ 301 and of the learned authors The Hon. S. Casey Hill, Louis P. Strezos & David M. Tanovich, *McWilliams Canadian Criminal Evidence, 5th ed (*Toronto: Thompson Reuters Canada) at chap. 21:20 and of the ULCC's Federal/Provincial Task Force in 1982.

[2] Uniform Law Conference of Canada, *Federal/Provincial Task Force on Uniform Rules of Evidence*, (Toronto: Carswell, 1982), 615 p. at p. 326. See in particular Chapters 21 (Manner of Questioning Witnesses) and 24 (Use of Previous Statements).

We are unanimously of the view that reform is required, indeed it is long overdue. The status quo is cumbersome, inefficient and unnecessarily hampers the search for the truth. While we recommend the preservation of the general rule against cross-examining one's own witnesses, we suggest replacing section 9 to clarify two critical issues:

i) the circumstances that justify relaxing that rule against cross-examining one's own witness, and
ii) the permissible scope of resulting cross-examination.

II: Witness Confrontation Rationales and Critiques

a) Historical Context

We need rules that permit litigants to help or confront their own witness in certain circumstances. The truth-finding function of a trial would suffer without them.[3] To illustrate why, examine first how the adversary system is intended to function. The ideal is that the judge (or jury) will remain passive, providing litigants with a powerful incentive to present *all* the evidence that advances their own cause. Further, each counsel will ensure that the evidence of their adversary is *fully* and fairly presented – primarily through cross-examination – by exposing any omissions, lies, errors or by bringing out other facts that bear on the issues at play. When the dust settles, the hope is that the litigants' conduct will have ensured that the trier of fact will have heard *everything* relevant to the issues to be decided. Lawyers, however, cannot control how witnesses testify. Sometimes witnesses are unwilling to recount all they know. When that happens, the strength of the adversarial system breaks down unless there is a way to help or confront one's own witness to complete the evidentiary record. Without some legal mechanism to confront one's witness, when witnesses give only part (or none) of their "damaging" evidence in chief, the incentive of the opposing litigant to complete the record dissipates. It is more likely that the opposing party would exploit that evidentiary shortcoming rather than cross-examine to expose the omission.[4] Not allowing cross-examination by the party who called the witness in these circumstances would result in a court deliberating without all relevant evidence and the quality of justice could suffer.

[3] Similar discussions can be found in Paciocco, *Confronting Disappointing, Hostile and Adverse Witnesses in Criminal Cases,* [2012] 59 CLQ 301 at page309-311 and in S. Casey Hill, Louis P. Strezos & David M. Tanovich, *McWilliams Canadian Criminal Evidence, 5th ed* (Toronto: Thompson Reuters Canada) at chap. 21:20.30.10.

[4] We recognize that the ethical obligations of Crowns vs. defence counsel may differ when it comes to in to exploiting a potential evidentiary omission of an adversary's witness. Simply, loyalty obligations may oblige defence counsel to refrain from completing the evidentiary record to the detriment of their client. In contrast, a Crown, unhampered by client loyalty obligations, may see fit to take a different approach.

Canada has a host of common law and statutory rules relating to witness confrontation. Perhaps the single most significant statutory provision is section 9 of the *CEA*. It is not surprising that subs. 9(1) is difficult to read, as it was drafted over 160 years ago and must be read in its common law context.[5] First enacted in Canada in 1906,[6] it remains virtually identical to a provision appearing in an 1854 English statute.[7] Subsection 9(1) provides:

> 9.(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

Subsection 9(2) was enacted in 1969 in response to a problematic line of cases[8] which held that a party was not permitted to use a prior inconsistent statement to demonstrate adversity because a finding of adversity was required before *any* use could be made of the prior inconsistent statement. Subsection 9(2) was intended to provide a procedural assist to a subs. 9(1) application. Subsection 9(2) provides:

> (2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, *without proof that the witness is adverse*, grant leave to that party to cross-examine the witness as to the statement and the court *may consider the cross-examination in determining whether in the opinion of the court the witness is adverse*.

Despite the clear intention of Parliament, subs. 9(2) has not been interpreted as a mere "procedural assist" to a subs. 9(1) application to determine *if* a witness is adverse.[9] Rather, subs. 9(2) now provides "*an independent procedure* under which the judge may permit a party to cross-examine their own witness as to a statement previously

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[5] Paciocco, *supra*, at p. 303 opined they are "awkwardly worded statutory provisions, which in order to be understood, require one to understand their common law overlay. Read in isolation, the statutory provisions are largely incoherent."

[6] Ch. 145, section 9.

[7] *Common Law Procedure Act, 1854* (Lord Denman's Act) 17 & 18 Vict., c.125, section 22.

[8] *Greenough v. Eccles* (1859), 28 L.J.C.P. 160; 5 C.B. (N.S.) 786; 141 E.R. 315 the finding thereafter followed in *R. v. May* (1915), 23 C.C.C. 469 (B.C.C.A.). Not all Canadian courts followed this line of cases however. For example see *Wawanesa* v. *Hanes,* [1963] 1 C.C.C. 176 (Ont. C.A.) varied on appeal [1963] S.C.R. 154.

[9] A comprehensive examination of legislative debates and committee representations can be found in the "*Report of the Commission of Inquiry Into the Wrongful Conviction of David Milgaard – Appendix K Memorandum of Law – section 9(2) of the Canada Evidence Act*" at pp. 2581-2591, online:< http://www.publications.gov.sk.ca/freelaw/Publications_Centre/Justice/Milgaard/43-Appendix_K.pdf >.

made...without any necessity for a declaration that the witness is adverse."[10] The substance of section 9 of the *Canada Evidence Act* has remained unchanged for a very long time.[11]

b) Legal Context

Generally, a party may not ask leading questions of their own witness during examination-in-chief. Nor may they use other suggestive tactics including expressly confronting their own witness with a prior inconsistent statement. That restriction, however, is not absolute. With leave, a questioner has avenues that permit a relaxation of this general rule. Writing extra-judicially, Justice Paciocco explained that counsel currently face a "ladder of increasingly aggressive but nonetheless limited techniques that they can attempt to climb in an effort to exert control over the information their witnesses have given." The ladder metaphor is a helpful analytical tool so long as it is recognized that counsel are not necessarily required to progress through all lower "rungs" before moving on to the higher ones. We recommend leaving the *ladder* intact but merging three steps into one. Justice Paciocco sets out the "ladder" as follows:

(1) Moderately leading "trigger" questions[12]
(2) Refreshing the witness's memory
- Past recollection recorded
- Present memory revived
- Transcripts and depositions

(3) Subsection 9(2)
(4) Subsection 9(1)
(5) Declaration of hostility at common law

Our recommendations merge (3),(4) and (5)

(6) The *K.G.B.* statement (offering out of court statements for their truth, in preference to the testimony provided).

[10] *R. v. Cassibo,* (1982), 70 C.C.C. (2d) 498 (Ont. C.A.).

[11] This is simplified somewhat. Section 9(2) actually did change *a bit* in 1995, by expanding "statement in writing or reduced to writing" to its current version which includes electronically recorded statements. The need to amend the section was identified by the ULCC's Federal Provincial Task Force on Uniform Rules of evidence in 1982.

[12] A judge has jurisdiction to permit leading questions of a party's own witness *whenever justice requires*. Leading one's own witness is commonly permitted on undisputed matters, to direct witnesses to a particular field of enquiry, where the subject matter is technical and/or where a witness lacks comprehension or whose understanding is limited by reason of extreme youth, lack of education, mental disability or other illness. See *Reference re R. v. Coffin, [1956] S.C.R. 191 per Kellock J.* To like effect, see The Hon. Mr. Justice Watt, *Watt's Manual of Criminal Evidence 2013* (Toronto, Carswell, 2013) at chap. 19.02; S. Casey Hill, Louis P. Strezos and David M. Tanovich, (general editors), *McWilliams Canadian Criminal Evidence 5th ed (*Toronto: Thompson Reuters Canada) at chap. 21:20.10.20. Still, leading is to be pursued with caution because extensive cross-examination without leave may justify overturning a conviction: See *R. v. C .(J.R)* (1996), 110 C.C.C. (3d) 373 (Sask. C.A.); *R. v. Booth*, (1984), 15 C.C.C. (3d) 237, (B.C.C.A.); *R. v. Handy*, (1978), 45 C.C.C. (2d) 232 (B.C.C.A.); *R. v. Rose* (2001), 153 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Caron* (1994), 94 C.C.C. (3d) 466 (Ont. C.A.).

Rungs in the ladder have different purposes. Moderate leading and memory refreshing serve as more subtle ways of *assisting* one's own witnesses who are having difficulty. Section 9 and declarations of hostility are a means to confront witnesses – and are the primary focus of this working group. *K.G.B*., the last resort, involves a litigant asking a court to effectively ignore their witness' testimony altogether and to admit hearsay, namely to receive their witness' out-of-court statement and rely upon it for its truth.

Thus, the existence of other less-intrusive "rungs" on the ladder make clear that witness *confrontation* exists within a larger legal context. Where a witness' evidence is less than complete in chief, confrontation by cross-examination may be unnecessary if lower rungs – like refreshing memory – are effective in completing the record.

c) Rule Against Cross-Examining One's Own Witness and Its Exceptions

Aside from leading on preliminary or undisputed matters,[13] leading questions are only permitted in cross-examination, not in examination-in-chief. Counsel are generally not permitted to cross-examine their own witness. Before examining the rationales for the general prohibition, it should be understood that cross-examination, often using leading questions, can have different goals. Sometimes cross-examination occurs with the intention of eliciting or emphasizing facts helpful to a litigant's cause – in which case the cross-examiner wishes to leave the witness' credibility intact. Depending on the witness, however, cross-examination can occur to elicit information intended to undermine witness credibility.

There are several historical rationales for the rules prohibiting cross-examination and leading of one's own witness, which have been criticized as no longer reflective of modern litigation realities or as being inapplicable in many circumstances.[14] For example:

- **Loyalty**. Historically, our law has presumed that witnesses *usually* have a bias towards the party calling them and that they will too readily adopt suggestions put to them by counsel who acts for the party that called them rather than testifying in accordance with their true recollection. While this will be true in many cases, often there is little choice but to call even disreputable or antagonistic persons as witnesses "because they are the only possible witnesses to whatever it is that

[13] See footnote 12.

[14] This summary that follows could be much longer. It is distilled, mostly, from Paciocco's *Confronting Disappointing, Hostile and Adverse Witnesses in Criminal Cases*, supra, and from The Hon. S. Casey Hill, Louis P. Strezos & David M. Tanovich, *McWilliams Canadian Criminal Evidence, 5th ed, supra.*

occurred."[15]

- **Intimidation**. Here, the concern is that lawyers will come to know their own witness so well that they are "apt to have inside knowledge of discreditable or contradictory information that can be held over the witness to intimidate the witness into testifying falsely in favour of the party who called the witness."[16] In reality, rarely do lawyers know their own witnesses so well that they could intimidate in this way even if so minded. More fundamentally, however, this cynical theory is premised on the notion counsel will suborn perjury by implied or direct threat.
- **Selective Presentation**. Here, the concern is that skilful use of leading questions of one's own witness will permit lawyers to control the narrative to the point that important aspects of what a witness would otherwise say will never emerge and the trier will be misled. In other words, lawyers will have the ability to ask leading questions "in such a manner as to extract only so much of the evidence that would be favourable to their side and skew the fact finding process by presenting but *part* of the relevant evidence." In modern times, this concern is addressed by disclosure obligations and broad powers of cross-examination "in relation to matters not touched upon in chief, whether it be a topic directly related to the facts in issue or a point going solely to the witness's credibility."[17]
- **Voucher theory**. The theory is *not* rooted in a risk that leading questions may taint the quality of a witness' evidence. Rather, under this theory, litigants vouch for their witnesses' evidence. If that is so, using leading questions to undermine credibility should be unnecessary. It is now widely accepted, however, that counsel, including the Crown, who cannot control what witnesses choose to say, are entitled to invite the jury to be selective as to what part or parts of the evidence of any witness they should choose to believe.[18]

While the rationales have been criticized, and we agree with these critiques, we also accept that the general rule against cross-examining one's own witness, including asking leading questions, should remain intact (though we note, as will be seen, that some jurisdictions have abandoned this rule altogether). In our modern litigation environment, counsel should not be able to cross-examine their own witnesses without

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[15] *R. v. Walker* (1994), 90 C.C.C. (3d) 155 (Ont. C.A.), at para. 31.

[16] Paciocco, at page 308.

[17] *McWilliams' Canadian Criminal Evidence, 5th ed., supra*, at chap. 21:20 citing *Jones v. Burgess* (1914), 43 N.B.R. 126 (C.A.), at pp. 150-52; *R. v. Laplante* (1954), 18 C.R. 237 (Que. C.A.), at pp. 237-38; *R. v. McDonald* (1958), 120 C.C.C. 209 (Ont. C.A.), at pp. 219-20; *R. v. Rowbotham (No. 5)* (1977), 2 C.R. (3d) 293 (Ont. Sess. Ct.), at p. 296; *R. v. Burgar* (2010), 263 C.C.C. (3d) 521 (Alta. C.A.), at para. 17.

[18] *Walker*, at para. 31; *R. v. Lupien* (1995), 10 M.V.R. (3d) 87 (Que. C.A.), at para. 34; *R. v. Biniaris*, (1998), 124 C.C.C. (3d) 58 (B.C.C.A.), at paras. 9-16, overturned on other grounds, 2000 SCC 15 ; *R. v. Phillips* (2001), 154 C.C.C. (3d) 345 (Ont. C.A.), at para. 29, application to appeal to S.C.C. refused, [2001] S.C.C.A. No. 609; *R. v. Li*, [2004] O.J. No. 4145 (S.C.), at para. 36; *Brouillette v. R.*, (2005), 202 C.C.C. (3d) 260, starting at para. 63; *R. v. Pritchard,* 2007 BCCA 82, at para. 77; *R. v. Benji*, 2012 BCCA 55, at paras. 29-31; *R. v. Ryan,* 2014 ABCA 85, at paras. 42-45.

good reason. Concerns about the integrity of evidence received and, to some extent fairness to witnesses,[19] suggests to us that every effort should be made to elicit evidence without undue direction. Unconstrained use of leading questions of one's own witness can result in less reliable evidence and undermine the truth-finding function of the court. Fundamentally courts want to hear what witnesses remember, not what the lawyers who call them suggest. We believe that the general rule prohibiting cross-examining one's own witness still supports the primary function of the trial process as a search for the truth.

That said, where a witness testifies in manner that frustrates the objectives of the party that called them and prevents valuable evidence from being presented, the rule against cross-examining one's own witness can *impede* the truth-finding function of the court, the very purpose it otherwise seeks to promote. This is precisely the problem that section 9 *CEA* and the common law of hostility currently seek to address – rungs 3, 4 amd 5 on the "ladder". The question for our Working Group was whether the existing exceptions – in particular section 9 *CEA* – are adequately responsive to the interests of justice.

d) Critiques of Existing Exceptions (Section 9 and Common Law Hostility)

Section 9 and the common law doctrine of hostility have been criticised for numerous reasons.

i. Threshold Issues

Hostility and Adversity under Subsection 9(1). Subsection 9(1) permits a party to prove a prior inconsistent statement of their own witness if the witness proves "adverse." Yet there is no statutory definition of "adverse" – the most significant concept in section 9(1). In the face of this omission, courts have created a body of common law relating to the test under section 9. "Adversity" is generally interpreted to mean "unfavourable in the sense of assuming by his testimony a position opposite to that of the party calling him."[20]

Moreover, while section 9 speaks of "adversity", the common law had previously provided for the doctrine of "hostility," which enabled a party to cross-examine "at large" their own witness if the witness was found to be "hostile". At common law "hostility"

[19] While fairness to witnesses was not our primary concern, we were mindful of the need to ensure that witness confrontation reform did not undercut their right to be treated fairly or negatively impact public perception of the administration of justice. We understand that witnesses already often see testifying as an ordeal: *R. v. Askov*, [1990] 2 S.C.R. 1199, at para. 45.

[20] For a review of the law relating to this definition and the factors relevant to the determination of adversity, see *McWilliams, supra*, at chap. 21:20.03.60.30.

requires proof of a specific motive which is often very difficult to establish, namely, that the witness is "not giving her evidence fairly and with a desire to tell the truth *because of a hostile animus*"[21] or "demonstrates an antagonistic attitude or hostile mind"[22] *towards the party that called them*.

The relationship between subs. 9(1) and 9(2) is not clear or consistent across Canadian jurisdictions, nor is the related question of the interpretation of the scope of permissible cross-examination under subs. 9(1), when compared to the scope for a "hostile" witness.

Provincially, Canadian courts are split regarding the scope of permissible cross-examination once a witness is determined to be adverse under subs. 9(1) (not hostile at common law). In Ontario and in Alberta a finding of adversity does not permit cross-examination "at large"[23] but rather permits a more restricted cross-examination upon a prior statement – precisely the same remedy as afforded by subs. 9(2).[24] In British Columbia, Manitoba and Nova Scotia[25], a finding of adversity under subs. 9(1) permits a party to cross-examine "at large" (which would include the ability to pose leading questions).

Accordingly, in some provinces declarations of hostility at common law have become redundant but in others hostility is the only route to cross-examine the witness as though they were called by the opposing litigant.[26] Where hostility remains relevant, it is defined too narrowly in the sense that it requires proof of a specific motive – a hostile animus towards the party who called them. Where the motive to testify unfairly is rooted in reasons other than animus towards the party calling them, the need to lead or cross-examine arises, yet the witness will not be found to be hostile. In *R. v. Vivar*[27] this issue

[21] Per Kellock J. in *R. v. Coffin* (1956), 114 C.C.C. 1 (S.C.C.), at p. 24.
[22] *R. v. Figliola,* 2011 ONCA 457, at para. 50.
[23] *R. v. Figliola, supra*, at paras. 48-51; *R. v. Spence*, 2011 ONSC 5587, at para. 215-16; *R. v. Vivar,* [2004] O.J. No. 9 (S.C.) at paras. 11-20; *R. v. Koester,* 1986 ABCA 108, at paras. 20-21; *R. v. Currie*, 2008 ABCA 374, at para. 54.
[24] In *R. v. S.(S.W.)*, [2005] O.J. 2005 (S.C.), despite the fact that adversity had been established, cross-examination under subs. 9(1) was denied because the cross-examination it would allow had "already occurred" under subs. 9(2). Subsection 9(1) was redundant.
[25] *R. v. Marshall* (1972), 8 C.C.C. (2d) 329, 4 N.S.R. (2d) 517, [1972] N.S.J. No. 138 (C.A.) at para. 47. *R. v. Deacon*, (1948), 91 C.C.C. 1 (Man. C.A.), at para. 105 per Dystart J.A.; *R. v. T.(T.E.)*, [1991] B.C.J. No. 4081 (C.A.) at para. 33; *R. v. Uppal*, 2003 BCSC 1922, at para. 4.
[26] *Figliola,* at para. 49: a finding of "hostility" would have entitled the beneficiary of the ruling to cross-examine "at large"; In *R. v. Haughton (No.3)*, (1983) 38 O.R. (2d) 536 (Cty. Ct.) the finding of hostility permitted "a general cross-examination".
[27] *R. v. Vivar,* [2004] O.J. No. 9 (S.C.) at para. 19; See also *R. v. Malik* 2003 BCSC 1428*; R. v. S.(S.W.)*, [2005] O.J. No. 4958 (S.C.).

arose where a Crown witness was not *hostile* because the motivation for testifying unfairly was "out of fear" of the accused, not by animus towards the Crown.

ii. The Scope of Cross-examination that Subsection 9(2) Permits is Unclear.

While the permissible scope of cross-examination "as to the statement" under section 9(2) might be broad,[28] there are no well-established limits. The uncertainty is unfortunate because going "too far" or cross-examining "improperly" under section 9(2) may be grounds for a new trial.[29]

iii. We Simply Ignore Part of the Section

While more a consequence of a poorly drafted section than a critique *per se*, the reality is that we ignore part of the section. Subsection 9(1) states that a court *must* find adversity *before* "the party may contradict him by other evidence." Cast as a drafting "blunder" long ago[30], Parliament has not amended section 9. Despite the clear wording of subs. 9(1), Canadian courts have simply ignored what it clearly says. Instead, Canadian courts widely agree that without any finding of adversity, parties are permitted to call multiple witnesses whose evidence may conflict and to urge the trier of fact to accept only some aspects of each witness' evidence.[31]

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[28] The scope of cross-examination under subs. 9(2) may include not merely questions about inconsistencies but also questions relating to "bias and collusion" between the witness and others and questions intended to elicit the reason(s) underlying the change of position: *R. v. Dayes*, 2013 ONCA 614, at paras. 29-31.

[29] In *R. v. Fraser,* [1990] B.C.J. No. 632 (C.A.), the nature of the Crown's subsection 9(2) cross-examination, while permitted by the trial judge, was the basis for a successful appeal. The permissible scope of cross-examination under subsection 9(2) can be unpredictable due to judicial rulings: In *R. v. Boyce,* 2014 ONCA 150, a trial judge had concerns about police coercion when obtaining a witness statement. Rather than completely bar subs. 9(2) cross-examination on that statement [which is contemplated by *Milgaard*], the trial judge severely restricted its scope. The trial judge's decision to do so was upheld on appeal.

[30] *Greenough v. Eccles* (1859), 141 E.R. 315 at 353 dealing with the equivalent English provision. To like effect, see Paciocco, *supra*, at p. 315.

[31] *R. v. Biniaris*, (1998), 124 C.C.C. (3d) 58, (B.C.C.A.) at paras. 9-16, overturned on other grounds, 2000 SCC 15; *R. v. Walker*, *supra*, at para. 31; *R. v. Benji*, 2012 BCCA 55; *R. v. Ryan,* 2014 ABCA 55, at paras 42-45; R. v. Lupien (1995), 10 M.V.R. (3d) 87 (Que. C.A.); *R. v. Phillips* (2001), 154 C.C.C. (3d) 345 (Ont. C.A.) at para. 29, application to appeal to S.C.C. refused, [2001] S.C.C.A. No. 609; *R. v. Li*, [2004] O.J. No. 4145 (S.C.), at para. 36; *Brouillette v. R.*, (2005), 202 C.C.C. (3d) 260, starting at para. 63; *R. v. Pritchard,* 2007 BCCA 82, at para. 77; C*ontra R. v. Pere Jean Gregoire de la Trinite*, (1980), 60 C.C.C. (2d) 542 (Que. C.A.) at page 566, leave to further appeal dismissed, [1980] 2 S.C.R. viii.

iv. Cumbersome and Confusing Common Law Procedure

Canadian courts have largely accepted and adapted the procedure first set out in *R. v. Milgaard* which is as follows:[32]

> (1) Counsel should advise the court that he desires to make an application under section 9(2) of the *Canada Evidence Act.*
> (2) When the court is so advised, the court should direct the jury to retire.
> (3) Upon retirement of the jury, counsel should advise the learned trial judge of the particulars of the application and produce for him the alleged statement in writing, or the writing to which the statement has been reduced.
> (4) The learned trial judge should read the statement[33], or writing, and determine whether, in fact, there is an inconsistency between such statement or writing and the evidence the witness has given in court. If the learned trial judge decides there is no inconsistency, then that ends the matter. If he finds there is an inconsistency, he should call upon counsel to prove the statement or writing.
> (5) Counsel should then prove the statement or writing. This may be done by producing the statement or writing to the witness. If the witness admits the statement, or the statement reduced to writing, such proof would be sufficient. If the witness does not so admit, counsel then could provide the necessary proof by other evidence.
> (6) If the witness admits making the statement, counsel for the opposing party should have the right to cross-examine as to the circumstances under which the statement was made. A similar right to cross-examine should be granted if the statement is proved by other witnesses. It may be that he will be able to establish that there were circumstances which would render it improper for the learned trial judge to permit the cross-examination, notwithstanding the apparent inconsistencies. The opposing counsel, too, should have the right to call evidence as to factors relevant to obtaining the statement, for the purpose of attempting to show that cross-examination should not be permitted.
> (7) The learned trial judge should then decide whether or not he will permit the cross-examination. If so, the jury should be recalled. [and the section 9(2) cross-examination "as to the statement" would proceed in their presence]

If the subs. 9(2) application is granted, cross-examination of one's own witness – which can include leading questions "as to the statement", would occur. Thereafter, where deemed necessary, a second application to declare adversity under section 9(1)

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[32] *R. v. Milgaard,* (1971), 2 C.C.C. (2d) 206 (Sask. C.A.), leave to appeal refused [1971] S.C.J. No. 154.

[33] The statement should be marked as an exhibit on the *voir dire* at least. A number of appellate courts have struggled with section 9 related issues with an incomplete factual record. See the comments of Spence J. dissenting in *R. v. Stewart*, *supra*, note 19; *R. v. Handy*, [1979] 1 W.W.R. 90, 45 C.C.C. (2d) 232, [1978] B.C.J. No. 1138 (C.A.). Where there has been extensive reference to the prior statement there is some discretion to mark a prior statement as an exhibit before a jury but doing so may constitute reversible error: *R. v. Campbell* (1990), 106 A.R. 309, 57 C.C.C. (3d) 200 (Alta.C.A.), *R. v. Rowbotham* (1988), 25 O.A.C. 321, 41 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Larue* (1991), 13 W.C.B. 208, 65 C.C.C. (3d) 1 (B.C.C.A.).

(or for a declaration of hostility at common law) would follow for leave to cross-examine "at large".

Two aspects of the *Milgaard* procedure bear mentioning. First, step (4) requires the trial judge to examine the statement to determine whether "there in fact is an inconsistency." Oddly, section 9 fails to address the relatively common situation of a witness that claims no recollection. Strictly following the *Milgaard* procedure becomes murky when witnesses claim no recollection because the statement contains nothing clearly inconsistent with the witness' testimony.[34] Second, where there *is* a clear inconsistency between the statement and the testimony, step (6) of the *Milgaard* procedure permits counsel for the opposing party to cross-examine or call evidence "as to the circumstances under which the statement was made" so that the court may determine if there "were circumstances which would render it improper" to permit the cross-examination.[35] Neither section 9 nor the common law explain the kinds of circumstances that would *render it improper* for the party calling the witness to cross-examine "in respect of the statement" during the trial in the face of an inconsistency.[36] The cross-examination by opposing counsel during the *Milgaard* procedure and resulting argument about the circumstances that renders cross-examination improper creates a time-consuming side show because the focus can become lost.[37] For example, some courts have focused on reliability and have conflated the reliability issues at play in a *KGB/Khelawon* application – where an out of court statement of the witness is sought to be used for the truth of its contents (i.e., hearsay) – with those that relate to an application under subs. 9(2).[38]

The upshot is that the *Milgaard* procedure is not well suited to situations where witnesses claim a lack of recollection and, distinctly, using the procedure can become

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[34] Courts have held that where the trial judge believes the witness is lying about their absence of recollection, section 9(2) is available: *R. v. McInroy*, [1979] 1. S.C.R. 588; *R. v. Aubin (1994),* 94 C.C.C. (3d) 89, (Que. C.A) leave to appeal to SCC denied [1998] C.S.C.R. no. 256*; R. v. Curry* (2005), 206 C.C.C. (3d) 100 (Ont. C.A.).

[35] *R. v. Cassibo*, (1962), 39 O.R. (2d) 288, 70 C.C.C. (2d) 498 (C.A.) held that denying cross-examination notwithstanding an inconsistency may be based on "policy rules based on considerations of fairness".

[36] Withholding evidence of a prior inconsistent statement could be a significant factor in a trial. Our law is heavily weighted in favour of providing triers of fact with all evidence relevant to the tasks to be performed: *R. v. Corbett,* [1988] 1 S.C.R. 670, [1988] S.C.J. No.40 at para. 50.

[37] A full discussion of the factors relevant to the exercise of discretion to refuse a section 9(2) application can be found *in McWilliams Canadian Criminal Evidence 5th ed., supra,* at chap. 21:20.30.80.10. For example, see *R. v. Aitkenhead*, 2001 MBCA 60, (leave to appeal to S.C.C. refused 157 C.C.C. (3d) vi) where subs. 9(2) cross-examination was permissible despite police inducements and threats; See also *R. v. Tran,* 2010 ONCA 471, at paras. 31-35; *R. v. Fraser*, [1990] B.C.J. No. 632; Subsection 9(2) should not be permitted where police conduct was itself criminal: *R. v. MacMillan*, [2003] O.J. No. 3489 (C.A.).

[38] Where cross-examination raises concerns about the reliability of a witness's prior statement, the degree of reliability required for substantive admissibility under *KGB/Khelawon* principles is higher than the degree of reliability required for mere confrontation under subs. 9(2): In *R. v. Tran, supra*, the court upheld the trial

protracted. Cases can be further protracted by the necessity of a second application to declare the witness adverse (or hostile at common law). As explained in our recommendations, we think the trial process can be simplified and streamlined.

v. Section 9 Says Nothing about Whether Courts Can Review the Whole Prior Inconsistent Statement

Canadian law is clear that prior inconsistent statements can be used to assess witness credibility but cannot be used for the truth of their contents unless adopted[39] (absent a ruling under *KGB/Khelawon*). How a court actually uses a statement to assess credibility is left unclear. Specifically, section 9 does not indicate whether a court can read and consider the *entirety* of a witness' prior inconsistent statement and/or consider "cores of consistency" as between the testimony of a witness and their prior statement. As explained in more detail later, our recommended approach overcomes this issue by explaining that sections 10 and 11 of the *CEA* (cross-examination on prior oral and written statements) would operate where cross-examination is permitted and therefore the jurisprudence in relation to those sections would apply.

III: Jurisdictional Scans

a) Introduction

In attempting to identify a better approach to witness confrontation, we investigated how this issue is dealt with in four foreign jurisdictions with legal systems most closely resembling ours: the United States; the United Kingdom; New Zealand; and Australia. Broadly, we found that each of those jurisdictions has moved from an approach that closely parallels Canada's current law to new approaches that respond to some of the shortcomings identified above. The different approaches these four countries have adopted are described in this section.

b) United States

i. Summary

In the United States there are distinct rules of evidence at the federal and state levels. Originally, the rules of evidence at both levels prevented a party from impeaching his or her own witness, but this rule has been abandoned at the federal level. Some states

judge's ruling denying admissibility under *KGB/Khelawon* while permitting cross-examination under subs. 9(2).

[39] Watt's Manual of Criminal Jury Instruction, 2nd ed. (Toronto: Carswell, 2015) - Final Instruction 25-A

have retained their own exceptions and qualifications to the rule. Under the present federal rules, the power to cross-examine in order to impeach one's own witness is now broad and not limited solely to when there is a finding of adversity or when there is an inconsistent statement.

ii. Attacking Witness Credibility

The Federal Rules of Evidence were amended in 1975 and under the new rules there is no requirement that a witness be found adverse or hostile before his or her credibility can be attacked or impeached in general terms. Below is the relevant rule:[40]

> **Rule 607. Who May Impeach a Witness?**
>
> Any party, including the party that called the witness, may attack the witness's credibility.
>
> **Excerpt from Notes of Advisory Committee on Proposed Rules**
>
> The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d)(1).

iii. Hostility and Adversity: The Power to Pose Leading Questions

Rule 607 does not require a finding of hostility or adversity for a party *to attack the credibility* of any witness. However, the ability to pose leading questions is complicated by the retention of the terms "adverse" and "hostile" in Rule 611. Rule 611 provides discretion for the court to control the procedure of examining such witnesses as follows:

> **Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence**
>
> 611 (c) **Leading Questions**. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:
>
> (1) on cross-examination; and
>
> (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

[40] Federal Rules of Evidence, Rule 607, available online courtesy of Cornell: <https://www.law.cornell.edu/rules/fre>.

The section preserves the need to have witnesses declared hostile or be declared an adverse party or as being "identified with" an adverse party. The section does not define these terms however – so they have been defined judicially. In her article, "Federal Rules of Evidence 611(c): Leading a Witness on Direct Examination", Christina Kang summarizes concepts and case-law pertaining to the definitions of hostile and adverse parties.[41]

Adverse parties and those associated to an adverse party? Ms. Kang notes that there has not been much debate in the courts as to who is an adverse party (generally the *other side* in litigation), but indicates that determining whether a witness is *associated with* an adverse party like a corporation, can be more difficult.[42] Examples of associated adverse parties have included former and current employees[43], romantic partners[44], and in some cases, expert witnesses.[45]

Hostile? Ms. Kang defines a hostile party as one where his or her "actual hostility, bias or reluctance to testify can be demonstrated to the trial court's satisfaction." Hostility has not been defined with absolute certainty. Merely offering evidence contradicting a party is not enough to constitute a finding of hostility.[46] However, having aligned sympathies with an adverse party or being unwilling to share knowledge is sufficient.[47]

iv. Common-law Limitations to Impeachment

Despite a broad ability to impeach one's own witness, there are other policy-related rules under the laws of evidence that constrain the ability to do so, none of which are directly relevant to the current inquiry.[48]

c) <u>The United Kingdom</u>

In examining the UK, our group considered the approaches taken in England and Wales, and Scotland.

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[41] Christina J. Kang, "Federal Rule of Evidence 611(c): Leading a Witness on Direct Examination" (2009) 17(3) *Proof* 1.
[42] *Ibid* at 7.
[43] *Perkins v. Volkswagen of Am Inc,* 592 E 2d 681 (5th Cir 1979); *Chonich v. Wayne County Community College* 874 F 2d 359 (6th Cir 1989).
[44] *United States v Hicks,* 748 F 2d 854 (4th Circ 1984).
[45] *Leskin v. Pottsville Hosp Civil Action No* 87-2487, 1991 US Dist Lexis 6842.
[46] *Hickory v. US,* 141 US 303 (1894) at 309;
[47] *Kang, supra* at 17.
[48] These limitations include the collateral facts rule, the need to have a good faith basis to ask questions in cross-examination for the purposes of impeachment, and the requirement that the questioner lay a foundational questions before asking about prior statements. See K.S. Broun *et al., McCormick on evidence*, 6th ed (St. Paul, MN: Thomson/West, 1999) at pages 157-169 and 232-238.

i. England and Wales

The rules governing witness confrontation in England and Wales are set out in the *Criminal Procedure Act 1865* and the *Criminal Justice Act 2003*.

Section 3 of the *Criminal Procedure Act* uses language similar to subs. 9(1) of the *CEA*.

Criminal Procedure Act 1865

Section 3: How far a witness may be discredited by the party producing

> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

For section 3 to apply, the witness must be found by the judge to be hostile. While the common law does make a distinction between an "unfavourable" witness and a "hostile" one, the threshold to be found hostile appears to be lower than what is suggested in Canadian law.

"Hostile" means, "not desirous of telling the truth to the Court at the instance of the party calling him."[49]

In *R*. v. *Jobe,*[50] the Court of Appeal held that hostility may be demonstrated by the witness' manner and demeanour alone, by refusing to answer questions or repeatedly saying "I cannot remember", or by inconsistency between the witness' evidence and a prior statement. The inconsistency does not have to be a "flat contradiction", but the judge must decide "whether the proposed evidence has a tendency to contradict or be inconsistent with the witness' present statement."[51]

Once a witness is declared hostile pursuant to section 3, the party calling the witness can cross-examine the witness on the previous statement.'

[49] Stephen's *Digest of the Law of Evidence* approved by Court of Appeal in *R v. Prefas and Pryce* 86 Cr. App. R. 111.
[50] *R*. v. *Jobe* [2004] EWCA Crim 3155 at para 63.
[51] *Ibid* at para 66.

In sharp contrast to the law in Canada, if the witness does not admit the truth of the previous statement, section 119 of the *Criminal Justice Act 2003* allows the previous statement to be entered as evidence for the truth of its contents.[52]

If evidence is admitted under section 119, the jury must be given a warning as to how to weigh the evidence in the previous statement with the evidence provided by the witness on the stand, and how the inconsistencies may be used to assess credibility.

Some cases indicate there is confusion about when to use a statement to refresh a witness' memory, when to use it as past recollection recorded, and when to use it to show a witness is hostile and then enter the statement as evidence pursuant to section 119.

ii. Scotland

Scottish practice is governed by the common law and the *Criminal Procedure (Scotland) Act 1995*. The issue of hostile witnesses does not occur in Scotland. Cross-examination on a prior statement is permitted by either party when it is "different" on a pertinent issue from the witness' testimony.

A prior statement can be put to a witness in three main scenarios:

- The witness is unable to recall events but acknowledges that a statement was made to police and was true (past recollection recorded).
- The previous statement is contained in a document and the witness indicates the statement was made by him and he adopts it as his evidence (section 260 *Criminal Procedure (Scotland) Act 1995).*
- The witness gives evidence different from his previous statement (section 263(4) *Criminal Procedure (Scotland) Act 1995).*

In the first two situations the statement can be entered as evidence for the truth of its contents. In the third situation, where the witness does not adopt the contents of the previous statement, it can only be used for credibility and reliability purposes.[53]

The overlap between the three scenarios causes some confusion for criminal law practitioners in Scotland, especially when determining what use can be made of the previous statement.

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[52] See *R. v. Gibbons* [2008] EWCA Crim 1574 at para. 11 where the Court of Appeal states section 119 comes into play principally when a witness maintains that the contents of a prior statement are not true. The big change made by section 119 was to permit the jury to rely upon the prior statement, albeit that the witness in evidence declines to adopt it or goes further and says that it is not true.

[53] Judicial Institute for Scotland, *Jury Manual 2015, chapter 23*.

d) New Zealand

i. General Provisions Related to Adverse/Hostile Witnesses

In New Zealand, the rules for confronting a party's own witness have been reformed in the *Evidence Act 2006* (the "*Evidence Act*"), a comprehensive codification of the law of evidence. Cross-examination of "hostile" witnesses is permitted under section 94, which provides that:

> In any proceeding, the party who calls a witness may, if the Judge determines that the witness is hostile and gives permission, cross-examine the witness to the extent authorised by the Judge.

Relative to the Canadian approach, the definition of "hostile" is fairly liberal. "Hostile" is defined in section 4 of the *Evidence Act* as meaning, in relation to a witness, that the witness:

(a) exhibits, or appears to exhibit, a lack of veracity when giving evidence unfavourable to the party who called the witness on a matter about which the witness may reasonably be supposed to have knowledge; or

(b) gives evidence that is inconsistent with a statement made by that witness in a manner that exhibits, or appears to exhibit, an intention to be unhelpful to the party who called the witness; or

(c) refuses to answer questions or deliberately withholds evidence.

ii. Relationship between Confrontation and the Admissibility of Out-of-Court Statements

The impact of adopting this relatively low standard of "hostility" is particularly significant when considered alongside other changes to the definition of hearsay. A "hearsay statement" is defined in section 4 of the *Evidence Act*, as a statement that:

(a) was made by a person other than a witness; and

(b) is offered in evidence at the proceeding to prove the truth of its contents.

A hostile witness is still a witness in a proceeding, and consequently under the provisions of the *Evidence Act* their previous out-of-court statements are no longer considered hearsay. Put another way, the practical effect of this change, when paired with section 94, is to make previous statements of a hostile witness potentially admissible as proof of their contents without being adopted by the witness.

These statements are 'potentially' admissible because they are still subject to a general exclusionary rule in section 8 which provides:

> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
>
> (a) have an unfairly prejudicial effect on the proceeding; or
>
> (b) needlessly prolong the proceeding.
>
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

iii. Impeaching A Party's Own Witness

Previous to the introduction of the *Evidence Act*, there was a general rule that the Crown should not call a witness if that witness is known to be "intractably hostile"[54]. In *R. v. O'Brien*, the court of appeal explained that the reason for that common law principle was:

> ... the undesirability of the Crown calling a Crown witness known to be hostile with the intention of using him or her as a conduit through which to introduce a prior statement which would be otherwise inadmissible evidence [because it was hearsay].[55]

In *Morgan v. The Queen*, [2010] NZSC 23 ["*Morgan"*], the Supreme Court of New Zealand revisited this common law rule and held that the *Evidence Act* had materially changed the law because a previous statement of a hostile witness is no longer hearsay. Such a statement is now admissible as proof of its content, unless section 8 otherwise applies. The Court in *Morgan* goes on to quote, with approval, the following passage of Asher J. in *R. v. Vagaia* ["*Vagaia*"]:

> … the primary rationale for the principle set out in *R v O'Brien*, being the undesirability of calling a hostile witness to introduce a previous inconsistent statement that is not admissible as evidence of the truth of the facts stated, no longer exists. The effect of the new definition of hearsay is that such a statement can now be evidence of the truth of the facts stated. I would not, however, go so far as to say that *R v O'Brien* no longer has any application. There may still be circumstances where because of a witness' intractability or history of hostility or dishonesty, the Crown should not call that witness, providing that appropriate notice and details of the witness are given to the defence. To call such a witness might be to adduce blatantly unreliable evidence of little probative value but considerable prejudicial effect.[56]

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[54] *R v Vagaia* [2008] 2 N.Z.L.R. 516 (H.C.) at para. 7. This general rule is *not* the law in Canada: See footnote 68.

[55] *R v O'Brien*, [2001] 2 N.Z.L.R. 145 (C.A.) at para. 21, per Tipping, Williams and Goddard JJ.

[56] *Vagaia*, at para. 15.

iv. Summary

New Zealand has adopted a liberal interpretation, relative to the Canadian standard, of what constitutes a "hostile witness" and will generally permit cross-examination by the party who has called such a witness. The impact of this provision is magnified by the broader approach taken to the definition of hearsay. The effect of these changes is to make previous statements of a hostile witness admissible as proof of their contents without adoption, subject to the general exclusionary rule contained in section 8 of the *Evidence Act*.

e) Australia

i. Australian Commonwealth, New South Wales, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory

On January 1, 1995, the Australian Commonwealth and New South Wales each brought into force an *Evidence Act 1995*. These are sometimes referred to as the Uniform Evidence Acts. They were largely identical and were based on a draft bill prepared by the Australian Law Reform Commission. Similar legislation followed in some of the other states and territories: Victoria, Tasmania, the Australian Capital Territory and the Northern Territory.

The principal provision relevant to witness confrontation is section 38 ("Unfavourable Witnesses"). Leading questions are dealt with in section 37, which has been interpreted as reflecting the common law.[57] The equivalent provisions in the legislation of each of those jurisdictions either mirror or are substantially equivalent to the Commonwealth version of sections 37 and 38, according to the Australian Attorney-General's Department Uniform Evidence Act comparative tables.[58] Therefore the following discussion will refer only to the *Evidence Act 1995* (Cth).[59] The remaining states (Queensland, Western Australia and South Australia) will be dealt with briefly following that.

[57] A. Ligertwood and G. Edmond, *Australian Evidence: A Principled Approach to the Common Law and Uniform Acts*, 6th ed., Lexis Nexis Butterworths, 2017 at ¶ 7.117.
[58] https://www.ag.gov.au/LegalSystem/Pages/Uniform-Evidence-Acts-comparative-tables.asp*x*
[59] https://www.legislation.gov.au/Details/C2017C00386

The heart of the witness confrontation issue is dealt with in subs. 38(1) of the *Evidence Act 1995* (Cth):

> 38 *Unfavourable witnesses*
>
> (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
>
> (a) evidence given by the witness that is unfavourable to the party; or
>
> (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
>
> (c) whether the witness has, at any time, made a prior inconsistent statement.

This provision does not expressly state what the threshold trigger is that would cause the court to grant leave, but one text has stated that "[a]t a minimum, it is enough that the witness, whatever his or her intent, has merely given unfavourable evidence, that is, evidence that does not favour the party calling the witness, and that evidence will not be probed by the cross-examination of another party."[60] Subsection (6) provides that, in determining whether to give leave under the section, the court is to take into account the matters on which and the extent to which the witness is likely to be questioned by another party.[61] The court is also to determine whether the party gave notice at the earliest opportunity of its intention to seek leave.[62] Other factors of general application to the granting of leave for any question are provided in subs. 192(2), some of which pertain to efficiency, fairness, and the importance of the evidence. Significantly, wider ranging cross-examination on matters relevant *only* to credibility requires a further grant of leave under subsection (3).[63]

At common law, the ability to cross-examine one's own witness required a declaration that the witness was hostile, which was interpreted as the witness being unwilling to tell the truth.[64] Thus, section 38 represented a significant change, which was designed to improve the fact-finding process.[65] Very relevant to the impact of section 38 is the fact that, pursuant to the combined effect of section 38 and subs. 60(1), when a

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[60] Ligertwood and Edmond, at ¶ 7.122.
[61] Para. 38(6)(b).
[62] Para. 38(6)(a).
[63] Subsection (3) reads: "The party questioning the witness under this section may, with the leave of the court, question the witness about maters relevant only to the witness's credibility." See *Ligertwood and Edmond* at ¶ 7.122.
[64] Ligertwood and Edmond, at ¶ 7.120.
[65] *Uniform Evidence Law,* Report of the Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, December 2005, ALRC 102, 2005 [2005 Report], ¶ 5.69.

prior statement is proved during witness confrontation, it becomes admissible for the truth of its contents.[66]

In 2004-5, the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission together undertook a review of the operation of the *Evidence Act 1995* and published its report in December 2005. On section 38 generally, the Commissions concluded that on balance, the section was working well:

> 5.69 The guiding principle under which s. 38 was first recommended – improvement in fact-finding by enabling a party who calls a witness to challenge unfavourable evidence by cross-examining that witness – has been upheld by the operation of the section over the last 10 years. While there has been some criticism of the section, there has also been strong judicial support, as in the *Adam* and *Milat* judgments noted above. On this basis, the Commissions recommend no change to the section.

Earlier in the report, the Commissions paraphrase the Chief Justice of the New South Wales Supreme Court as saying, in the April 23, 1996 unreported judgment in *R. v. Milat* that "the effect of section 38 would probably prove to be one of the most worthwhile achievements of the uniform Evidence Acts."[67]

In considering the impact of section 38, one contextual difference between Australia and Canada is noteworthy. In at least the jurisdictions covered by the 2005 report, the prosecution has a seemingly broader duty to call witnesses than is the case in Canada - any witness whose evidence may assist in determining the truth of the matter, although the prosecution does not need to call a witness whose evidence the prosecutor considers to be unreliable, untrustworthy or otherwise incapable of belief.[68] If so, it would make sense that the prosecutor should be able to confront unfavourable witnesses through cross-examination.[69]

ii. Queensland, Western Australia, and South Australia

These three states each have a provision in their evidence statutes that deals with how far a party can discredit its own witness. Each provision is somewhat different. On the central question of the ability to cross-examine one's own witness on a prior inconsistent statement, Western Australia's statute requires a judicial determination that

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[66] Subsection 60(1) reads: "The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact."
[67] 2005 Report at ¶ 5.49.
[68] *Whitehorn v. The Queen* (1983) 152 CLR 657, 674. In Canada, the prosecution has a discretion whether or not to call a particular witness, which discretion is subject to review only when exercised for an oblique or improper motive (*R. v. Cook*, [1997] 1 SCR 1113).
[69] Ligertwood and Edmond at ¶ 7.123.

the witness is hostile.[70] South Australia's and Queensland's statutes use the term "adverse" rather than hostile.[71]

IV: Analysis and Recommendations

a) General Concerns and Broad Goals

As explained in the introduction, and for the reasons contained in Part II, we recommend replacing section 9 of the *CEA*. Based on the many critiques of our current approach to witness confrontation (canvassed earlier), the working group concluded that our witness confrontation laws as developed under section 9 of the *CEA* require significant change. Right now, our law is unpredictable in its application and there is no coherent basis upon which to support it. The part in section 9(1) that prohibits contradiction of one's own witness by other evidence has been written off as a drafting "blunder" and is simply ignored. Canadian provinces disagree on the significance of a finding of adversity (vs. hostility), which is understandable in that the section does not define adversity or what flows from that finding. Subsection 9(2) has become its own separate code – so it is being used in a way Parliament never intended.[72] We currently have two levels of cross-examination – one under subs. 9(2) "as to the statement" and another cross-examination "at large" under subs. 9(1) or after a declaration of adversity at common law. Each step requires a separate and often cumbersome application.

We recognized the following four goals:

1. Any change must facilitate and enhance the truth-finding function of the court.
2. Any change should streamline the trial process by particularizing the circumstances that justify relaxing the rule against cross-examining one's own witness, and clarifying the permissible scope of resulting cross-examination. We suggest that one benefit of a clearer approach is that the spectre of arguments about when cross-examination of one's own witness is

[70] *Evidence Act 1906,* https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a260.html , section 21.

[71] *Evidence Act 1929* https://www.legislation.sa.gov.au/LZ/C/A/EVIDENCE%20ACT%201929.aspx, section 27. *Evidence Act 1977*, https://www.legislation.qld.gov.au/view/html/inforce/current/act-1977-047, section 17.

[72] A comprehensive examination of legislative debates and committee representations can be found in the "*Report of the Commission of Inquiry Into the Wrongful Conviction of David Milgaard – Appendix K Memorandum of Law – section 9(2) of the Canada Evidence Act*" at pp. 2581-2591, online:< http://www.publications.gov.sk.ca/freelaw/Publications_Centre/Justice/Milgaard/43-Appendix_K.pdf >.

permissible and its scope should diminish. This would streamline trials, make witness confrontation issues more predictable and make resulting verdicts less vulnerable to appeal.

3. We should remove the cumbersome and unworkable elements of our current law.
4. Any change needs to appropriately balance the needs of litigants and fairness to witnesses.

To accomplish all these goals, we concluded that *tweaking* section 9 is insufficient. Major overhaul is needed.

We looked to the jurisdictional scan and decided it was best to adopt and adapt some approaches we see abroad. We were also mindful that the legislation from afar may not be easily "imported" because foreign provisions were sometimes enacted as part of a larger "code" – and the mandate of this working group was much narrower in scope. We were not attempting to address the questioning of *all* witnesses *generally* – but rather, we address only confrontation of one's own witness.

We were concerned about making recommendations that had unforeseen consequences and decided, in some cases, to leave parts of our common law intact completely.

b) Initial Impressions of the Laws in Other Jurisdictions

The American rules, being part of a larger body of evidence laws and using language that is substantially different from our concepts, seemed to us to pose too many challenges to use as a model for reform.

The UK experience was of interest to us because their laws often more closely resemble ours. While it appears that their threshold for adversity is lower than ours, and that previous inconsistent statements can be entered for the truth of their contents, which might hold some attraction, there remain areas of confusion and uncertainty under the various UK approaches, such as about how witness confrontation rules interact with other evidentiary doctrines like refreshing memory and past recollection recorded. These models did not suggest a clear path forward.

The group was particularly drawn to aspects of the New Zealand and the Australian Uniform Evidence Act models.[73] The main appeal of New Zealand's approach was its simplicity and its clear definition of the concept of hostility. The Australian approach

[73] In speaking of the Australian Model/approach, we mean the *Uniform Evidence Act*/Commonwealth approach.

focuses on the evidence rather than the witness, allowing cross-examination on, amongst other things "unfavourable" evidence, regardless of the intent of the witness. While the Australian approach lacks some of the clarity of New Zealand's, we liked the flexibility of the concept and the fact that the witness' motive does not matter if it is otherwise clear their evidence is unfavourable.[74]

While the Australian approach had some appeal in that it clearly defines what kind of cross-examination is permitted, on balance we were not drawn to either the New Zealand or Australian approaches to the question of the scope of cross-examination that would be permitted. The New Zealand approach allows cross-examination "to the extent authorised" by the Court. We reject this as it fails to provide the needed clarity to enable the parties to conduct themselves appropriately. The Australian model preserves differing levels of cross examination, which we avoid in the interests of simplicity.

c) Recommendations

We recommend as follows:

1. Section 9 of the *Canada Evidence Act* should be repealed in its current form and replaced in accordance with the recommendations that follow.

2. The circumstances in which cross-examination of one's own witness are permissible should be clearly defined including:
    - When the testimony of the witness is meaningfully inconsistent with a previous oral or recorded statement; or
    - When it appears that the witness is not making a genuine attempt to remember matters he or she ought reasonably be expected to have some recollection about; or
    - When the witness refuses to answer questions or otherwise exhibits, through words or conduct, an intention to be unhelpful to the party that called them; or
    - When the witness gives evidence that is unfavourable to the party that called them. [See section (i) below for further detail]

3. We recommend that the section make clear there is only one level of cross-examination. Where cross-examination is permitted under this section, counsel should be permitted to question their own witness on all matters as

[74] In Canada, witness motive can impact whether the witness is hostile. We suggest motive should not matter if the witness is otherwise decidedly being unfair. For example, in *R. v. Vivar*, *supra,* a Crown witness who testified unfairly was not *hostile* because the motivation was "out of fear" of the accused not by animus to the Crown.

though they were called by the opposing litigant. Sections 10 and 11 of the *Canada Evidence Act* should apply[75] for the purposes of proving the previous statement and for the use that can be made of previous statements. [See section (ii) below for further detail]

i. Circumstances Permitting Cross-Examination of One's Own Witness

[Re Recommendation #2]

When Testimony Is Inconsistent With a Previous Oral or Recorded Statement. This is not novel. It makes sense that witnesses who testify inconsistently from previous statements may be cross-examined. There are some nuances here:

a) What is a *statement*? Right now, subs. 9(2) requires inconsistent statements be reduced to writing or electronically recorded before that subsection applies. Subsection 9(1), however, has no such limitation, which means that cross-examination on an *oral* statement can only be done pursuant to a subs. 9(1) application. We suggest *statement* for the purpose of witness confrontation **should include oral statements**. Our recommendation removes the restriction found only in the current subs. 9(2) limiting its operation to cases where a witness' statement is written or electronically recorded.

b) What is an *inconsistency*? Now, subs. 9(2) makes reference to inconsistent statements but says nothing about the nature of inconsistency that suffices to trigger operation of the section. We suggest that there should be some limit on the nature of the inconsistency that triggers cross-examination – that essentially meaningless inconsistencies on trivial matters should not trigger the ability to cross-examine one's own witness. We think judges should maintain discretion on this issue by assessing the nature of the inconsistency. "Material inconsistency" may be too high as it might introduce a concept (materiality) that has a specific meaning. An inconsistency may be very significant to a witness' credibility but not particularly "material" to a central fact in the case. Thus,

[75] **Section 10(1) provides**: *On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.*
Section 11 provides: *Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.*

inconsistency needs a qualifier. We are undecided as to the best modifier but agree there needs to be one. *Significant* inconsistency? *Relevant* inconsistency? *Meaningful* inconsistency? An inconsistency *about an important matter*?

When Witness Makes No Genuine Attempt to Remember. The new provision should capture both the witness who professes no recollection about matters they ought reasonably be expected to have some recollection about and the witness who does not appear to the court to be making a genuine attempt to remember. Right now, courts have applied subs. 9(2) to witnesses who testify that they no longer remember the relevant events even though, technically, the statement "I do not currently remember" is not inconsistent with a prior statement. As developed, cross-examination under subs. 9(2) is permissible once the court concludes a witness is lying about their lack of recollection. Our recommendation, in contrast, is more expansive in that it also includes witnesses who profess no recollection about matters they ought reasonably be expected to remember. For such witnesses, the judge need not make a finding as to the witness' motive – a fact that can be impossible to determine.

When Witness Exhibits an Intention to be Unhelpful. Where witnesses refuse to answer questions or exhibit, through words or conduct, an intention to be unhelpful to the party who called them, courts should have the ability to permit a party to cross-examine their own witness. In substance, this is not new.

When Testimony Is Unhelpful to the Calling Party. While witness demeanor may suffice to permit cross-examination, evidence of unfavourable demeanor should not be necessary in all cases. Right now, an adverse witness is one whose testimony advances a position "opposite*"* to the party who calls them.[76] Here, the emphasis is on the impact of the evidence on the party that called the witness, and not strictly speaking on the witness' attitude toward that party. We think "opposite" is potentially too narrow. We favour the Australian formulation which allows for cross-examination when a judge determines the witness' testimony is "unfavourable" to the party that called them. In substance, then, permitting cross-examination for witnesses whose testimony is unfavourable to the party that called them is a modest expansion of the status quo.

ii. Scope of Cross-Examination

[Re Recommendation #3]

Our proposed approach removes subs. 9(2)'s limited cross-examination "as to the statement". Rather, our recommendation is that there be a single scope of cross-examination under section 9, namely cross-examination as though the witness was called

[76] The definitional issues relation to "adversity" and "hostility" are addressed in Part II (i) *Threshold Issues*.

by an opposing litigant. We also recommend making clear that sections 10 and 11 of the *CEA* would apply (as they would be when a witness is called by an opposing litigant) when putting the previous statement to the witness, as would any corresponding common law and evidentiary rules regarding the use of any previous statements.

In taking this approach we suggest that the current two-stage approach – first obtaining leave to cross-examine *as to the statement* before obtaining leave to cross-examine "at large" - causes more problems than it solves. For reasons explained earlier (in Part II of this document), our current two-stage approach to cross-examination of one's own witness protracts proceedings and creates uncertainty, both of which we seek to avoid.

Regarding the scope of permissible cross-examination we considered including a express provision that would empower judges to control it. We decided that to do so was not required on the basis of three related bodies of law, all of which would continue to operate if our recommended approach is accepted:

- Trial judges already have the ability to restrict *how* cross-examination occurs. Judges already have broad powers to curtail cross-examination that is unduly repetitive, abusive, insulting, overly aggressive, or intended to elicit hearsay or otherwise irrelevant information. etc.

- Further, regarding objectionable *content*, trial judges already maintain a gatekeeper function to restrict admissibility on the basis of undue prejudice. Prejudice, it is to be remembered, includes not only moral and reasoning prejudice but also unfairness to the witness and unfair surprise. Reasoning prejudice includes the potential that the evidence in question will consume an inordinate amount of time.[77]

- Last, quite apart from judicial oversight, counsel who are permitted to cross-examine their own witness will likely choose to limit the scope of their cross-examination in many instances for two reasons. First, when faced with an unusually pliable witness, leading the witness on critical issues can impact the weight to be given to their answer.[78] Further, for tactical reasons counsel will sometimes restrict their cross-examination, choosing solely to bring out or emphasize facts helpful to their position rather than attempting to elicit, by leading

[77] *R. v. Handy*, [2002] 2 S.C.R. 908.
[78] *Moor v. Mo*or , [1954] 2 All ER 458 (CA); R. v. Williams, (1982), 66 C.C.C. (2d) 234 (Ont. C.A.) see p. 236 :"It is clear, however, that an answer elicited by a leading question is entitled to little, if any, weight."; *R. v. Nicholson,* 1998 ABCA 290, (1998), 129 C.C.C.(3d) 198 (Alta. C.A.). See also *McWilliams' Canadian Criminal Evidence, 5th ed., supra*, at chap. 21:40: *Leading Questions may Impact Weight of Evidence.*

or other suggestive questioning, information that casts doubt on the witness' credibility.

Expressly including reference to sections 10 and 11 is important for another reason. When a witness denies ever having made a prior inconsistent statement, proving what they previously said might offend the collateral facts rule (the common law rule that bars a party from introducing extrinsic evidence for the sole purpose of proving a matter not directly related to an issue in dispute).[79] By including reference to sections 10 and 11, determining whether the collateral facts rule bars proof of a witness' prior inconsistent statement is unnecessary because section 10 (cross-examination on previous written or recorded statements) clearly contemplates "contradictory proof". Similarly, section 11 (cross-examination as to previous oral statements) also expressly contemplates "proof may be given".

iii. ULCC Civil Section and Provincial Evidence Acts

Many provincial and territorial evidence laws closely parallel the provisions found in the *Canada Evidence Act*. While we recognize that federal rules of evidence may apply in many civil contexts, provincial rules often apply. Indeed provincial evidence laws also apply in many quasi-criminal contexts as well. It may be advisable to share this report with the ULCC's Civil Section for their consideration. They may wish to assess provincial and territorial laws in this area to determine whether there is a comparable need for reform at that level. We see benefits of harmonizing federal, provincial and territorial laws relating to evidence.

d) <u>What We Considered Recommending and Dismissed</u>

We entertained simply repealing section 9 altogether and allowing the form of questioning to be left simply as a matter of judicial evolution and discretion. We decided this approach is not advisable because of the desire to foster certainty and finality in the judicial process. While most of the evidence law in Canada is judge-made rather than legislative, repealing section 9 and leaving it to the courts to develop a replacement could take significant time and lead to years of uncertainty. Litigants are entitled to know with confidence what is admissible, or not, and when they are wading into or causing appealable error. While absolute precision in legislation is impossible, we think that providing a coherent framework that establishes a fresh, clear and principled rule is to be preferred over leaving the matter entirely to the courts.

We considered recommending enacting a provision that would require lawyers to believe that the witness they call *would* (not *could*) say something of

[79] The Hon. David Watt, Manual *of Criminal Evidence* (Toronto: Thompson Reuters, 2017), chapter 22.03.

relevance. This seemed inadvisable for two reasons. First, we felt that requiring a trial judge to enquire about counsel's motives in calling witnesses is inconsistent with the proper role of the courts. The second concern is that this approach could undermine the truth-finding function of the courts. Simply, counsel's motive for calling a completely uncooperative witness, believing they are to lie about everything of substance, may be both ethical and mandatory when counsel anticipates applying to tender a sworn video statement as substantive evidence under the principled approach to the admission of hearsay explained in *Khelawon* and *KGB*.[80] In such circumstances, calling the uncooperative witness is usually *required* to establish necessity.[81] The Court retains the ability to curtail abusive trial tactics like in *Soobrian* where the Court concluded that the Crown called a witness to elicit lies and to prove collusion with the accused.[82]

We considered retaining the use of terms like *Adverse* and *Hostile*. We decided that it would be preferable if the new section 9 not include the terms "adversity," "adverse witness" or other similar existing concept, such as "hostile." Even if re-defined, these terms carry historical baggage. To re-define these terms will inevitably lead to future judicial consideration about whether earlier jurisprudence defining them retains any relevance. We recommend that the new provision eliminate the term "adversity" or "adverse witness" or similar concept entirely. It is simpler to define the circumstances when cross-examination is permissible.

Amending the definition of hearsay. We considered the New Zealand model carefully because it had some positive aspects but it also included an amended definition of "hearsay" that is not consistent with the current Canadian definition. We chose not to recommend re-defining hearsay because it arises in so many evidentiary contexts. Any change made for the purpose of confronting one's own witness could generate unforeseen and unintended consequences in other contexts.

We considered recommending the enactment of provisions setting out what the trier of fact could receive/review. We considered whether a new Canadian law in this area should specify expressly that triers of fact (judge or jury) are *entitled* to see the *entire* inconsistent statement once a witness is confronted with it for the purpose of assessing the weight/significance to be attached to an alleged inconsistency when ultimately determining witness credibility. There will be cases where examining the entire inconsistent statement will help in the fair assessment of overall context and extent of the inconsistency, and, more generally, the appropriate weight to be placed upon any

[80] *R. v. B.(K.G.),* [1993] 1 S.C.R. 740; *R. v. Khelawon*, [2006] 2 S.C.R. 787.
[81] *R. v. Glowatski,* 2001 BCCA 2499; *R. v. M. (D.),* 2007 NSCA 296; *R v. Mohammad, (2007), 75 W.C.B. (2d) 690, [2007] O.J. No. 4901 (S.C.) at para. 27:* "Normally the *necessity* requirement of the principled approach to hearsay is met by the recantation of the witness."
[82] *R. v. Soobrian*, [1993] O.J. No. 703 (Gen.Div.) (trial ruling); further appeal (1994), 96 C.C.C. (3d) 208 (Ont. C.A).

inconsistency.[83] On the other hand, in some cases there are risks of misuse or prejudice. We decided our recommended approach renders this kind of provision unnecessary. Because we recommend an approach that permits cross-examination "as though they were called by the opposing litigant", expressly including the use of sections 10 (cross-examination relating to a prior recorded statement) and section 11 (cross-examination as to a previous oral statement), ensures the jurisprudence in relation to the use of prior statements under those sections is maintained and applied.

e) Topics for Further Consideration

i. Presumptive Admissibility?

This issue relates *to the use of prior inconsistent statements.* Currently, when a witness does not adopt an inconsistent statement, it remains hearsay and is therefore not evidence of the truth of its content unless a party obtains a ruling for substantive admissibility under *KGB/Khelawon*.[84] Accordingly, in Canada when a witness is confronted with a prior inconsistent statement, it is *presumptively* inadmissible for its truth. Ours is not the approach taken in Australia, New Zealand, England and Wales, where, once confrontation occurs, the statement presumptively may be considered by the trier of fact for its truth. That is, where a witness is cross-examined on a prior statement, the trier of fact is presumptively entitled to receive it and consider the contents of the inconsistent statement *for the truth* of its content *subject to* judicial discretion to exclude if admission is unfair. Although we decided against recommending presumptive admissibility (the approach taken in Australia, New Zealand, England and Wales), some of us think it is a matter that warrants future consideration.

ii. Abrogating hostility and adversity

Declarations of hostility permit examination *at large*. Similarly, in at least some provinces, a declaration of adversity accomplishes the same thing. Our recommendations include that there be only one scope for cross-examination, namely, cross-examination as though the witness was called by an opposing litigant. For this reason, our recommended approach renders both adversity and hostility moot as a practical matter. We leave to drafters to determine whether there is any need to statutorily

[83] See *R. v. Dorsey*, [1997] O.J. No. 349 (C.A.) where the trial judge examined the entirety of a witness' prior inconsistent statement to assess the *extent of the alleged inconsistency.* See also *R. v. Campbell* (1990), 57 C.C.C.. (3d) 200 (Alta. C.A.); *R. v. Rodney* (1988), 46 C.C.C. (3d) 323 (B.C.C.A.); R. v. Cain, 2018 SCC 20 adopting the majority in 2017 NSCA 96. While these cases addresses cross-examination on inconsistent statements under section 10 of the *Canada Evidence Act*, there is no reason the use made of an inconsistent statements under section 9 should be treated differently.

[84] *Supra,* note 79.

abrogate the law that is associated with these terms, in particular “hostility” which is a creature of the common law.

V: Concluding Remarks

This working group consists of prosecutors and defence counsel as well as policy counsel both provincial and federal. We see the issues similarly. Confronting one’s own witness is not rare in practice. It occurs daily in courtrooms across Canada. We are using a provision written 160 years ago and nobody likes it. We can find no academic or judicial writing that suggests our current approach is good or coherent. It is unfortunate that after over fifty years of judicial and academic criticism our witness confrontation laws have been permitted to fester for so long. Every other major common law jurisdiction we sampled has been able to revise this area of law with varying degrees of success. Canada, alone, seems stuck in the distant past. It is time to revise this area of law and the fix suggested is not complicated. What is proposed, we submit, is principled, simple, practical and fair.