

THE ADVERSARY'S WITNESS: CROSS-EXAMINATION AND PROOF OF PRIOR INCONSISTENT STATEMENTS

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The cross-examination and proof of a previous inconsistent statement of an adversary's witness frequently occurs in our courts. This article examines the common law and statutory rules of evidence which govern this method of impeachment and challenges the traditional interpretation of these rules. The concluding part of the article is an assessment of the corresponding sections of the proposed Canada Evidence Act, 1982.

Il arrive souvent dans un procès qu'il y ait, au cours d'un contre-interrogatoire, preuve qu'un témoin de la partie adverse a fait une déposition qui contredit sa déposition préalable. Dans cet article, l'auteur examine le droit de la common law et la Loi sur la preuve qui permettent cette méthode de mise en accusation et il y conteste l'interprétation qui en est faite habituellement. En conclusion, l'auteur se penche sur les articles correspondants du projet de la Loi sur la preuve au Canada de 1982.

Introduction

In order to challenge the accuracy of the evidence-in-chief given by an opposing witness,¹ it is often necessary to impeach the credit of that witness. The most effective, and most frequently used method of impeachment is "by proof that the witness on a previous occasion made statements inconsistent with his present testimony".² The underlying purpose of this method of impeachment is stated by Wigmore:³

We place his contradictory statements side by side, and, as both cannot be correct, we realize that in at least one of the two he must have spoken erroneously. Thus, we have detected him in one specific error, from which may be inferred a capacity to make other errors.

The rules of evidence governing the cross-examination and proof of a prior inconsistent statement of an adversary's witness are part statutory and part common law. Some common law rules have survived legislative intrusion⁴ into this area, several have been codified by statute, and others

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¹ R. Cross, *Evidence*, (5th ed., 1979), p. 256.

² C. McCormick, *Evidence*, (2nd ed., 1972), p. 66.

³ J.H. Wigmore, *Evidence in Trials at Common Law*, vol. 3A (Chadbourn rev. 1970), s. 1017, p. 993.

⁴ For example, the evidential value of a prior statement is governed by the common law: Wigmore, *ibid.*, s. 1018, p. 998; *Deacon v. R.*, [1947] S.C.R. 531, 89 C.C.C.1, 3

have been repealed by legislation. The statutory provisions are found in similarly worded sequential sections of the evidence Acts of the Canadian common law jurisdictions.⁵ The proposed Canada Evidence Act, 1982⁶ also contains provisions governing this method of impeachment. This article will examine the common law, and the existing and proposed legislation.

I. The Common Law Prior to Legislative Reform

The common law distinguished between impeachment by verbal and by written statements.⁷ Consequently, the law developed separately depending upon the form of communication. The following analysis adopts that division.

A. Previous Inconsistent Verbal Statements

Phillipps and Arnold, writing in 1852, set out the prerequisite to impeaching an adversary's witness by means of a prior inconsistent verbal statement:⁸

Before the evidence of verbal contradictory statements can be received in evidence against a witness, it will be necessary, in the first instance, to prepare the way for its reception by cross-examining him as to the supposed contradictions which are afterwards to be brought forward against him.

In *The Queen's Case*, Abbott C.J. stated:⁹

The legitimate object of the proposed proof is to discredit the witness. Now the usual practice of the courts below, and a practice, to which we are not aware of any exception, is this; if it be intended to bring the credit of a witness into question by proof of any thing that he may have said or declared, touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared, that which is intended to be proved.

C.R. 265; *McInroy & Rouse v. R.*, [1979] 1 S.C.R. 588, 42 C.C.C. (2d) 481, 5 C.R. (3d) 125.

⁵ R.S.C. 1970, E-10 ss. 10 & 11; R.S.A. 1980, c. A-21, ss. 23 & 24; R.S.B.C. 1979, c. 116, ss. 13 & 14; R.S.M. 1970, c. E-150, ss. 22 & 23; R.S.N.B. 1973, c. E-11, ss. 18 & 19; R.S.N. 1970, c. 115, ss. 9 & 10; R.O.N.W.T. 1974, c. E-4, ss. 25 & 26; C.S.N.S. 1979, c. E-18, ss. 53 & 54; R.S.O. 1980, c. 145, ss. 20 & 21; R.S.P.E.I. 1974, c. E-10, ss. 16 & 17; R.O.Y.T. 1976, c. E-6, ss. 25 & 26; R.S.S. 1978, c. S-16, ss. 39 & 40.

⁶ Senate Bill S-33 (first reading, November 18, 1982; second reading, December 7, 1982).

⁷ S. Phillipps and T. Arnold, *A Treatise on the Law of Evidence*, vol. 2 (10th ed., 1852), p. 505.

⁸ *Ibid.* See also *Carpenter v. Wall* (1840), 11 Ad. & E.803, at p. 804, 113 E.R. 619, at p. 620 (Q.B. en banc): "There is no doubt that these declarations could not be made evidence without first asking the witness if she ever uttered them . . ." (per Littledale J.); and, "I like the broad rule, that, where you mean to give evidence of a witness's declarations for any purpose, you should ask him whether he ever used such expressions" (per Patteson J.). This principle also applied to other declarations of a witness and to acts done by him if it was intended to prove his former declarations for the purpose of discrediting him (Phillipps and Arnold, *ibid.*, p. 508).

⁹ (1820), 2 Brod. & Bing. 284, at p. 313, 129 E.R. 976, at p. 988 (H.L.).

If a party failed to properly prepare for the reception of the former statement "... by previously interrogating the witness on the subject of those declarations, the Court will . . . call back the witness in order that the requisite previous questions may be put".¹⁰ However, if this was impossible because the witness had departed from the courtroom and could not be found, then the party could not adduce the former statement.¹¹ The courts also held that it was improper to ask the witness just the "... general question whether he has ever said so and so, but he must be asked as to the time, place and person involved in the supposed contradiction"¹² together with the particulars of the conversation.¹³

There were sound reasons for these preliminary requirements. In the interest of trial efficiency, "[i]f the witness on the cross-examination [unequivocally] admits the conversation imputed to him, there is no necessity for giving other evidence of it".¹⁴ Also, if the impeaching evidence "... could be adduced on the sudden and by surprise, without any previous intimation to the witness or the party producing him great injustice might be done".¹⁵ Thus the witness should be given "... an opportunity of recollecting the facts, and, if necessary, of correcting the evidence he has already given, as well as of explaining the nature, meaning, and design of what he is alleged elsewhere to have said".¹⁶ Finally, the trier of fact should be aware of all the surrounding circumstances.¹⁷ Phillipps and Arnold state:¹⁸

The former account, given by him in conversation may have been only partially heard, or misunderstood, or partly forgotten, or intentionally misrepresented; and where the variance between his present statement upon oath, and the former statement as reported by a third person, may be as much owing to the mistake of the one witness as to the misrepresentation of the other, it will be necessary that the memory and credit of both witnesses should be fairly tried and contrasted.

At common law, only matters relevant to the issues or the position in which a witness stands (bias, interest or corruption) could subsequently be proved to contradict him.¹⁹ This proposition is now known as the collateral

¹⁰ T. Starkie, *A Practical Treatise of the Law of Evidence*, vol. 1 (2nd ed., 1833), p. 184. See also *The Queen's Case*, *ibid*, at pp. 314 (Brod & Bing), 988 (E.R.) and *Andrews v. Askey* (1837), 8 Car. & P. 7, 173 E.R. 376 (N.P.).

¹¹ *The Queen's Case*, *ibid*, at pp. 313 (Brod & Bing), 987 (E.R.). See also J.P. Taylor, *A Treatise on the Law of Evidence*, vol. 2 (1st ed., 1848), 983.

¹² Starkie, *op. cit.*, footnote 10, p. 183. See also *Angus v. Smith* (1829), M. & M. 473, 173 E.R. 1228 (N.P.).

¹³ Phillipps and Arnold, *op. cit.*, footnote 7, p. 505.

¹⁴ *Crowley v. Page* (1837), 7 Car. & P. 789, at p. 792, 173 E.R. 344, at p. 345 (N.P.).

¹⁵ *The Queen's Case*, *supra*, footnote 9, pp. 314 (Brod & Bing), 988 (E.R.).

¹⁶ Taylor, *op. cit.*, footnote 11, p. 983.

¹⁷ Starkie, *op. cit.*, footnote 10, p. 183.

¹⁸ *Supra*, footnote 7, p. 505.

¹⁹ *The Attorney-General v. Hitchcock* (1847), 1 Ex. 90, 154 E.R. 38. It could be argued that a party was allowed to prove the former statement of a witness only if the facts

fact rule.²⁰ If a party was entitled to prove every former utterance of a witness, irrespective of its content, for the sole purpose of contradiction, then "... this would render an inquiry, which ought to be simple, and confined to the matter in issue, intolerably complicated and prolix, by causing it to branch out into an indefinite number of collateral issues".²¹

A witness who was discredited by this method of impeachment could be rehabilitated (subject to certain limitations) during his re-examination. In *The Queen's Case*, Abbott C.J. stated:²²

I think the counsel has a right, upon re-examination, to ask all questions, which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and, also, of the motive, by which the witness was induced to use those expressions; but, I think, he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.

A dispute arose whether this limitation on the scope of the re-examination extended to parties who gave evidence. In *Prince v. Samo*,²³ Denman L.C.J. held that this limitation applied to party and non-party witnesses alike and confirmed the limits of the re-examination:²⁴

set out in the statement were independently admissible. For example, if the witness was also a party, a former statement relative to a matter in issue would be independently admissible as an admission. Conversely, if the statement was not independently admissible, the proponent of the statement was not entitled to prove it. For example, a statement of a non-party witness would not be admissible in chief. This proposition may explain Pollock, C.B.'s reasoning that the former statement was admissible for all purposes ("... in order that the jury may believe the account of the transaction which he gave to that other witness to be the truth, and that the statement he makes on oath in the witness-box is not true" (42 (Ex.), 99 (E.R.)). But see *Wright v. Beckett* (1833), 1 M. & Rob. 414, 174 E.R. 143 (N.P.).

²⁰ The correct formulation of the rule is: Could the fact, as to which the prior self-contradiction is predicated, have been shown in evidence for any purpose independently of the self-contradiction? (Wigmore, *op. cit.*, footnote 3, s. 1020, p. 1010).

See also *The Attorney General v. Hitchcock*, *ibid*; *Crowley v. Page*, *supra*, footnote 14, at pp. 791 (Car. & P.), 345 (E.R.); *Christian v. Coombe* (1796), 2 Esp. 489, 170 E.R. 430 (N.P.); *Andrews v. Askey*, *supra*, footnote 10; *DeSailly v. Morgan* (1798), 2 Esp. 691, 170 E.R. 498 (N.P.).

²¹ Starkie, *op. cit.*, footnote 10, p. 164. Indeed, there was authority for the proposition that the cross-examiner could not even put the question with respect to a collateral matter (Starkie, *ibid*; *Gibert v. Gooderham*, (1856), 6 U.C.C.P. 39, at p. 46; *Harris v. Trippett* (1811), 2 Camp. 637, 170 E.R. 1277 (N.P.); and *Spenceley v. De Willott* (1806), 7 East 108, 103 E.R. 42 (K.B.)). However, the law evolved so that the question could be asked, but if the matter was collateral, the cross-examiner could not prove it (see *The Attorney General v. Hitchcock*, *supra*, footnote 19; *R. v. Dean* (1852), 6 Cox C.C. 23 (assizes); and *R. v. Brown* (1861), 21 U.C.Q.B. 330).

²² *Supra*, footnote 9, at pp. 297 (Brod. & Bing), 981 (E.R.). "[The witness] should have an opportunity of ... explaining, in the re-examination, the nature and particulars of the conversation, under what circumstances it was made, from what motives, and with what design" (per Phillpotts and Arnold, *op. cit.*, footnote 7, p. 505).

²³ (1838), 7 Ad. & E. 627; 112 E.R. 606 (K.B.).

²⁴ *Ibid.*, at pp. 634 (Ad. & E.), 609 (E.R.).

[W]e think it must be taken as settled that proof of a detached statement made by a witness at a former time does not authorise proof by the party calling that witness of all that he said at the same time, but only of so much as can be in some way connected with the statement proved.

Although the cross-examining party was entitled to prove a former verbal statement²⁵ if the witness denied making it, the law was unclear as to precisely when he would be afforded such an opportunity. Generally, it appeared that if the defendant was the cross-examining party he would prove the statement after he elected to call evidence.²⁶ If the plaintiff was cross-examining a defence witness, the plaintiff would normally prove it in reply.²⁷

One area of contention occurred when the witness, upon cross-examination, neither admitted nor denied making the former verbal statement. Some courts held that a positive admission or denial was a prerequisite to impeachment and if the witness claimed to have no present recollection of the earlier statement then the party could not impeach him.²⁸ However, the better view was that a former statement could be proven in such circumstances. Phillipps and Arnold supported this view:²⁹

It is true, the proof of the statement imputed to the witness, which he says he does not remember to have made, is not admissible as a *contradictory statement*, for, until further inquiry be made, there is no apparent contradiction; but still, it seems, the evidence should be admitted, for the imputed statement, when proved, may be such as to amount to a direct contradiction of the witness, and may also possibly convince the jury, that the witness did not speak the truth in saying he did not remember making the statement. If the rule were otherwise, it might happen that, under the pretence of *not remembering*, a witness who has made a false statement, and who knows it to be false, would escape contradiction and exposure.

The Common Law Commissioners, whose second report formed the basis for the remedial legislation in the United Kingdom, reviewed the law relating to cross-examination and proof of prior inconsistent verbal statements.³⁰ The Commissioners adopted the above reasoning of Phillipps and Arnold and recommended that a party should be entitled to prove a

²⁵ The Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Supreme Court of Common Law (London, 1853); reprinted in 9 British Parliamentary Papers (Legal Administration General, 1851-60), 184. It appeared that counsel could prove the statement by calling the impeaching witness who heard the verbal statement and by reading to that witness the particular words from his brief (*Edmonds v. Walter* (1820), 3 Stark 7, 171 E.R. 749 (N.P.)).

²⁶ *Edmonds v. Walter*, *ibid.*; *Crowley v. Page*, *supra*, footnote 14, at pp. 792 (Car. & P.), 345 (E.R.).

²⁷ *Pain v. Beeston* (1830), 1 M. & Rob 20, 174 E.R. 7 (N.P.).

²⁸ *Pain v. Beeston*, *ibid.*; *Long v. Hitchcock* (1840), 9 Car. & P. 617, 173 E.R. 981 (N.P.).

²⁹ Phillipps and Arnold, *supra*, footnote 7, p. 507 (italics supplied).

See also *Crowley v. Page*, *supra*, footnote 14; Taylor, *op. cit.*, footnote 11, p. 983-984.

³⁰ *Loc. cit.*, footnote 24.

prior verbal statement whether a witness admitted or denied its making.³¹ It is interesting to note that the Commissioner's analysis and their recommendation concerning prior verbal utterances related only to the problem of the witness who claimed he could not recollect making the prior statement; presumably they were satisfied with the present law in other respects.

B. *Previous Inconsistent Written Statements*

At common law, it was competent for a party to prove a prior inconsistent written statement³² for the purpose of impeaching a witness's credibility. However, unlike the law relating to prior verbal utterances, the law with respect to impeachment by a former written statement was extremely complex. This complexity was the cumulative result of the rulings made by the judges when advising the House of Lords in *The Queen's Case*.³³ The judges advised that in *civil* matters the following rules governed the procedure for cross-examination and proof of a prior inconsistent written statement. Initially, counsel was required to show the statement to the witness and ask the witness whether he had formerly made it.³⁴ Second, if the witness admitted making the statement and counsel desired to have the statement put in evidence, he was required to read it into the record at that stage of the proceedings when he was entitled to adduce evidence (that is, normally the plaintiff would read the statement in evidence during reply and the defendant would do so after he elected to call evidence).³⁵ Alternatively, if the witness denied making the statement or refused to answer the question because of its tendency to incriminate him, counsel was allowed to prove the former statement when he was entitled to adduce evidence.³⁶ Counsel was prohibited from cross-examining the witness as to the contents of the statement or suggesting what it contained until after the contents of the document had been formally proven in evidence.³⁷

In conformity with these rulings, the judges were of the view that it was improper for cross-examining counsel to ask the general question whether the witness has previously made representations of a particular

³¹ *Ibid.*, p. 185.

³² *The Queen's Case*, *supra*, footnote 9 (a letter); *Christian v. Coombe*, *supra*, footnote 20, and *The Attorney-General v. Bond* (1839), 9 Car. & P. 187, 173 E.R. 786 (N.P.) (documents); *Ewer v. Ambrose* (1825), 3 B. & C. 746, 107 E.R. 910 (K.B.) and *R. v. Ford* (1851), 2 Den. 245, 169 E.R. 491 (Cr. Cas. Res.) (signed deposition).

³³ *Ibid.*

³⁴ *Ibid.* at pp. 286-291 (Brod. & Bing), 976-979 (E.R.).

³⁵ *Ibid.* See *R. v. Coveney* (1837), 7 Car. & P. 667, 173 E.R. 292 (N.P.). Comp. *Stephens v. Foster* (1833), 6 Car. & P. 289, 172 E.R. 1245 (N.P.) and *Holland v. Reeves* (1835), 7 Car. & P. 35, 173 E.R. 16 (N.P.) for variations of this procedure.

³⁶ *Ibid.*, at pp. 313-314 (Brod. & Bing), 987-988 (E.R.). See also Cross, *op. cit.*, footnote 1, p. 259.

³⁷ *Ibid.*; *R. v. Taylor* (1839), 8 Car. & P. 726, 173 E.R. 691 (N.P.).

nature.³⁸ If the representation was in writing, then the proper procedure was to first prove the document, but, if the representation was by words alone then the question was proper. Therefore cross-examining counsel was required to specify the nature of the witness's previous statement.³⁹ Similarly in *criminal* matters, the general question whether the witness had always told the same story was improper unless it was qualified by the words "except when you were before the coroner or magistrate".⁴⁰ The courts reasoned that since the testimony of the witness in those proceedings would be reduced to writing, the depositions themselves were the best evidence of the witness's previous statement.

Some judges permitted an exception to the procedure laid down in *The Queen's Case* if counsel advised the court that he wished to ask certain questions of a witness arising from a document. Under these circumstances, some courts allowed counsel to read the document during cross-examination⁴¹ and then question the witness with respect to the document. But by reading the document, counsel was deemed to have called evidence even though he adduced no other evidence. Thus if defence counsel read the document during the cross-examination of a witness called by the plaintiff, he was deemed to have adduced evidence, thereby forfeiting his right to address the jury last.⁴²

In *criminal* matters, the Judges issued a practice direction relating to the cross-examination of witnesses upon the depositions returned by the committing magistrate. According to a contemporary authority, "[t]hese rules were framed in consequence of the frequency of objections started by counsel after the passing of the Prisoners' Counsel Act,⁴³ as to trifling variations between the testimony of a witness given upon the trial and the statement taken down in writing before the committing magistrate".⁴⁴ The practice direction adopted the minority view that counsel could adduce the document while conducting his cross-examination but it was otherwise consistent with the judge's rulings in *The Queen's Case*. It provided:⁴⁵

³⁸ *Ibid.*, at pp. 292-294 (Brod. & Bing), 979-980 (E.R.).

³⁹ *Ibid.* See also Starkie, *op. cit.*, footnote 10, p. 173; and Phillippis and Arnold, *op. cit.*, footnote 7, pp. 513-514.

⁴⁰ *R. v. Holden* (1838), 8 Car. & P. 606, at p. 609, 173 E.R. 638, at p. 640 (N.P.); *R. v. Shellard* (1840), 9 Car. & P. 277, at p. 280, 173 E.R. 834, at p. 835 (N.P.).

⁴¹ *The Queen's Case*, *supra*, footnote 9, at pp. 289-290 (Brod. & Bing), 978 (E.R.). See also the Second Report of the Common Law Commissioners, *loc. cit.*, footnote 25, p. 186.

⁴² *Ibid.*; Phillippis and Arnold, *op. cit.*, footnote 7, p. 511.

⁴³ An Act for enabling Persons indicted of Felony to make their Defence by Counsel or Attorney (1836) 6 & 7 Wm. IV, c. 114.

⁴⁴ Phillippis and Arnold, *op. cit.*, footnote 7, p. 515.

⁴⁵ (1837), 7 Car. & P. 676, 173 E.R. 296. This practice direction was not binding on all the judges although most complied with it. Compare *R. v. Edwards* (1837), 8 Car. & P. 26, 173 E.R. 384 (N.P.) and *R. v. Holden*, *supra*, footnote 40. See also the comments set

I. That where a witness for the Crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel.

II. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in Court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and after the prisoner's counsel had addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the Court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

III. That the witness cannot, in cross-examination, be compelled to answer, whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statements. In that event the counsel for the prisoner may proceed with his cross-examination: and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

In criminal matters, where the order of speeches is perceived to be very important, defence counsel's attempts to circumvent the harshness of the practice direction met with various degrees of success. One method was for counsel to ask the judge to look at the witness's deposition and request that the judge question the witness as to the discrepancies between his present testimony and his previous deposition. Some judges did so⁴⁶ but others refused.⁴⁷ Another variation met with even less success. In *R. v. Ford*,⁴⁸ defence counsel proposed to hand the Crown witness his deposition for the purpose of refreshing his memory and then intended to ask the witness if he still persevered in his testimony. This procedure was not permitted because it conflicted with the practice direction.

out in the Second Report of the Common Law Commissioners, *loc. cit.*, footnote 25, 186. Presumably, an omission in a deposition was the equivalent of a written statement. For an illustration of a method of proof see: *Jeans v. Wheedon* (1843), 2 M. & Rob. 486, 174 E.R. 357 (N.P.). However, if a deposition contained an oral statement which was reduced to writing, and it should not have been in the deposition, the statement was treated as an oral one: *R. v. Christopher* (1850), 1 Den. 536, 169 E.R. 362 (Cr. Cas. Res.); *R. v. Griffiths* (1841), 9 Car. & P. 746, 173 E.R. 1035 (N.P.).

⁴⁶ *R. v. Edwards*, *ibid.* Compare that case to *R. v. Quin* (1863), 3 F. & F. 818, 176 E.R. 374 (N.P.) where subsequent to the statute the trial judge allowed counsel to question the witness with respect to the discrepancies without first requiring him to prove the document.

⁴⁷ *R. v. Holden*, *supra*, footnote 40.

⁴⁸ *Supra*, footnote 32. See also *Gregory v. Tavernor* (1833), 6 Car. & P. 280, 172 E.R. 1241 (N.P.).

As with contradictory verbal statements, the witness upon re-examination was able to qualify, contradict, or explain any discrepancies between his present testimony and his prior written statement but new matters, apart from those arising out of the cross-examination, could not be explored.⁴⁹ However, this occurred only when counsel was permitted to read the document while cross-examining the witness.⁵⁰ Otherwise, if counsel proved the document during his examination in chief, the witness did not have such an opportunity.

The rulings in *The Queen's Case*⁵¹ and the practice direction⁵² were not consistently applied. For example, if a letter, document or deposition was lost, stolen or not in possession of the cross-examining party (and production could not be procured by ordinary methods), the courts held that these rulings were not applicable.⁵³ Phillipps and Arnold⁵⁴ stated that three alternative procedures were available in these circumstances: (1) counsel was permitted to prove the lost document while conducting his cross-examination (the authors noted that this may disturb the regular progress of the case); (2) counsel was allowed to question the witness as to the contents of the document and the witness's responses were admitted as evidence of the contents; (3) counsel's right of cross-examination as to the lost document was reserved until after the contents were proved by secondary evidence during the cross-examiner's case in chief.⁵⁴ Although the authorities were not uniform, the judicial trend favoured the first procedure.⁵⁵ However, by using any of the alternative procedures, the cross-examiner was deemed to have adduced evidence, thereby affecting the order of jury addresses.⁵⁶

A primary justification for these cumbersome rulings with respect to written documents was strict adherence to the best evidence rule. The

⁴⁹ *The Queens's Case*, *supra*, footnote 9, at pp. 297 (Brod. & Bing), 981 (E.R.); *Prince v. Samo*, *supra*, footnote 23.

⁵⁰ *R. v. Pearson* (1837), 7 Car. & P. 671, 173 E.R. 294 (N.P.) "The only object of receiving the depositions in evidence, is to give an opportunity of contradicting the witnesses; and if it is wished on the part of the prisoner that any deposition should be read, that witness ought to see the deposition, or it ought to be read in his presence, to give him an opportunity of contradiction or explanation" (per Mr. Recorder Law, *ibid.*, at pp. 672 (Car. & P.), 295 (E.R.)).

⁵¹ *Supra*, footnote 9.

⁵² *Supra*, footnote 45.

⁵³ Starkie, *op. cit.*, footnote 10, 175; Phillipps and Arnold, *op. cit.*, footnote 7, p. 512.

⁵⁴ *Ibid.* See also Starkie, *Ibid.*, pp. 177-8 for further complications concerning lost documents.

⁵⁵ Phillipps and Arnold, *ibid.*, pp. 512-513; Taylor, *op. cit.*, footnote 11, pp. 962-3; *R. v. Shellard*, *supra*, footnote 40; *Davies v. Davies* (1840), 9 Car. & P. 252, 173 E.R. 823 (N.P.); *Calvert v. Flower* (1836), 7 Car. & P. 386, 173 E.R. 172 (N.P.). Contra: *Graham v. Dyster* (1816), 2 Stark. 21, 171 E.R. 559 (N.P.).

⁵⁶ I draw this conclusion from the discussion by Starkie, *op. cit.*, footnote 10, pp. 177-178.

judges reasoned that the “. . . contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence”.⁵⁷ Another justification was due to the judges’ anxiety concerning the possibility of being misled. A party might show the witness only a part of the document and “. . . the whole, if produced, might have an effect very different from that which might be produced by the statement of a part”.⁵⁸ It was necessary that the court be aware of the contents of the whole document. The special procedure for lost documents was adopted because it was thought that, since the party was entitled to prove the contents of the lost document by secondary evidence as part of his case, the witness should have an opportunity of explanation during the cross-examination.⁵⁹ But if this reasoning was valid, it would equally apply when the document existed.

The rulings in *The Queen’s Case*⁶⁰ (civil) and the practice direction⁶¹ (criminal) have been severely criticized by both contemporaneous⁶² and modern authorities.⁶³ Starkie stated that if the purpose of the cross-examination was to establish the contents of the written document as substantive evidence, then the underlying reasoning for these rulings was “invincible”; but he argued, that if the object of the cross-examination as to the former statement was merely to test the credit of the witness, then the justifications for the rule did not apply.⁶⁴ For example, compare the situation where a party adduces a document in evidence which is material to the issues at trial (a contract or a written admission of liability), to the case where the party uses the document for the limited purpose of impeaching the witness’s credibility. It is only in the former instance that a party is adducing substantive evidence⁶⁵ and therefore in the latter case the best

⁵⁷ *The Queen’s Case*, *supra*, footnote 9, at pp. 289 (Brod. & Bing), 978 (E.R.). Similarly, in criminal cases “. . . the statements of the witnesses before the magistrates being required by statute [11 & 12 Vict. c. 42, s. 17] to be reduced into writing in the form of depositions, such depositions become the primary evidence of what was stated by the witnesses, and stand upon the same footing as any other written documents” (Phillips and Arnold, *op. cit.*, footnote 7, pp. 515-516).

⁵⁸ *Ibid.*, at pp. 287 (Brod. & Bing), 979 (E.R.). This was thought to be the main reason behind the rule by some—see Second Report of the Common Law Commissioners, *loc. cit.*, footnote 25, p. 186.

⁵⁹ Starkie, *op. cit.*, footnote 10, pp. 177-178; Phillips and Arnold, *op. cit.*, footnote 7, p. 512.

⁶⁰ *Supra*, footnote 9.

⁶¹ *Supra*, footnote 45.

⁶² Taylor, *op. cit.*, footnote 11, pp. 959-960; Starkie, *op. cit.*, footnote 10, pp. 175-179.

⁶³ Cross, *op. cit.*, footnote 1, pp. 258-261; J.H. Wigmore, Evidence in Trials at Common Law, vol. 4 (Chadbourn rev. 1972), s. 1259, p. 610.

⁶⁴ Starkie, *op. cit.*, footnote 10, pp. 175-179. This argument was rejected in *Macdonnell v. Evans* (1852), 11 C.B. 930, 138 E.R. 742 (C.P.), which in turn was criticized in the Second Report of the Common Law Commissioners, *loc. cit.*, footnote 25, p. 186.

⁶⁵ *Ibid.*, pp. 178-179; Wigmore, *op. cit.*, footnote 3, s. 1018, p. 998.

evidence rule does not apply.⁶⁶ Moreover, when a party is impeaching a witness's credibility during cross-examination by means of a prior statement, it is unnecessary for the court to have knowledge of the whole document because "on re-examination the witness may be asked as to any other parts of the writing which may tend to qualify, contradict, or explain the passages referred to in cross-examination".⁶⁷

Apart from their questionable theoretical justifications, these rulings also had several practical shortcomings. First, the requirement that cross-examining counsel must first read the statement to the witness before embarking upon his cross-examination deprived counsel of the element of surprise⁶⁸ and defeated his opportunity to catch the witness in a contradiction. Second, the proviso that the cross-examiner must introduce the prior statement as his evidence had the result that defence counsel in criminal matters were most reluctant to cross-examine a Crown witness as to a deposition unless they intended to adduce other evidence.⁶⁹ Third, the requirement that cross-examining counsel must read the whole statement was potentially disastrous because some statements contained prior consistent statements supportive of the opponent's case or the credibility of an adversary's witness.⁷⁰ Fourth, unlike the procedure with respect to verbal statements, the cross-examining party was not obliged to give the witness the opportunity of explanation or elaboration. If the document was introduced as part of the cross-examiner's case after the witness had departed from the witness box, the opposite party did not have an opportunity to re-establish the witness's credibility. This aspect of the procedure was unfair to witnesses and parties alike.⁷¹ Lastly, the rules governing cross-examination should be the same whether the statement was verbal, in writing,⁷² or whether the document had been lost or destroyed. The common law was unnecessarily complicated.

The Common Law Commissioners considered the problems associated with prior written statements or statements reduced to writing and made several recommendations.⁷³

⁶⁶ Wigmore, *op. cit.*, footnote 63, s. 1260, p. 613, n. 1.

⁶⁷ Starkie, *op. cit.*, footnote 10, pp. 178-179. The Second Report of the Common Law Commissioners, *loc. cit.*, footnote 25, p. 186. See also *R. v. Duncombe* (1838), 8 Car. & P. 369, 173 E.R. 535 (N.P.).

⁶⁸ The Second Report of the Common Law Commissioners, *ibid*; Cross, *op. cit.*, footnote 1, p. 259.

⁶⁹ *Ibid*; Cross, *ibid*, p. 260.

⁷⁰ Cross, *ibid*.

⁷¹ Cross, *ibid*. See *Holland v. Reeves*, *supra*, footnote 35 where defence counsel cross-examined a witness upon the document but did not read it until after he addressed the jury. The court was of the view that it could not require counsel to read it to the witness thereby giving the witness an opportunity of explanation.

⁷² Starkie, *op. cit.*, footnote 10, p. 179.

⁷³ *Loc. cit.*, footnote 25, pp. 186-187.

... a witness should be open to cross-examination as to previous written statements he may have made, without the writing being first put in. To such a rule we would, however, annex this limitation, that if it is intended to contradict the witness by the writing, his attention should, before doing so, be called to those parts which are to be used for that purpose. And we further think that in order to prevent any abuse of the facility thus given, it should be competent to the judge, if he deem right, to require the writing to be produced for his inspection, and to be dealt with by him as he thinks fit.

II. *The Present Law*

A. *Introduction*

The Parliament of the United Kingdom, as a result of the recommendations of the Common Law Commissioners,⁷⁴ enacted the Common Law Procedure Act, 1854.⁷⁵ Sections 23 and 24 of that Act dealt with the cross-examination and proof of prior statements in civil proceedings. Prior to that Act's repeal,⁷⁶ sections 23 and 24 were re-enacted as section 4 and section 5 of the Criminal Procedure Act, 1865.⁷⁷ The nomenclature of the Act is misleading because it applies to civil and criminal matters.⁷⁸ In 1869 the Canadian Parliament enacted comparable provisions⁷⁹ which are presently found in section 10 and section 11 of the Canada Evidence Act.⁸⁰ The evidence acts of the common law provinces and the territorial ordinances contain provisions which are similar in form and substance.⁸¹

⁷⁴ *Ibid.*

⁷⁵ An Act for the further Amendment of the Process, Practice and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at *Westminster*, and of the Superior Courts of Common Law of the Counties Palatine of *Lancaster* and *Durham* (1854), 17 and 18 Vict., c. 125.

⁷⁶ An Act for further promoting the Revision of the Statute Law by Repealing Enactments which have ceased to be in force or have become unnecessary (1892), 55 & 56 Vict., c. 19.

⁷⁷ An Act for amending the Law of Evidence and Practice on Criminal Trials (1865), 28 Vict., c. 18.

⁷⁸ *Ibid.*, s. 1.

⁷⁹ These provisions were first enacted in An Act respecting Procedure in Criminal Cases, and other matters relating to Criminal Law, (S.C. 1869, c. 29, s. 64 & 69). They were re-enacted as part of the Criminal Procedure Act (R.S.C. 1886, vol. 2, c. 174, s. 235 & 236), and then the Criminal Code (S.C. 1892, c. 29, s. 700 & s. 701) until they became embodied in the Canada Evidence Act (R.S.C. 1906, c. 145, s. 10 & s. 11).

⁸⁰ *Supra*, footnote 5.

⁸¹ Section 10(2) of the Canada Evidence Act, *supra*, footnote 5, states:

A deposition of the witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed *prima facie* to have been signed by the witness.

The subsection was added to the present section 10 in 1877 (S.C. 1877, c. 26, s. 5) and was modified in subsequent enactments without effect. This section provides that a deposition which is purportedly signed by the witness and justice and produced from the custody of the court officer is *prima facie* evidence of authorship. A statutory counterpart to subsection 2 does not exist in the other Canadian jurisdictions or the United Kingdom (*supra*, footnote

The orthodox Canadian interpretation of sections 10 and 11 is: (1) section 10(1) "governs cross-examination and proof of a previous statement made in writing or reduced to writing"; and, (2) section 11 "governs cross-examination and proof of a previous statement which was neither made in writing nor reduced to writing".⁸² I submit that the traditional construction of these sections is erroneous. The sections form part of a legislative scheme: (1) section 9(1) and section 9(2) are concerned with the cross-examination and proof of the prior inconsistent statements of one's own witness;⁸³ (2) section 10(1) repeals the awkward common law rules governing cross-examination and proof relating to prior inconsistent written statements of an adversary's witness⁸⁴ and makes the statutory procedure for cross-examination as to written statements the same as that pertaining to oral statements; and, (3) section 11 provides a uniform procedure for proof of *oral* and *written* statements of an opponent's witness. I propose to analyze section 10 and section 11 in support of my interpretation of the legislation.

B. Section 10 of the Canada Evidence Act

The first branch of section 10(1) provides:

Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him; . . .

This part enables counsel to cross-examine the witness as to the contents of a document without being required to disclose or prove it in the first instance.⁸⁵ This statutory procedure is superior to the common law for several reasons. First, the mere cross-examination as to the content of a

5). This presumptive clause is archaic because it is dependent upon both the witness and the justice signing the deposition after the preliminary hearing—a practice which no longer prevails. (Schiff, *Evidence in the Litigation Process*, vol. 1 (2nd ed., 1983), p. 195). Normally the court reporter certifies the transcript of the evidence taken at a preliminary hearing. See also 468(2) of the Criminal Code.

⁸² Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (1982), pp. 317-318. For similar constructions see the Ontario Law Reform Commission Report on the Law of Evidence (1976), pp. 39-40; J. Sopinka and S. Lederman, *Evidence in Civil Cases* (1974), p. 505; Morden, *Case and Comment*, (1962), 40 Can. Bar Rev. 96, p. 100; S. Schiff, *ibid.*, p. 539; *R. v. Cherpak* (1978), 42 C.C.C. (2d) 166, at p. 171 (Alta. C.A.). Contra: J.F. Stephen, *Digest of the Law Evidence*, (12th ed., 1948), 168, footnote 1; S.L. Phipson, *The Law of Evidence*, (2nd ed., 1898), pp. 162-163; and *R. v. Hart* (1957), 42 Cr. App. R. 47 (C.A.), where Lord Devlin correctly implies that the United Kingdom equivalent to s. 11 also governs proof of former written statements.

⁸³ *Wawanesa Mutual Insurance Co. v. Hanes*, [1961] O.R. 495 (C.A.); *R. v. Cassibo* (1982), 39 O.R. (2d) 288 (C.A.); *R. v. Carpenter* (1983), 31 C.R. (3d) 261 (Ont. C.A.); *R. v. Booth* (1981), 74 Cr. App. R. 123 (C.A.).

⁸⁴ Stephen, *op. cit.*, footnote 82.

⁸⁵ *North Australian Territory Company v. Goldsborough, Mort & Company*, [1893] 2 Ch. 381, at pp. 385-386; *Cormier v. R.* (1973), 25 C.R.N.S. 94 (Que. C.A.); *R. v. Stack & Pytell* (1946), 88 C.C.C. 320, at p. 323 (Que. K.B., App. Div.); *R. v. Savion & Mizrahi* (1980), 52 C.C.C. (2d) 276, at p. 287 (Ont. C.A.); Cross, *op. cit.*, footnote 1, p. 260.

document does not necessitate proving it and the consequent forfeiting of the right of defence counsel to address the jury last. Second, counsel may test the witness's memory and veracity concerning the events set out in the statement and if the witness is unaware of the existence of the former statement or has forgotten its contents, he may unwittingly contradict himself.

The opening words of the first branch of section 10(1), "upon any trial" do not appear in the corresponding legislation of the United Kingdom.⁸⁶ This qualifying phrase should be viewed in its historical perspective. The remedial legislation repealed the awkward common law rules governing cross-examination and proof relating to prior written statements of an adversary's witness.⁸⁷ As this impeaching tactic normally arose at trial,⁸⁸ perhaps this phrase was added to reflect practical realities. Wigmore noted that in criminal matters "[t]he question [that is, impeachment by means of the depositions] had not attracted attention before that time, because by the Prisoners' Counsel Act in 1836, a counsel's aid for the first time became available, for the purposes of cross-examination, to defendants accused of felony, and so such attempts to discredit a prosecuting witness by professional methods had just begun to be common".⁸⁹ The right to representation by counsel at the preliminary hearing was first allowed in 1848.⁹⁰ A literal interpretation of section 10(1), restricting the section's application to trials, produces the illogical result that the common law rules relating to cross-examination and proof of previous written statements would continue to apply at preliminary inquiries and administrative hearings. I submit that proceedings which do not fall within the expressed terms of the subsection, should by analogy (except perhaps for production), be governed by the same procedure.⁹¹

There is some doubt as to what the phrase "statement in writing or reduced to writing" means. Obviously, a letter or other document⁹² drafted by the witness himself is a statement in writing as is a written document

⁸⁶ *Supra*, footnote 77.

⁸⁷ Wigmore, *op. cit.*, footnote 63, s. 1263, p. 629.

⁸⁸ The issue of contradiction usually arose at trial between the witness's present testimony and his testimony in other proceedings (see cases cited at footnote 32). Also, the practice direction governing criminal matters (*supra*, footnote 45) was issued because the judges were concerned about defence counsel's unnecessary objections to minor variances between the witness's depositions (preliminary hearing) and his present testimony (trial) (see text at footnote 44). It seems that the issue of cross-examination at other proceedings was not contemplated at the time the legislation was first enacted.

⁸⁹ Wigmore, *op. cit.*, footnote 63, s. 1262, p. 628.

⁹⁰ J.F. Stephen, *History of the Criminal Law of England*, vol. 1 (1883), p. 211.

⁹¹ *Falovitch v. Lessard* (1979), 9 C.R. (3d) 197 (Que. S.C.). I will examine (see text, *infra*, at footnote 113) the scope of section 10(1) as it relates to the authority of a magistrate to order production at a preliminary hearing.

⁹² *Deacon v. R.*, *supra*, footnote 4.

expressly adopted by him. In *Falovitch v. Lessard*,⁹³ a witness affirmed in an affidavit the truthfulness of certain paragraphs contained in the pleadings of a civil suit. It was held that by incorporating the pleadings in his affidavit, the pleadings became a statement in writing of the deponent. A transcript of the viva voce testimony of a witness at an examination-for-discovery⁹⁴ or a preliminary hearing obviously qualifies as a statement reduced to writing.⁹⁵ But the notes of a police officer, wherein he reduces to writing his recollection of a third party's statement, may not qualify as a statement reduced to writing.⁹⁶ However, if the witness reads over a statement taken down in writing by a police officer, and adopts the prepared version as true at the time of its making, then such statement complies with the statutory requirements.⁹⁷ Although it is difficult to say with any degree of certainty which statements will meet the statutory requirements, it seems that to so qualify there must be some guarantee of completeness, authenticity, or contemporaneity.⁹⁸ Otherwise, every oral statement which is subsequently reduced to a written form would qualify as a statement in writing, thereby rendering the statutory distinction between the two types of statements meaningless.

The second branch of section 10(1) provides:

... but, if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him; ...

This part incorporates the normal rule of fairness that if counsel wishes to contradict a witness then counsel must apprise the witness of the contents of the statement and give him an opportunity to explain any inconsistencies.⁹⁹ This requirement overcomes one of the drawbacks of the common law that cross-examining counsel was not obliged to give the witness an opportunity

⁹³ *Supra*, footnote 91.

⁹⁴ *Modriski v. Arnold* [1947] O.W.N. 483 (C.A.). For an example of the special procedure governing examinations for discoveries see Rule 329 of the *Ontario Rules of Practice* (R.R.O. 1980, Reg. 540).

⁹⁵ Similarly, a sworn statement taken for the purposes of an extradition hearing may be used to cross-examine the affiant at a subsequent criminal trial: *R. v. Campbell* (1977), 38 C.C.C. (2d) 6, at p. 30 (Ont. C.A.).

⁹⁶ *R. v. Carpenter*, *supra*, footnote 83, at p. 266. See also *R. v. Handy* (1978), 45 C.C.C. (2d) 232, at p. 237 (B.C.C.A.); *R. v. Cassibo*, *supra*, footnote 83, pp 300-301; *R. v. Cherpak*, *supra*, footnote 82, p. 171.

⁹⁷ *McInroy & Rouse v. R.*, *supra*, footnote 4.

⁹⁸ Report of the Federal/Provincial Task Force on Uniform Rules of Evidence, *loc. cit.*, footnote 82, p. 320.

⁹⁹ Cross, *op. cit.*, footnote 1, pp. 260-261. See also *North Australian Territory Company v. Goldsborough, Mort & Company*, *supra*, footnote 85, p. 286. Cross-examination is a mandatory prerequisite to proof of the statement (*Staniforth v. R.* (1979), 11 C.R. (3d) 84, at p. 88 (Ont. C.A.); *R. v. Conway* (1979), 70 Cr. App. R. 4 (C.A.)). See also the Second Report of the Common Law Commissioners, *loc. cit.*, footnote 25, pp. 186-187 (this recommendation is reproduced in full at footnote 73 in the text).

to explain any apparent contradiction.¹⁰⁰ It is important to note that pursuant to this branch of section 10(1), the whole document does not need to be shown to the witness, but simply those parts¹⁰¹ that counsel intends to use for contradicting him. A suggested procedure which generally complies with section 10(1) is best illustrated by an example. Assume a witness testifies in chief that at the relevant time a traffic light was green. Counsel has what purports to be the witness's signed statement saying the light was red, made at the scene to a police officer. The examination may proceed as follows:

- (1) Counsel firmly establishes the witness's present testimony that the light was green.
- (2) Counsel suggests to the witness that the traffic light was red (counsel does not need to disclose the existence of the statement at this stage).
- (3) Counsel asks the witness if he has previously made a statement to anyone that the light was red.
- (4) If the witness admits he did make such a former statement, counsel may produce the statement and attempt to prove it by reading verbatim the relevant part to the witness or by placing the document in the hands of the witness and requesting that the witness refresh his memory.¹⁰²
- (5) (i) If the witness unequivocally *admits* making the former statement, counsel may ask the witness whether he adheres to his present testimony or whether the account set out in his former statement is correct.
 (ii) If the witness *denies* making the former statement and denies that the traffic light was red, counsel is stuck with the answer unless counsel independently proves the self-contradiction pursuant to section 11.¹⁰³
- (6) If the witness admits the former statement is correct, that is, the traffic light was red, that ends the matter.¹⁰⁴

The third branch of section 10(1) provides:

... the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit.

The pre-statutory authorities were of the view that a trial judge did not have the power to order production.¹⁰⁵ The third branch of section 10(1) was specifically enacted to remedy this defect¹⁰⁶ and this proviso grants the trial judge a discretion to order production of the impeaching document.¹⁰⁷ This

¹⁰⁰ Cross, *ibid.*

¹⁰¹ Staniforth v. R., *supra*, footnote 99.

¹⁰² R. v. Riley (1866), 4 F. & F. 964, 176 E.R. 868 (N.P.); R. v. Wright (1866), 4 F. & F. 967, 176 E.R. 869 (N.P.).

¹⁰³ R. v. Riley, *ibid.*; R. v. Wright, *ibid.*; R. v. Stack & Pytell, *supra*, footnote 85.

¹⁰⁴ North Australian Territory Company v. Goldsborough, Mort & Company, *supra*, footnote 85. For another illustration see J. Sopinka, The Trial of an Action (1981), pp. 197-198.

¹⁰⁵ The Queen's Case, *supra*, footnote 9.

¹⁰⁶ This proviso adopts, almost verbatim, one of the recommendations set out in The Second Report of the Common Law Commissioners, *loc. cit.*, footnote 25, pp. 186-187 (See text at footnote 73).

¹⁰⁷ R. v. Savion & Mizrahi, *supra*, footnote 85.

branch allows the court to review the whole document to ensure that counsel is not abusing the procedure by "... putting the court in possession of only a part of the contents of a paper, though a knowledge of the whole might be essential ...".¹⁰⁸ In addition, the trial judge may require the document to be shown¹⁰⁹ or read to the witness¹¹⁰ or may order production to the opposite party.¹¹¹ However, prior to trial, production of a previous statement of a witness is at the discretion of the Crown.¹¹² The Supreme Court of Canada has interpreted the third branch of section 10(1), granting the power to order production "at any time during the trial", to preclude the authority to order production at a preliminary hearing.¹¹³ The Ontario Supreme Court¹¹⁴ has decided that to be the law, even taking into account sections 468(1) (a) and 475 of the Criminal Code¹¹⁵ and, more recently, section 7 of the Charter of Rights and Freedoms.¹¹⁶

¹⁰⁸ The Second Report of the Common Law Commissioners, *loc. cit.*, footnote 25, p. 186; *R. v. Tousignant* (1962), 38 C.R. 319, at p. 320 (B.C.C.A.); *R. v. Cherpak*, *supra*, footnote 82, at p. 172.

¹⁰⁹ *R. v. Quin*, *supra*, footnote 46. See also *Stewart v. R.*, [1977] 2 S.C.R. 748, at p. 752, 31 C.C.C. (2d) 497, at p. 500.

¹¹⁰ H. Roscoe, *Criminal Evidence*, (11th ed., 1890), p. 133.

¹¹¹ *R. v. Savion & Mizrahi*, *supra*, footnote 85, pp. 283-284; *R. v. Lantos*, [1964] 2 C.C.C. 52 (B.C.C.A.); *R. v. Lalonde* (1971) 5 C.C.C. 168, at p. 174 (Ont. S.C.). See also the Ontario Attorney General's Guidelines for Disclosure (June 30, 1981).

¹¹² *R. v. Lalonde*, *ibid.*; *R. v. Savion and Mizrahi*, *supra*, footnote 85, at p. 183; *R. v. Lantos*, *ibid.*, at p. 54; *R. v. Lyons* (1982), 69 C.C.C. (2d) 318 (B.C.C.A.).

¹¹³ *Patterson v. R.* [1970] S.C.R. 409, 2 C.C.C. (2d) 227. Although the Supreme Court held that *certiorari* does not apply when a magistrate refuses to order production of a witness's statement at a preliminary hearing (Spence J. dissenting), the decision generally stands for the wider proposition that production cannot be ordered unless a refusal to do so would amount to a denial of natural justice (per Hall J. at p. 413, in a concurring opinion).

¹¹⁴ *Re Martin, Simard & Desjardins & the Queen; Re Nichols & the Queen* (1977), 41 C.C.C. (2d) 309, at p. 341 (Ont. C.A.); *R. v. Diotte* (1982), 40 O.R. (2d) 469 (Ont. S.C.); *Re Hislop and the Queen* (1983), 43 O.R. (2d) 208 (Ont. C.A.), leave to appeal refused (1983), 43 O.R. (2d) 208n.

¹¹⁵ S. 468(1): Where the accused is before a justice holding a preliminary inquiry the justice shall,

(a) take the evidence under oath, in the presence of the accused, of the witnesses called on the part of the prosecution and allow the accused or his counsel to cross-examine them;

S. 475(1): When all the evidence has been taken by the justice he shall,

(a) if in his opinion the evidence is sufficient to put the accused on trial,

(i) commit the accused for trial, or

(ii) order the accused, where it is a corporation, to stand trial in the court having criminal jurisdiction; or

(b) discharge the accused, if in his opinion upon the whole of the evidence no sufficient case is made out to put the accused on trial.

¹¹⁶ Canadian Charter of Rights and Freedoms, Constitution Act, 1982 (en. by Canada Act, 1982 (United Kingdom), c. 11).

Section 7 states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The United Kingdom legislation relating to cross-examination and proof of prior statements was first enacted in 1854,¹¹⁷ and was copied almost verbatim in Canada in 1869.¹¹⁸ The issue of cross-examination on a previous inconsistent statement at a preliminary hearing was in all likelihood not even considered by either Parliament when section 10(1) was passed.¹¹⁹ I submit that the issue of production of statements at the preliminary hearing should be considered apart from the third branch of section 10. Defence counsel may argue that timely disclosure of a statement is necessary in order to advise his client on his plea. Also, counsel may need to know the contents of the statement in order to lay a proper foundation for cross-examination at trial. The contrary arguments are that unnecessary (and lengthy) cross-examination may occur at the preliminary hearing when credibility is not in issue and, short of abuse of process, the court should not supervise a matter (disclosure before trial) that has historically been within the discretion of the Crown.

C. Section 11 of the Canada Evidence Act

It was competent for a party at common law to impeach an adversary's witness by cross-examining and proving a prior inconsistent oral or written statement. Section 11 codifies this right to prove a contradiction independently¹²⁰ and also provides the procedural requirements for this method of impeachment. It complements the procedure for cross-examination as to written statements (section 10(1)) and oral statements (common law). The section reads as follows:

Where a witness upon 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 such statement, proof may be given that he did in fact make it; but before such 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 such statement.

It is easier to analyse the section by considering the latter part of it first. It requires counsel to ask the witness whether he did make such and such a statement. In order that the witness may adequately respond to this question, counsel must first identify the circumstances and the occasion of the making of the former statement so that the witness has an opportunity to recall it. As a minimum, counsel should advise the witness of "the time, place and persons involved in the supposed contradiction" together with

¹¹⁷ *Supra*, footnote 75.

¹¹⁸ *Supra*, footnote 79.

¹¹⁹ When section 10 was enacted, the issue of cross-examination on previous statements at the preliminary hearing did not arise. See Wigmore, *op. cit.*, footnote 89. See Stephen, *op. cit.*, footnote 90, pp. 216-229 for the development of the office of justice of the peace and the evolution of the preliminary hearing.

¹²⁰ Stephen, *op. cit.*, footnote 82, p. 167; Cross, *op. cit.*, footnote 1, p. 258.

the particulars of the statement.¹²¹ If these suggestions do not refresh the witness's memory, counsel may read the pertinent parts of the alleged statement to the witness.¹²² In the event the witness "distinctly admits" that he made that statement or that part, there is no need to independently prove the contradiction.¹²³

The first branch of the section allows counsel to prove a previous inconsistent oral or written statement if the witness does not admit making it. At common law, it was unclear whether a party was entitled to prove a former oral statement of the forgetful, equivocating or evasive witness.¹²⁴ This part settles the controversy by allowing a party to independently prove a previous written or oral statement unless the witness "distinctly admits" making it.¹²⁵ To deny counsel the right, in appropriate circumstances, to prove a former statement may be a reversible error.¹²⁶ However, unless the former statement is admitted or proven under the section, no contradiction exists.¹²⁷

The language of section 11 raises several interpretation problems. The first is the meaning of the word "inconsistent". Blackburn J. interposed during counsel's argument in *Jackson v. Thomason*¹²⁸ and stated that "the judge must see whether the proposed evidence [that is the former statement] has a tendency to contradict, or to be inconsistent with the witness's present statement [that is his testimony] . . ." McCormick states that the test of inconsistency should be:¹²⁹

. . . could the jury reasonably find that a witness who believed the truth of the facts testified to would have been unlikely to make a prior statement of this tenor?

Some Canadian courts have applied the section liberally by finding an inconsistency where the witness "did not remember some of the details contained in the statement",¹³⁰ or the witness admitted the statement "in a

¹²¹ These were the common law prerequisites for impeaching by means of an oral statement (see text at footnotes 12 and 13) which are now incorporated in the statute. See also *R. v. Clarke* (1907), 12 C.C.C. 299, at pp. 314-315 (N.B. S.C. *en banc*).

¹²² See the illustration in the text at footnotes 101 to 105. See also the reasons for judgment of Beck J. in *Maves v. G.T.P. Railway Co.* (1913), 5 W.W.R. 212, at pp. 222-223 (Alta. S.C., *en banc*) for an elaboration of this procedure.

¹²³ *North Australian Territory Company v. Goldsborough, Mort & Company, supra*, footnote 85, at p. 386; Schiff, *op. cit.*, footnote 81, p. 540.

¹²⁴ This common law problem was discussed above (see text at footnotes 26 and 31).

¹²⁵ Cross, *op. cit.*, footnote 1, p. 248.

¹²⁶ *Abel v. R.* (1955), 115 C.C.C. 119, at pp. 122-124 (Que. Q.B., App. Div.). See *R. v. Moore & Parsons* (1979), 36 N.S.R. (2d) 228, at p. 249 (S.C., App. Div.); *R. v. Dollan & Newstead* (1982), 35 O.R. (3d) 283, at p. 288 (C.A.) and *R. v. Cassibo, supra*, footnote 83 which held that the denial of an opportunity to prove an inconsistent statement under s. 9 may be cured by s. 613 of the Criminal Code.

¹²⁷ *R. v. Riley, supra*, footnote 102.

¹²⁸ (1861), 31 N.S. 11, at p. 13 (Assize).

¹²⁹ *Op. cit.*, footnote 2, p. 68.

¹³⁰ *R. v. Dollan & Newstead, supra*, footnote 126, at p. 288.

slightly different form".¹³¹ These rulings are compatible with the legislative proviso that unless the witness "distinctly admits" making the previous statement, counsel may independently prove it. A liberal construction placed on the word "inconsistent" fulfils the purpose of the section; if proof of the statement may assist the jury in assessing the credibility of the witness; counsel should be able to prove the contradiction.¹³²

Another issue which arises is the meaning that should be ascribed to the phrase "relative to the subject-matter of the case"? Because relevance is a matter of degree, an exhaustive construction is impossible. Obviously, a statement concerning a substantive issue falls within the proviso. For example, a statement purporting to identify the culprit as a person other than the accused is a statement relative to the subject matter of the case. In civil matters, a statement relating to the colour of a traffic light in a motor vehicle right of way suit similarly meets the statutory requirement. However, it could be argued that in an appropriate case, a former statement relating only to the witness's credibility may come within the meaning of these words. For example, the theory of the defence may be that the Crown's chief witness has fabricated his testimony to exculpate himself,¹³³ or that the witness's credibility is the very issue in the case and the inconsistency is extremely important evidence on that issue.¹³⁴ The admission of a prior inconsistent statement relating to credibility in such circumstances is analogous to the case in which a prior consistent statement is admitted to rehabilitate a witness where it is alleged that his testimony is a recent fabrication.¹³⁵

Some confusion exists concerning the relationship of the statutory language ("relative to the subject-matter of the case")¹³⁶ to the collateral

¹³¹ *R. v. Moore & Parsons*, *supra*, footnote 126, at p. 249.

¹³² McCormick argues for a liberal interpretation and cites some U.S. authorities in support, *op. cit.*, footnote 2, pp. 68-69. But see *R. v. Wainwright* (1875), 13 Cox C.C. 171, at p. 173 where a substantial variance was felt to be necessary; however, this may reflect the court's lack of confidence that the transcripts of the testimony (i.e. the depositions) were totally accurate. See also the recent decision of *R. v. Cassibo*, *supra*, footnote 83, where Martin J.A. analyses inconsistent statements of one's own witness (s. 9(1) Canada Evidence Act).

¹³³ *R. v. Cassibo*, *supra*, footnote 83, pp. 294-295. See also *R. v. Phillips* (1936), 26 Cr. App. R. 17; *R. v. Savion & Mizrahi*, *supra*, footnote 85.

¹³⁴ Compare the following cases: *R. v. Brown* (1861), 21 U.C.Q.B. 330; *R. v. Phillips*, *ibid.*, and *R. v. Shewfelt* (1972), 6 C.C.C. (2d) 304 (B.C.C.A.), where credibility was the issue, to *R. v. Rafael* (1972), 7 C.C.C. (2d) 325 (Ont. C.A.) and *Latour v. R.* [1978] 1 S.C.R. 361, 33 C.C.C. (2d) 377, where the courts held credibility was a collateral matter. See also *R. v. Cassibo*, *supra*, footnote 83, pp. 312-313, for an example where credibility was found to be an important issue under s. 9(1).

¹³⁵ *R. v. Lalonde*, *supra*, footnote 111, p. 173.

¹³⁶ In comparison, the United Kingdom states: "relative to the subject-matter of the indictment or proceeding" (*supra*, footnote 77). I submit that this difference in wording does not produce different interpretations. See also *Attorney-General v. Hitchcock* (*supra*, footnote 19).

fact rule. Some argue that the phrase incorporates the collateral fact rule,¹³⁷ whereas Cross states that proof of a prior statement is an exception to that rule.¹³⁸ I submit that neither of these emphatic statements are correct. For example, assume in a motor vehicle negligence case the colour of the traffic light is the determinant issue. A prior inconsistent statement of a non-party witness concerning the colour of the light meets the requirement of "relative to the subject-matter of the case". In these circumstances the previous statement is relevant only to the witness's credibility and therefore is admissible as an exception to the collateral fact rule.¹³⁹ In comparison, if the witness is a party, the prior statement is admissible as substantive evidence in addition to being relevant to credibility.¹⁴⁰ However, a prior statement of a non-party witness may also be relevant to a substantive issue as well as to credibility. For example, in a sexual assault case, a previous statement of a complainant concerning his state of mind at the time of the assault may be relevant to the issue of consent as well as to the complainant's credibility.¹⁴¹ Similarly, the former statement of a non-party witness is admissible on the material issue of the witness's bias, interest or corruption¹⁴² in addition to credibility. Thus, proof of the prior inconsistent statement in these instances complies with the collateral fact rule.

D. Related Matters not Governed by the Canada Evidence Act

There are several remaining issues which are not expressly dealt with by the Evidence Act. For example, unless the non-party witness expressly adopts the previous statement as true, its contents are hearsay and its evidential value (subject to the above qualifications) is limited to credibility.¹⁴³ The often-used phrase "putting the statement in" does not mean the statement is substantive evidence for the jury's consideration.¹⁴⁴ Normally, it is correct to say that a prior statement does not become an exhibit unless it is substantive evidence such as a confession.¹⁴⁵ However,

¹³⁷ Report of the Federal/Provincial Task Force on Uniform Rules of Evidence, *loc. cit.*, footnote 82, p. 323.

¹³⁸ *Op. cit.*, footnote 1, p. 265.

¹³⁹ See text, *supra*, at footnotes 60 to 66.

¹⁴⁰ Cross, *op. cit.*, footnote 1, p. 259.

¹⁴¹ *R. v. Bashir* (1969), 54 Cr. App. R. 1 (Cir.). See also *R. v. Hart*, *supra*, footnote 82.

¹⁴² *R. v. Phillips*, *supra*, footnote 133; *R. v. Mendy* (1976), 64 Cr. App. R. 4 (C.A.); *R. v. Busy* (1981), 75 Cr. App. R. 79 (C.A.).

¹⁴³ *Deacon v. R.*, *supra*, footnote 4; *McInroy & Rouse v. R.*, *supra*, footnote 4; *Ontario Gravel Freighting Company Ltd v. Matthews Steamship Company, Limited*, [1927] S.C.R. 92, at p. 100. Of course, if the witness is also the accused, or the party in a civil suit, then the statement is an admission and thus an exception to the hearsay rule (Cross, *op. cit.*, footnote 1, pp. 259, 261).

¹⁴⁴ *McCormick*, *op. cit.*, footnote 2, p. 67; *R. v. Harris* (1927), 20 Cr. App. R. 144 (C.A.); *Ontario Gravel Freighting Co. Ltd v. Matthews*, *ibid.*

¹⁴⁵ *Sopinka*, *op. cit.*, footnote 104, p. 77; E. Ewaschuk, *Criminal Pleadings and Practice in Canada*, (1983), p. 388.

the statement may become an exhibit for identification purposes¹⁴⁶ and if the appearance of the statement itself may be of assistance in evaluating credibility, the trial judge may allow it to go to the jury. With respect to a previous statement of a non-party witness, the trier of fact is required to complete the following thought process: (1) find that the witness did make the former statement; (2) compare the contents of the statement with the witness's present testimony and determine whether an inconsistency exists; (3) use the contradiction to evaluate the credibility of the witness;¹⁴⁷ and (4) ignore the contents of the previous statement as to its truth, even though the trier of fact accepts that the former account was made by the witness and it is a true and accurate version of the event. The phrase "putting the statement in" must be understood in the context of the above illustration.

A second matter is that the proponent of a prior statement is not required to "put in" the whole statement but only the contradictory parts relative to the subject-matter of the case.¹⁴⁸ Of course, "on re-examination the witness may be asked as to any other parts of the writing which may tend to qualify, contradict, or explain the passages referred to in cross-examination".¹⁴⁹ The third issue that the statute fails to address is whether counsel must be in possession of the document, or be in a position to prove the substance of the document, if he intends to make suggestions in the form of leading questions as to its content. I submit that unless counsel is abusing his licence of cross-examination, it is not necessary that he possess the document.¹⁵⁰ Similarly, if the document is inadmissible, counsel is entitled to put questions based on its content if counsel is "... careful not to indicate to the jury in his questions anything as to the nature of document

¹⁴⁶ *R. v. Dollan & Newstead*, *supra*, footnote 126, p. 286; *R. v. Campbell* (1977), 38 C.C.C. (2d) 6, at p. 21 (Ont. C.A.); Ewaschuk, *ibid.* But see *R. v. Smith* (1983), 35 C.R. (3d) 86 (B.C. C.A.).

¹⁴⁷ The English authorities tend to be of the view that the former statement renders the witness's testimony negligible (*R. v. Harris*, *supra*, footnote 144). The Canadian position is that the prior statement is useful in evaluating the witness's credibility (*R. v. Kadishevitz* 61 C.C.C. 193, at pp. 199-200 (Ont. C.A.)).

¹⁴⁸ In *R. v. Riley* and *R. v. Wright* (*supra*, footnote 102) Channell B. erroneously suggests that the whole document must be put in evidence. I agree that if the accused is the witness, it is necessary to put the whole document in evidence (McWilliams, *Canadian Criminal Evidence*, (1974) p. 272), but in these circumstances the statement is substantive evidence in addition to being relevant to credibility. For similar reasoning in a civil context when the witness is also a party see: *Capital Trust Corporation v. Fowler* (1920), 50 O.L.R. 48, at p. 55 (App. Div.); *Saskatchewan Co-op Wheat Producers Ltd. v. Luciuk*, [1931] 2 D.L.R. 981, at p. 983 (Sask. C.A.).

¹⁴⁹ The Second Report of the Common Law Commissioners, *loc. cit.*, footnote 25, p. 186. See also *Saskatchewan Co-op Wheat Producers*, *ibid.*; *Canary v. Vested Estates Ltd.*, [1931] 1 D.L.R. 997 (B.C.C.A.); *Massey-Harris Co. Ltd v. Dell* (1919), 45 D.L.R. 735 (Sask. C.A.).

¹⁵⁰ *R. v. Cherpak*, *supra*, footnote 82, 171; *R. v. Racco* (No. 4) (1975), 29 C.R.N.S. 322, at p. 324 (Ont. Co. Ct.); *R. v. Bencardino & de Carlo* (1973), 11 C.C.C. (2d) 549 (Ont. C.A.). Contra: *R. v. Anderson* (1929), 21 Cr. App. R. 178 (C.A.).

handed to the witness or as to its content".¹⁵¹ However, if counsel is not in possession of the material document or it is inadmissible and he receives "... a denial or some answer that does not suit him, the answer stands against him for what it is worth".¹⁵² Similarly, if counsel cross-examines as to a previous statement and the reply he receives does not amount to a contradiction, the precondition for proof does not exist.¹⁵³

A fourth matter concerns questions arising as to the timing of proof of a prior statement. As shown above, in an admission situation, a statement is proven during cross-examination. However, if the witness denies making the former statement, could the party independently prove it during cross-examination? Prior to statutory intervention, a minority of judges allowed counsel to do so.¹⁵⁴ Adopting this procedure, the trier of fact is able to hear all the evidence relating to the making of the prior statement at one time.¹⁵⁵ Thus the trier of fact is in a good position to determine whether the witness made the statement and perhaps to make a tentative evaluation of the witness's credibility. However, allowing a party to independently prove a statement during cross-examination may disrupt the normal flow of a trial, it may confuse the jury as to who has the burden of adducing evidence, and it may over-emphasize this aspect of the trial. Although there is a paucity of authority, I tend to agree with Sopinka that independent proof of the former statement in a civil case must occur as part of the cross-examiner's case.¹⁵⁶ In criminal matters, the Criminal Code¹⁵⁷ and the common law¹⁵⁸ govern

¹⁵¹ *R. v. Tompkins* (1967), 67 Cr. App. R. 181, at p. 184 (C.A.). See also *Fox v. General Medical Council* [1960] 1 W.L.R. 1017, at p. 1023 (P.C.); *R. v. Yousry* (1914), 11 Cr. App. R. 13 (C.A.). See *R. v. Gillespie and Simpson* (1967), 51 Cr. App. R. 172 for an example of when a statement of a third person may be put to a witness.

¹⁵² *Fox v. General Medical Council*, *ibid*.

¹⁵³ Schiff, *op. cit.*, footnote 81, p. 524.

¹⁵⁴ See text, *supra*, at footnotes 18, 41 and 45. However, because the pre-statutory procedure was different, this analogy is not overly persuasive.

¹⁵⁵ In the adverse witness situation, this impeaching technique occurs during examination-in-chief. But the impeaching party does so when he is entitled to adduce evidence. (See *Wawanesa Mutual Insurance Co. v. Hanes*, *supra*, footnote 83, (per McKay J.A.); *Wright v. Beckett*, *supra*, footnote 19; *McInroy & Rouse v. R.*, *supra*, footnote 4).

¹⁵⁶ *Supra*, footnote 104, p. 76.

¹⁵⁷ R.S.C. 1970, c. 34

S. 577(3) states: An accused is entitled, after the close of the case for the prosecution to make full answer and defence personally or by counsel.

S. 578 states:

(1) Where an accused, or any one of several accused being tried together, is defended by counsel, the counsel shall, at the end of the case for the prosecution, declare whether or not he intends to adduce evidence on behalf of the accused for whom he appears and if he does not announce his intention to adduce evidence, the prosecutor may address the jury by way of summing up.

(2) Counsel for the accused or the accused, where he is not defended by counsel, is entitled, if he thinks fit, to open the case for the defence, and after the conclusion of

the issue of timing. Accordingly if the witness denies making the statement, proof must be made during one's case, that is, after the close of the Crown's case (defence) or in reply (Crown).

Lastly, the question arises as to the effect, if any, that independent proof of the prior statement will have upon the order of jury addresses. The Criminal Code provides that if an accused examines a witness after the close of the Crown's case, the prosecution is entitled to address the jury last.¹⁵⁹ Thus, by independently proving a former statement of a witness, the accused loses this right. The same consequence will occur if the accused calls evidence that a Crown witness should not be believed on his oath, or introduces evidence tending to prove bias, interest, or corruption.¹⁶⁰ Apart from the instances when credibility is the issue and proof of the making of the statement is extremely important evidence on that issue,¹⁶¹ it would seem that evidence of bias or moral character are directed to the essence of the witness's credibility. It is somewhat anomalous that defence counsel in a criminal case is entitled to adduce substantive evidence in cross-examination without affecting his right to address the jury last, but if he calls evidence relating to the making of a prior statement for the sole purpose of impeaching credibility, he forfeits such right.

The order of jury addresses in civil matters is governed by the rules of practice. For example in Ontario, Rule 255 provides that a defendant shall lose his right to address the jury last if he adduces evidence.¹⁶² Unlike criminal cases, a defendant in a civil suit may forfeit this right if he adduces evidence during cross-examination.¹⁶³ The question arises whether proof of a prior statement during cross-examination amounts to adducing evidence? Sopinka correctly suggests that an admission by a non-party witness

that opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence.

(3) Where no witnesses are examined for an accused, he or his counsel is entitled to address the jury last, but otherwise counsel for the prosecution is entitled to address the jury last.

(4) Where two or more accused are tried jointly and witnesses are examined for any of them, all the accused or their respective counsel are required to address the jury before it is addressed by the prosecutor.

¹⁵⁸ Ewaschuk, *op. cit.*, footnote 145, pp. 383-384.

¹⁵⁹ S. 578(2) and s. 578(3), *supra*, footnote 157. See Ewaschuk, *ibid.*, p. 404. If an accused calls a witness who does not give admissible evidence he does not lose his right to address the jury last (*R. v. Hawke* (1975), 22 C.C.C. (2d) 19 (Ont. C.A.)).

¹⁶⁰ See *R. v. French* (1977), 37 C.C.C. (2d) 201, at p. 209 (Ont. C.A.).

¹⁶¹ See cases cited in footnote 134.

¹⁶² R.R.O. 1980, Reg. 540.

¹⁶³ Sopinka, *op. cit.*, footnote 104, p. 108; W. Williston, Evidence, [1955] L.S.U.C. Special Lectures. This may occur when defence counsel reads into evidence a part of the opposite party's examination-for-discovery during cross-examination (an admission) or files an exhibit (substantive evidence).

of a prior inconsistent statement during cross-examination does not produce this result.¹⁶⁴

E. Conclusion

The traditional view is that section 10(1) governs the cross-examination and proof of written statements.¹⁶⁵ Although section 10(1) anticipates proof of a former statement it does not expressly provide for its proof as does section 9(1) and section 11. The purpose of section 10(1) is twofold: (1) it abolishes the unsatisfactory common law rules governing cross-examination and proof of prior inconsistent *written* statements,¹⁶⁶ and, (2) it makes the procedure for cross-examination upon written statements the same as the common law procedure for cross-examination as to oral statements. In support of this construction, it is noted that pursuant to the common law (oral statement) or under section 10(1) (written statement), counsel may question the witness with respect to any previous statement.¹⁶⁷ However, if counsel wishes to independently prove a former oral or written statement, section 11 stipulates that the statement must be inconsistent. This distinction is compatible with other rules of evidence. Counsel may wish to cross-examine a witness with respect to any previous statement, but his right to independently prove a former statement is limited to those that are inconsistent because only they have probative value with respect to impeaching the witness's credibility.

It is difficult to understand the orthodox interpretation that section 11 applies solely to oral statements¹⁶⁸ when the statutory language is not qualified in this manner.¹⁶⁹ In support of this construction it is sometimes argued that since section 10 expressly refers to written statements, by default, section 11 must apply to oral statements. Although the simplicity of this theory is attractive, it lacks cogency and ignores the reasons for the introduction of the legislation.

Another possible justification for the traditional construction may lay in the uncritical acceptance of the accuracy of the marginal notes which accompany the sections. Originally, these notes were the same as their United Kingdom predecessors.¹⁷⁰ Section 64 of the Criminal Procedure

¹⁶⁴ *Ibid.* However no authority is cited to support this assertion.

¹⁶⁵ *Supra*, footnote 82.

¹⁶⁶ Stephen, *op. cit.*, footnote 82.

¹⁶⁷ *R. v. Tousignant*, *supra*, footnote 108; *R. v. Savion & Mizrahi*, *supra*, footnote 85, p. 287.

¹⁶⁸ *Supra*, footnote 82.

¹⁶⁹ In *R. v. Carpenter*, *supra*, footnote 83, p. 266, Grange J.A. noted that the word "statement" in section 9(1) includes both oral and written forms.

¹⁷⁰ Criminal Procedure Act, 1865, *supra*, footnote 77: Section 5—"Cross-examination as to previous statements in writing"; Section 4—"As to proof of contradictory statements of adverse witness". As can be seen, the order of the sections was reversed in Canada.

Act (now section 10(1)) stated: "cross-examination as to previous statements in writing", and section 69 of that Act (now section 11) stated: "proof of contradictory statements by witness".¹⁷¹ Although the Canadian legislation has remained substantially constant since it was first enacted, the marginal notes were varied when the provisions became part of the Evidence Act (1906).¹⁷² The marginal notes presently provide: (1) section 10(1) — "cross-examination as to written statements"; and (2) section 11 — "cross-examination as to oral statements". The popular annotated codes¹⁷³ have adopted these notes as the headings for these sections and they in turn are mechanically canted as the correct interpretations of the sections. I submit that the original notes accurately characterize the section while the present ones are misleading.

The criticism and recommendations of the Federal/Provincial Task Force¹⁷⁴ in this area of law are grounded upon the orthodox but erroneous construction of these sections. The proposed Canada Evidence Act, 1982 (Senate Bill s-33),¹⁷⁵ is the legislative product of the efforts of the Task Force. I will now examine the provisions of the proposed legislation.

III. *Proposed Legislation: The Canada Evidence Act, 1982*

Although the proposed *Canada Evidence Act*, 1982 is more comprehensive than the Act it will replace,¹⁷⁶ it is not an evidence code. The Bill is divided into ten parts. The rules governing prior statements are generally found in Part I ("Interpretation and Application") and Part IV ("Kinds of Evidence"); however, some provisions in Part III ("Rules of Admissibility") and Part V ("Statutory Privileges") apply to the present subject. The approach that was taken in the areas of cross-examination and proof of prior statements is a mixed one. In some instances the proposed legislation codifies an existing common law rule, in other matters it alters the present law, in still other cases it breaks new ground, and in some areas presently governed by the rules of evidence, it is silent. A sequential examination of the

¹⁷¹ *Supra*, footnote 79.

¹⁷² *Ibid.* The language of the headings or notes accompanying the corresponding provisions in other Canadian common law jurisdictions (*supra*, footnote 5) are generally speaking, individualistic. However in the jurisdictions of Ontario, Manitoba and the North-West and Yukon Territories the draftsman has followed the federal language. In Alberta, British Columbia, Newfoundland, Nova Scotia, Prince Edward Island and Saskatchewan, the notes are substantially similar to the English legislation. The heading for the Manitoba legislation is not comparable because one heading applies to several sections.

¹⁷³ See for example, Martin's Criminal Code (1982) and Crankshaw's Criminal Code (1982).

¹⁷⁴ The Uniform Law Conference authorized the publication of the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (1982). The origin of the Task Force and its work schedule are set out in the Report's introduction (pp. 1-6).

¹⁷⁵ *Supra*, footnote 6. See K. Chasse, Introduction to Bill s-33, The Canada Act, 1982, Law Society of Upper Canada with respect to the history of the legislation.

¹⁷⁶ Section 198 repeals the Canada Evidence Act, *supra*, footnote 5.

relevant sections found in Parts I and IV, with reference to the provisions in the other parts where necessary, will follow.

Several issues arise in Part I. Section 2 defines a "statement" as meaning:

... an oral or a recorded assertion and includes conduct that could reasonably be taken to be intended as an assertion.

Presumably this definition is to be read by interpreting the words "recorded assertion" in light of the Bill's definition of a "record", a word which is broadly defined to include many forms of recorded information.¹⁷⁷ The statutory definition should be clarified to achieve this result.¹⁷⁸ This definition of "statement" obliterates any distinction between oral and written statements and as well, grants parity to "conduct that could reasonably be taken to be intended as an assertion". Although this meaning may be appropriate in the context of the hearsay rule, to include conduct as a form of statement in the area of prior inconsistent statements may create confusion. Another problem of definition arises because the Bill defines a "witness" to include a "party unless the context otherwise requires".¹⁷⁹ This ambiguity will create innumerable interpretation problems, specifically in the provisions governing the evidential value of prior statements.

The Bill expressly applies to proceedings at a preliminary hearing and "a trial prior to the rendering of a verdict as to guilt".¹⁸⁰ It is unclear what rules of evidence govern in sentence proceedings (the common law prior to statutory intervention;¹⁸¹ the principles enunciated in the Act; or, ad hoc rules of evidence). This restriction creates needless uncertainty.

In Part IV of the Bill, sections of general application are concerned with the cross-examination of an adversary's witness on a previous statement. For example, section 104(1) permits a party to cross-examine an adversary's witness "... on all matters substantially relevant to the credibility of the witness".¹⁸² O'Connor correctly suggests that the phrase

¹⁷⁷ Section 2: "record means the whole or any part of any book, writing, other document, card, tape, photograph within the meaning of s. 130 or other thing on, in or by means of which data or information is written, recorded, stored or reproduced."

¹⁷⁸ The Bill follows this approach in other areas. For example, the definition of a record specifically incorporates the definition of a photograph (*ibid.*).

¹⁷⁹ Section 2: "witness includes a party unless the context otherwise requires."

¹⁸⁰ Section 4(2)(a) and section 4(2)(b).

¹⁸¹ In *R. v. Gardiner* (1983), 30 C.R. 289, at p. 330 (S.C.C.), Dickson J. states:

It is a commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail.

But his Lordship subsequently appears to qualify this statement:

If undisputed, the procedure can be very informal. If the facts are contested, the issue should be resolved by ordinary legal principles governing criminal proceedings. . . .

¹⁸² Section 104(1) provides: "A party may cross-examine any witness not called by him on all facts in issue and on all matters substantially relevant to the credibility of the witness, and on cross-examination may ask the witness leading questions."

"substantially relevant . . . may import a higher standard of relevancy for questions going to credibility" than is presently the case.¹⁸³ Presumably a prior statement which is relevant to the subject matter of the proceedings would be substantially relevant to credibility; however this qualification may preclude counsel from questioning the witness about other prior statements (a routine practice). Although section 115 also deals with the matter of cross-examination on a prior inconsistent statement, it does not change this construction of section 104.

Sections 115 to 120, contained in Part IV, deal specifically with various aspects of prior statements (the prior inconsistent statement of adverse witnesses, opponent's witnesses and the accused as a witness; prior consistent statements; production of statements; and the evidential value of previous statements). Section 115 sets out several prerequisites that must be followed before counsel may prove a prior statement.

- s. 115(1) . . . [cross-examination of one's own witness as to prior inconsistent statement]¹⁸⁴
- (2) A party intending to cross-examine a witness on a previous inconsistent statement shall, prior to the cross-examination,
 - (a) furnish the witness with sufficient information to enable him reasonably to recall the form of the statement and the occasion on which it was made and ask him whether he made the statement; and
 - (b) . . . [one's own witness]
- (3) If it is intended to contradict a witness by reason of a previous inconsistent statement, his attention shall be drawn to those parts of the statement that are to be used for that purpose.

Subsection 2(a) of section 115 requires counsel to forewarn the witness of both the existence and content of the former statement before cross-examining him on the statement. This may effectively preclude a successful cross-examination by depriving the cross-examiner of the element of surprise. Presently, counsel may cross-examine the witness without disclosing the document and is simply required to apprise the witness of its contents before independently proving the contradiction. This proviso in the Bill incorporates one of the drawbacks of the old common law; indeed that drawback was a reason the remedial legislation was enacted.¹⁸⁵ The present law is obviously superior and subsection 2(a) should be redrafted.

Subsection 3 of section 115 requires cross-examining counsel to draw the witness's attention to the contradictory parts of the former statement as a prerequisite to proving the contradiction. Fairness to the witness and

¹⁸³ D. O'Connor, *Cross-examination and Credibility*, *loc. cit.*, footnote 175, L.S.U.C. 208.

¹⁸⁴ As I have expressed my views elsewhere concerning prior statements of one's own witness (The common law rule against impeaching one's own witness (1982), 32 U.T.L.J. 412; The statutory rule against impeaching one's own witness (1983), 33 U.T.L.J. 108), I will not discuss the provisions specifically relating to that area of the law.

¹⁸⁵ See text at footnote 68.

opposite party deserve no less. As this proviso is meant to re-enact the procedure set out in the second branch of section 11, the need for the stylistic drafting changes is questionable.

The provisions of section 116 relating to the previous inconsistent statement of an accused as a witness will be examined below in conjunction with the hearsay sections of the Act.

Section 117 states:

If, after being questioned, the witness denies or does not distinctly admit that he made a previous inconsistent statement and it is relevant to a matter in issue, the proponent may prove the statement.

Presumably the draftsman intended to re-enact the pertinent parts of section 11 of the present legislation but section 117 does not accomplish that result. Section 11 provides that the statement must be "relative to the subject matter of the case" whereas section 117 requires the prior statement to be "relevant to a matter in issue". The new language is susceptible to several interpretations. A narrow construction of the wording would interpret the phrase to mean that the inconsistency must relate to a substantive issue. Alternatively, it could be argued that if a witness's credibility is in issue (and it frequently is), every former inconsistent utterance or conduct would be "relevant to a matter in issue". This latter interpretation is a change in the law that probably was not intended. I suggest section 117 should be re-drafted utilizing the wording of section 11, thereby incorporating the existing law.¹⁸⁶

The concluding phrase of section 117 is: "... the proponent may prove the statement." Section 11 of the present Act contemplates that the proponent is to prove the making of the statement. The latter wording more clearly expresses the effect of this proviso.

Section 118 provides that a prior consistent statement is admissible if a witness (which by definition may include the accused¹⁸⁷) has been impeached by a prior inconsistent statement.¹⁸⁸ This method of rehabilitation is presently permitted if there is an allegation that the witness has fabricated or concocted his evidence.¹⁸⁹ Surely, every time a witness's credibility has been impeached in this manner, a party should not be allowed to rehabilitate the witness by numerous previous consistent narratives. I suggest that

¹⁸⁶ See the reasons for judgment of Pollock C.B. in *Attorney-General v. Hitchcock*, *supra*, footnote 19, at pp. 99 (Ex.), 42 (E.R.) and text, *supra*, at footnotes 132 to 135 for a discussion of this problem.

¹⁸⁷ *Supra*, footnote 179.

¹⁸⁸ Section 118 provides: A statement made previously by a witness that is consistent with his present testimony is not admissible unless his credibility has been challenged by means of an express or implied allegations of recent fabrication or by means of a previous inconsistent statement.

¹⁸⁹ Report of the Federal/Provincial Task Force on Evidence, *loc. cit.*, footnote 82, at pp. 294-296, 304-312.

the Bill should grant the trial judge a discretion to refuse proof of a proposed consistent statement if its probative value with respect to the witness's rehabilitation is minimal. The trial judge should also have a discretion as to the number of prior statements which are admissible under this section.¹⁹⁰ For example, a relatively slight degree of impeachment by this method should not allow multiple confirmations of the witness's evidence by numerous prior consistent statements.¹⁹¹

Section 119¹⁹² allows a court to order production of a prior written or recorded statement used in cross-examination. This would allow a magistrate to order production at a preliminary hearing. However, the curious wording of the section may create another problem of interpretation. The section provides that a court may require the production of the statement if it has been "used in cross-examining a witness".¹⁹³ Normally, counsel wishes to obtain the statement in order to conduct a cross-examination and not the reverse; therefore a literal construction of the section may preclude production at trial as well as at a preliminary hearing. I doubt that this latter result was intended and suggest that the proposed section should be rewritten.

Section 120 relates to the evidentiary value of a previous statement of a witness. It provides:

Where a previous statement of a witness is received in evidence, it may be used only for the purpose of challenging or supporting the credibility of the witness, except in the following cases where it may be used for all purposes:

- (a) where it is adopted by the witness;
- (b) where it was made under oath or solemn affirmation and the witness was subject to cross-examination; or
- (c) where it is a previous inconsistent statement of a party, other than one adduced by the prosecution under subsection 116(1).

The introductory part of section 120 codifies the common law rule that where a witness's previous statement is admissible, it is relevant solely to his credibility. The remaining branches of the section create exceptions to this general proposition by providing that certain categories of previous statements also have independent testimonial value. Paragraph (a) con-

¹⁹⁰ The Federal/Provincial Task Force considered these matters but rejected them, *ibid.*, at pp 304-311. See M.H. Graham, Prior Consistent Statements Rule 801(d)(1)(B) of the Federal Rules of Evidence Critique and Proposal (1979), 30 *Hast. L.J.* 575 for an excellent analysis of previous consistent statements.

¹⁹¹ The Federal/Provincial Task Force was of the view that a trial judge had a discretion to prevent needless repetition of consistent statements (*ibid.*, 311). In the context of this legislation, since such consistent statements are deemed relevant, could a trial judge exclude such proof.

¹⁹² Section 119 provides: "The court may require the production of the whole or any part of a written or recorded statement used in cross-examining a witness or admitted under section 118."

¹⁹³ See F. Armstrong, *Adverse Witnesses and Previous Statements*, *loc. cit.*, footnote 175.

firms the common law rule that if a witness expressly adopts a prior inconsistent statement as true it is immune to the hearsay rule.¹⁹⁴ Paragraph (b) creates a new category of statements which have substantive value if they were made under the following circumstances: (1) the witness was under oath or affirmation; and (2) the witness was subject to cross-examination. Although this proviso is very limited, nevertheless some statements made under these conditions may be unreliable. For example, an accused who testifies in his own defence may name a third party as the perpetrator of the crime in order to exonerate himself. In these unusual circumstances a judge or magistrate should be able to limit the former statement's evidential value to credibility in a subsequent proceeding taken against the named third party.

The first part of paragraph (c) confirms the common law rule that an admission is an exception to the hearsay rule. However, this exception is further qualified by section 116(1). The latter section states:

- (1) The prosecution may cross-examine an accused on a previous inconsistent statement made to a person in authority within the meaning of section 63 [that is, a confession] if it first establishes that the statement was voluntary within the meaning of that section.
- (2) The question whether a statement referred to in subsection (1) was voluntary may be determined in a *voir dire* held during cross-examination of the accused.

Section 120(c) limits the evidential value of an accused's previous statement proven by the Crown during the cross-examination to an evaluation of the accused's credibility. This may create difficulties. Assume an accused makes two closely related statements, one inculpatory and one exculpatory. If the Crown uses section 116 to cross-examine the accused on the inculpatory statement, its evidentiary value is limited to credibility. However, if the party proves a prior inconsistent inculpatory statement of a witness (which may include the accused) the opposite party, under section 118, may prove a prior consistent exculpatory statement. Assume an accused adopts the prior consistent exculpatory statement, or it meets the requirements of section 120(b), but he refuses to adopt the prior inconsistent inculpatory statement. The prior consistent exculpatory statement is admissible for all purposes but the evidential value of the prior inconsistent inculpatory statement is limited to credibility. Similar problems may arise if the accused makes a statement that is part inculpatory and part exculpatory. Any attempts to explain these concepts to a jury will create confusion.¹⁹⁵

¹⁹⁴ *McInroy & Rouse v. R.*, *supra*, footnote 4. Presumably under this provision a prior consistent statement adopted by the witness will be admissible as substantive evidence.

¹⁹⁵ Unfortunately the problem concerning the evidential value of previous statements is further complicated because two additional provisions also deal with this issue. Section 48 provides:

Subject to section 163, a previous statement of a witness that is admissible under section 117 [previous inconsistent statement] or 118 [prior consistent statement] is

Conclusion

As the law now stands, the procedure for the cross-examination of an adversary's witness on a previous statement is governed by section 10(1) of the Canada Evidence Act (written statement) and corresponding common law rules (oral statement). The procedure for independently proving a previous inconsistent written or oral statement is contained in section 11 of the Act. The common law governs the evidential value of a prior statement. The numerous interrelated sections of the proposed legislation are not an improvement. Although the proposed Canada Evidence Act, 1982 is laudatory in some respects, in the area of prior inconsistent statements it will create far more problems than it solves.

admissible for all purposes if it was made under oath or solemn affirmation and the witness was subject to cross-examination when making it.

Section 163 provides:

Notwithstanding section 161 [compulsory testimony and protection against subsequent self-incrimination], a statement made previously by a witness that is relevant to a fact in issue and is inconsistent in a material particular with his present testimony may be received in evidence for the sole purpose of challenging his credibility.

Section 48 is "subject to section 163" and also incorporates by reference two other sections of the Act. Section 163 also contains an override clause by incorporating section 161. Further, section 13 of the Charter of Rights and Freedoms governs the use of previous testimony. Although one can devise a construction of these seemingly overlapping, occasionally redundant and partially contradictory sections, these provisions should be re-drafted and clarified (see M. Teplitsky, *Hearsay in Civil Cases*, *loc. cit.*, footnote 175, pp. 164-165).