The Use of Previous Recorded Statements in the Post-Khelawon Era

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INTRODUCTION

The focus of this paper is on the use of previously recorded statements and their evidential value. While the procedure for using a previously recorded statement to impeach a witness will be touched on briefly, the central focus of this paper is on the recent developments regarding the admission of such statements for the truth of their content.

In reviewing the use of previously recorded statements as substantive evidence, this paper reviews recent Supreme Court of Canada decisions, including *R. v. Khelawon*[1], *R. v. Couture*[2], *R. v. Devine*[3], and *R. v. Blackman*[4]. Following a review of the relevant jurisprudence, this paper explores whether the approach to hearsay evidence, as developed in the cases set out above, is resulting in the admission of evidence that adversely affects the accused's right to a fair trial. A troublesome decision emerging from the Nova Scotia Court of Appeal, *R. v. Poulette*[5], and a recent unreported decision from the Alberta Court of Queen's Bench, *R. v. Doul Tot Nhail*, are also discussed.

USING PREVIOUSLY RECORDED STATEMENTS TO IMPEACH A WITNESS

Sections 9 and 10 of the *Canada Evidence Act* ("*CEA*") govern the use of a previously recorded statement to impeach a witness. These sections have been attached in "Appendix A" for ease of reference. Outlined below is a brief overview of the procedure to be followed when impeaching a witness.

Impeachment of a Party's Own Witness (s. 9, *CEA*)

At common law, if a witness is hostile towards the examiner, the examiner can make an application to cross-examine the witness at large. Section 9(1), which recognizes the general rule that a party cannot impeach its own witness by reference to his or her bad character, addresses a slightly different scenario. Section 9(1) speaks to circumstances in which the witness, while not outwardly hostile, is proving to be adverse in interest to the party who

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[1] *R. v. Khelawon,* 2006 SCC 57, [2006] 2 S.C.R. 787 ["*Khelawon*'].
[2] *R. v. Couture,* 2007 SCC 28, [2007] 2 S.C.R. 517 ["*Couture*"].
[3] *R. v. Devine,* 2008 SCC 36, [2008] 2 S.C.R. 283 ["*Devine*"].
[4] *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298 ["*Blackman*"].
[5] *R. v. Poulette,* 2008 NSCA 95, [2008] N.S.J. No. 455, application for leave to appeal refused: [2008] S.C.C.A. No. 515 (S.C.C.) ["*Poulette*"].

called the witness. This would include circumstances in which the witness had previously given an oral statement that is inconsistent with the witness' in-court testimony.

A finding of adversity does not give the examiner the ability to cross-examine its own witness. Instead, it permits counsel to put the prior inconsistent statement to the witness and to allow the witness the opportunity to address the inconsistencies between their statements. In the event that the witness denies ever making such a statement, it would allow the party who called the witness to call independent proof to establish that the complainant did make the prior statement.

Unlike s. 9(1), s. 9(2) clearly contemplates allowing a party to cross-examine its own witness in certain circumstances. If a witness has made a prior inconsistent statement that was "in writing, reduced to writing, or recorded on audio tape or video tape or otherwise", the party calling the witness can make an application pursuant to s. 9(2) to cross-examine the witness. The party seeking to cross-examine the witness does not have to establish that the witness is adverse. However, when a party is given leave to cross-examine a witness pursuant to s. 9(2), the scope of the cross-examination is limited to the inconsistencies between the statements.[6]

The procedure to be followed when a party is making an application to cross-examine a witness pursuant to s. 9(2) was articulated in *R. v. Milgaard*, which provides:

> "(1) Counsel should advise the court that he desires to make an application under s. 9(2) of the Canada Evidence Act.
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> (2) When the court is so advised, the court should direct the jury to retire.
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> (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.
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> (4) The learned trial judge should read the statement, 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

[6] *R. v. Milgaard,* [1971] S.J. No. 264, 2 C.C.C. (2d) 206 ["*Milgaard*"], at para. 52.