# Appendix K

# Memorandum of Law - s. 9(2) of the *Canada Evidence Act*

## I. INTRODUCTION

This Memorandum of Law was provided to parties with standing during the hearings and has been prepared by John Agioritis of MacPherson Leslie & Tyerman LLP, Saskatoon, Assistant Commission Counsel.

## II. ISSUES

(1) Statutory Language: Section 9 of the *Canada Evidence Act* (*CEA)*

(2) What Principles of Statutory Construction and Interpretation Apply in the Circumstances?

(3) The Historical Lineage and Purpose of Section 9(1) of the *CEA*

(4) How did Section 9(1) of the *CEA* Operate Prior to the Enactment of Section 9(2)?

(5) What was the Purpose and Intent Behind the Enactment of Section 9(2) of the *CEA*?

(6) What is the Nature of the Relationship Between Sections 9(1) and 9(2) of the *CEA*?

(7) What is the Evidentiary Value of Proving Prior Inconsistent Statements Under Section 9 of the *CEA*?

(a) Evidentiary Value of Inconsistent Statements Proved Under Section 9(1) of the *CEA*

(b) Evidentiary Value of Inconsistent Statements Proved Under Section 9(2) of the *CEA*

(8) What Constitutes an "Inconsistency" under Section 9(2) of the *CEA*?

## III. CONCLUSION

***Historical Lineage and Purpose of Sections 9(1) and (2) of the CEA***

The origins of s. 9 of the *CEA* can be traced back to 19th century England and a widely debated point at common law: whether, and under what circumstances, a party could use a prior inconsistent statement to discredit his own witness.

At common law, if a party's witness *admitted* making an inconsistent statement, the party could cross-examine that witness with respect to why he contradicted his earlier statement. However, when a witness *denied* making the previous statement, the party's ability to introduce, prove and cross-examine the witness on the inconsistent statement became uncertain. To resolve the uncertainty, Parliament enacted s. 22 of the *Common Law Procedure Act* (1854) and s. 3 of the *Criminal Procedure Act* (1865), which allowed a party to cross-examine his or her own witness on a prior inconsistent statement upon proof that the witness was 'adverse'. These provisions were subsequently adopted in substantially similar form in a number of jurisdictions, including Canada, its provinces and Australia. In Canada, the English provisions now exist in the form of s. 9(1) of the *CEA*.

The first case to consider s. 22 of the *Common Law Procedure Act*, the English predecessor to s. 9(1) of the *CEA*, was *Greenough v. Eccles*[1]. *Greenough v. Eccles* which held that a party was not allowed to use a prior inconsistent statement to demonstrate the adversity of their witness. The overall result of the ruling in *Greenough v. Eccles* was the creation of a procedural 'catch-22', since a party calling a witness might need to use a prior inconsistent statement to prove that their witness was adverse, but was prohibited from relying on the prior statement until adversity was proven by other means.

Early Canadian decisions like *R. v. May*[2] followed the precedent set by *Greenough v. Eccles*. However, many courts in the Commonwealth recognized the conundrum created by *Greenough v. Eccles* and began interpreting the provision in a manner that would remedy the procedural 'catch-22'. Three of those cases were *Hannigan*[3], *Hunter*[4], and *Wawanesa (OCA)*[5]. Those cases held that a party producing a witness was entitled to rely on a prior inconsistent statement to prove 'adversity' under statutory counterparts to s. 9(1) of the *CEA* provided that the inconsistent statement was put to the witness in a *voir dire* in absence of the jury.

By 1968 Parliament recognized the divergence in the jurisprudence under s. 9(1) of the *CEA* and introduced an amendment to resolve the conflict respecting its operation. That amendment, which now exists in the form of s. 9(2) of the *CEA*, came into force on February 13, 1969. Parliamentary statements prior to the enactment of s. 9(2) of the *CEA* clearly indicate that s. 9(2) of the *CEA* was a reformatory enactment designed to work in unison with and resolve the procedural 'catch-22' respecting the

1 *Infra* note 24. Greenough v. Eccles was decided in 1859.
2 *Infra* note 27. R. v. May was decided by the British Columbia Court of Appeal in 1915.
3 *Infra* note 29. Hannigan was decided by the Irish Criminal Court of Appeal in 1941.
4 *Infra* note 30. Hunter was decided by the Supreme Court of Victoria in Australia in 1956.
5 *Infra* note 21. Wawanesa (OCA) was decided by the Ontario Court of Appeal in 1963.

operation of s. 9(1) of the *CEA*. However, notwithstanding Parliament's apparent intent respecting s. 9(2), that subsection has been construed as an independent procedure under which a judge may, in his or her discretion, permit a party to cross-examine his own witness on an inconsistent statement without obtaining a declaration of adversity.

***Evidentiary Value of Prior Inconsistent Statements***

Until the Supreme Court of Canada's ruling in *R. v. B(KG)*[6], the 'orthodox rule' at common law and under ss. 9(1) and (2) of the *CEA* was that a prior inconsistent statement could not be used as evidence of the truth of its contents unless the witness admitted the truth of the statement. Rather, the evidentiary value of an inconsistent statement is limited to demonstrating that the witness has contradicted him or herself in order to discredit the witness and nullify the effect of the witness' inconsistent testimony. The jurisprudence on this point also indicates that a judge's caution on the evidentiary value of such statements is a sufficient procedural safeguard against the improper use of inconsistent statements by juries. However, there is an abundance of judicial and academic commentary questioning a juror's ability to heed a judge's caution on this evidentiary point (see, for instance, Justice Estey's judgment in *McInroy*[7]).

***Meaning of 'Inconsistency' Under Section 9(2)***

Where a witness claims that he or she has no recollection of the matters contained in a prior statement, it is within the sole discretion of the trial judge to find that the witness is lying about his or her lack of recollection, and conclude that there is an 'inconsistency' between the witness' testimony and the prior statement: see *McInroy*. That is, an 'inconsistency' will arise under s. 9(2) of the *CEA* even when a witness does not expressly contradict the contents of a prior statement, but testifies to a lack of recollection regarding the statement that the Judge, in his or her discretion, finds unworthy of belief.

## IV. ANALYSIS & DISCUSSION

### (1) Statutory Language: Section 9 of the *CEA*

In its present form, s. 9(1) of the *CEA* reads as follows:

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

Section 9(1) of the *CEA* can be broken down into three branches:

> ***First Branch:*** A party producing a witness shall not be allowed to impeach his or her credit by general evidence of bad character.
>
> ***Second Branch:*** However, if, in the opinion of the court, the witness proves adverse, the party producing the witness may contradict the witness by other evidence.

6 *Infra* note 79.
7 *Infra* note 62.

> ***Third Branch:*** Alternatively, if, in the opinion of the court, the witness proves adverse, the party producing the witness may, with leave of the court, prove that the witness made, at other times, a statement inconsistent with his present testimony. However, before the party producing the witness can prove the inconsistent statement, the party must:
>
> (i) mention to the witness the circumstances of the supposed statement (sufficient to designate the particular occasion); and
>
> (ii) ask the witness whether he or she made the supposed statement.

Section 9(2) of the *CEA* came into force on February 13, 1969 and read as follows at that time:

> 9(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, inconsistent with his present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness' is adverse.

The foregoing version of s. 9(2) of the *CEA* was in force during David Milgaard's trial in 1970.

### (2) Principles of Statutory Construction and Interpretation

*Driedger on the Construction of Statutes* sets out the following principles with respect to ascertaining the purpose of legislation ('reform legislation' in particular):

> Historically, purposive analysis is associated with the so-called mischief rule or the rule in *Heydon's Case*. Although this rule did not originate in Heydon's Case, it was there it received it's most famous and influential formulation:
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> > For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: –
> >
> > 1st. What was the common law before making the Act.
> >
> > 2nd. What was the mischief and defect for which the common law did not provide.
> >
> > 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
> >
> > And
> > 4th. The true reason of the remedy; and then the office of all Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.
>
> Judges are here advised to not only interpret legislation to promote its purpose but also to suppress measures designed to avoid the impact of the legislation and add to the scheme, if necessary, to ensure that the legislature's true intent is accomplished.
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> …
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> Reform legislation is generally modest in its aspirations. It is meant to cure perceived defects or oversights in existing law by introducing new rules. The new rules are designed to supplement the existing regime in certain limited ways or, in the case of a more ambitious reform, to replace the existing regime with a full set of new rules. In either case, however, the new rules are meant to operate within the established framework of existing private law. This is essentially a common law framework. Even though private law has come to include significant

> amounts of statute law and in some areas is governed almost entirely by statute, it evolved as common law and its basic principles, concepts and categories continue to be derived from the common law.
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> …
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> In interpreting reform legislation the courts are obviously concerned with ensuring the efficacy of the intended reform. But as *Heydon's Case* indicates, in the context of reform legislation the intention to reform can only be understood in terms of existing law and the mischief or defect for which the law did not provide. The primary interpretive challenge, then, is to master the relationship between the new rules and existing law. And in keeping with this concern the primary interpretive values are integration, continuity and coherence.
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> …
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> The common law forms part of the context in which legislation is enacted and operates. This is true of program legislation as well as reform legislation. Both must be interpreted in the light of relevant common law authorities, and the courts must come to some understanding of their relation to the common law.[8]

The principles outlined in *Driedger* relating to reform legislation and the purposive approach to statutory interpretation will be utilized in the analysis of ss. 9(1) and (2) of the *CEA*, below. By using that approach, it is possible to demonstrate that the English predecessors and equivalents to s. 9(1) of the *CEA*, i.e., s. 22 of the *Common Law Procedure Act*, 1854[9] and s. 3 of the *Criminal Procedure Act*, 1865[10] were legislative responses to perceived deficiencies in the common law. It will also be shown that s. 9(2) of the *CEA* was enacted in response to the perceived deficiencies in the language of s. 9(1) of the *CEA* and the jurisprudence that considered, interpreted and applied that provision.

### (3) The Historical Lineage and Purpose of Section 9(1) of the *CEA*

Numerous cases, texts and commentators have considered the history and purpose of s. 9(1) of the *CEA*, its provincial counterparts and English ancestors. The authorities all generally indicate that s. 9(1) is the Canadian descendent of 19th century English legislation: s. 22 of the *Common Law Procedure Act*) and s. 3 of the *Criminal Procedure Act*. The authorities also indicate that the enactment of the section in all three statutes was linked and designed to resolve a widely debated point at common law, i.e., whether (and under what circumstances) a party could use a prior inconsistent statement to discredit their own witness.

Alan Bryant reviews the origins of s. 9(1) of the *CEA* and its provincial and commonwealth counterparts in his article, "The Statutory Rule Against Impeaching One's Own Witness"[11]:

> The state of the law in the pre-statutory period was correctly stated by the Common Law Commissioners [in the Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Supreme Court of the Common Law (London 1853)]:
>
> It occasionally happens that a witness called by a party in a cause, under a belief that he will prove a certain fact, turns round upon the party calling him, and proves directly the reverse. The party is, of course, not precluded from proving by other testimony what the witness has negatived; but ought he to be allowed to discredit the witness … by showing that he has made previous statements at variance with the evidence he

8 Emphasis added. Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) ("Driedger") at pages 36, 37, 41 and 297.

9 17 & 18 Vict., c. 125, s. 22 (U.K.) (enacted in 1854) (the "*Common Law Procedure Act*").

10 28 & 29 Vict., c. 18, s. 3 (U.K.) (the "*Criminal Procedure Act*") (enacted in 1865).

11 Alan W. Bryant, "The Statutory Rule Against Impeaching One's Own Witness" (1983) 33 U. Toronto L.J. 108 ("*The Statutory Rule*"). See also Alan Bryant's precursor companion article to *The Statutory Rule*: A. Bryant, "The Common Law Rule Against Impeaching One's Own Witness" (1982) 32 U. Toronto L.J. 412.

> had given in the witness box? The decisions are conflicting: the weight of authority tends to establish the negative, while the weight of reason and argument appears to us to be decidedly in favour of the affirmative.

The Commissioners recommend 'that a party should … be permitted not only as at present to contradict the testimony of the witness by other evidence, but also to prove that such witness has made opposite statements. This recommendation became embodied in the UK remedial legislation of 1854 and was substantially adopted in the Canadian common law jurisdictions. The third branch exemplifies such legislation:

> But if the witness, in the opinion of the court, proves adverse, such party … by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mention 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 that statement.

More than a century after the passage of Lord Denman's Act, differences of opinion remain with respect to the correct construction of this branch of section 9.[12]

*Sopinka*[13] makes the following comment regarding the origins of s. 9(1) of the *CEA*:

> At common law, it was well established that one's own witness could always be contradicted by other evidence, but not by general evidence of bad character. The cases conflicted however, as to whether or not a party had the right to prove at trial that one's own witness had made a prior inconsistent statement.
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> In 1854, the English Parliament enacted section 22 of the *Common Law Procedure Act*. The wording of the English act was reproduced in the *Canada Evidence Act* and all of the Evidence Acts of the Common Law provinces contained similar provisions.[14]

Mewett and Sankoff give the following reasons for the enactment of s. 9(1) of the *CEA*[15]:

> Where a witness had been declared to be hostile, it was fairly clear at common law that the party calling him or her had the right to cross-examination, but not the right to launch a general attack on the creditworthiness of that witness, as we have just discussed. What was never clear, nor satisfactorily resolved, was whether that party also had the right to prove that that witness had previously made a statement that was inconsistent with his or her present testimony. If a party calls a witness, knowing before hand that the witness is unfavorably disposed towards him or her or has an unsavory reputation, then that party must decide before hand whether or not to call that witness, knowing full well of the dangers. But where a witness has given that party every reason to believe that he or she will give favorable testimony and, relying upon that, the party does call the witness, this is the one case where that party has been taken completely by surprise and cannot be faulted for foreseeing the danger. As early as 1834, the judges had different opinions on the question, and in 1854, England enacted a provision for civil cases that such proof could be made [the *Common Law Procedure Act*, 1854 (U.K.)]. This was followed in 1865 by a similar provision for criminal cases [the *Criminal Procedure Act*, 1865 (U.K.)]. Soon thereafter this English legislation was adopted in Canada, both federally and in the provinces.[16]

*Canadian Criminal Evidence*[17] describes the nuances of the debate regarding a party's ability to cross-examine his or her own witness on a prior inconsistent statement at common law:

> 36:40310 Cross-Examination as to statement

12 *The Statutory Rule*, supra note 11 at pp. 116 and 117.
13 John Sopinka, Sydney N. Lederman and Alan W. Bryant, Law Of Evidence In Canada, 2nd ed. (Toronto: Butterworths, 1999) ("*Sopinka*").
14 *Sopinka*, supra note 13 at paras. 16.49 to 16.50.
15 Alan W. Mewett and Peter J. Sankoff, *Witnesses*, looseleaf (Toronto: Carswell) ("*Witnesses*") at 14-4 to 14-7.
16 *Witnesses*, *supra* note 15 at para. 14.3.
17 Peter K. McWilliams, Q.C., *Canadian Criminal Evidence*, 3rd ed., looseleaf (Toronto: Canada Law Book) ("*McWilliams*").

At common law a party could cross-examine his own witness as to a previous inconsistent statement so as to ascertain if possible what induced him to change it: *Wright v. Becket* (1833), 1 M & Rob. 414, 174 E.E. 143; *Melhuish v. Collier* (1850), 19 L.J.Q.B. 493. As Lord Hewart, C.J., dryly said in *R. v. Harris* (1927), 20 Cr. App. R. 144 at p. 147: "It did not need Mr. Denman's Act [*Common Law Procedure Act*, 1854, c. 125] to render that process possible." See also *R. v. Francis and Barber* (1929), 51 C.C.C. 343 (Sask. C.A.).

**This common law right assumes that the witness admits to making an earlier inconsistent statement upon being so asked. It is not subject to any ruling or evidence that the witness is hostile or adverse.** Further in *R. v. Fraser*; *R. v. Warren* (1956), 40 Cr. App. R. 150, Lord Goddard, C.J., said that it was not only the right of prosecuting counsel but his duty to inform the court regarding any earlier inconsistent statement. See also *R. v. Mitchell, Dyer, Lowry and Field*, [1964] Crim. L.R. 294 (C.C.A.). Strangely these cases do not appear to have been cited in Canada. The statement need not be directly or absolutely at variance: *Jackson v. Thomason* (1861), 31 L.J.Q.B. 11.

It is emphasized that this right to cross-examine is limited to the specific issue as to why the witness has contradicted his earlier statement. It does not extend to a general right to cross-examine as to facts generally in issue or as to credit. It does not infringe the general rule against impeaching the credit of one's own witness because, as Lord Denman, C.J., said in *Wright v. Beckett* (1833), 1 M. & Rob. 414 at p. 418, 174 E.R. 143:

> No inference arises, that I may not prove my witness to state an untruth, when he surprises me by doing so, in direct opposition to what he had told me before. In this case, the discredit is consequential, and the evidence is not general but extremely particular, and subject to any explanation which the witness may be able to afford.

See also *Wawanesa Mutual Insurance Co. v. Hanes*, [1963] 1 C.C.C. 176 (Ont. C.A.), at p. 184, varied [1963] 1 C.C.C. 321 (S.C.C.).

It is submitted that this rule continues. It prevents impeachment of one's own witness by evidence of bad character or reputation. That has not been modified by s. 9 of the *Canada Evidence Act* nor is it affected by the cross-examination permitted of a witness who has been ruled hostile. The view expressed by defence counsel and the court in *R. v. Singh* (1979), 48 C.C.C. (2d) 434 (Man. C.A.), at p. 438 seems to be too wide.

36:40320 Proof of statement under s. 9(1) of the *Canada Evidence Act*

> **At common law where one's own witness denied making an earlier inconsistent statement it was an open question whether other evidence could be adduced to prove that he had made it:** see *Wawanesa Mutual Ins. Co. v. Hanes*, [1963] 1 C.C.C. 176 (Ont. C.A.), at p.181, per Porter, C.J.O., and *Greenough v. Eccles* (1859), 5 C.B. (N.S.) 786 at p. 802, 141 E.R. 315, *per* Williams, J. See also *Bradley v. Ricardo (1831)*, 8 Bing. 57, 131 E.R. 321; *Alexander v. Gibson* (1811), 2 Camp. 555, 170 E.R. 1250. *Cf. R. v. Farr* (1839), 8 Car. & P. 768, 173 E.R. 709; *Ewer v. Ambrose & Baker* (1825), 3 B. & C. 746, 107 E.R. 910.

To remove the uncertainty of the common law section 22 of the *Common Law Procedure Act, 1854*, c. 125, was enacted.

A similar provision was also enacted in Canada and is now section 9(1) of the *Canada Evidence Act* which provides as follows: … [the authors of *McWilliams* cite the text of 9(1) of the *CEA*].[18]

The *Report of the Federal/Provincial Task Force on the Uniform Rules of Evidence*[19] summarizes the reasons for the enactment of s. 9(1) of the *CEA* as follows:

> At common law a party is generally prohibited from asking leading questions of his own witness or impeaching his credibility. By calling a witness, the party "vouches" for the witness's intention to tell the truth to the best of his recollection.

18 Emphasis added. *McWilliams*, *supra* note 17 at paras. 36:40100 to 36:40320 .

19 (Toronto: Carswell, 1982) (the "*Task Force Report*").

> A party cannot, at common law, impeach his own witness's credibility by attacking his character or by showing that he had a motive to fabricate because of bias, interest, or corruption, or contradicting him by a prior inconsistent statement. However, a party could contradict his own witness' testimony concerning the event in issue by calling another witness to relate his version of it.
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> As an exception to the general common law ban against impeaching one's own witness, a party could cross-examine a witness if he were hostile. But the common law excluded evidence offered for impeachment of a prior inconsistent statement made by a party's own witness.
>
> Section 3 of the (*The Criminal Procedure Act, 1865* (U.K.) (which reenacted section 22 of the *Common Law Procedure Act, 1854*) was introduced to permit a party to impeach his own witness' credibility by proof of a prior inconsistent statement. If the witness was adverse and the judge granted leave, the party would be entitled to cross-examine his own witness about a prior inconsistent statement. If the witness did not admit making the statement, the party could call other evidence to prove it, just as if he were an opposing party's witness. But impeachment by attacking the witness's character would, as at common law, be prohibited.[20]

In *Wawanesa Mutual Insurance Company v. Hanes*[21], the Ontario Court of Appeal examined s. 24 of Ontario's *Evidence Act* (a nearly identical provincial counterpart to s. 9(1) of the *CEA*). All three Court of Appeal Justices analyzed the 19th century English jurisprudence that led to the enactment of s. 22 of the *Common Law Procedure Act* and the purpose of the Canadian versions of that legislation (both federal and provincial).

At pages 181 and 182 of *Wawanesa (OCA)*, Chief Justice Porter refers to Best on Evidence:

> Best on Evidence, 12th ed., p. 566 states:
>
> > First, then, of the common law. It was an established rule that a party should not be allowed to give general evidence to discredit his own witness; i.e., general evidence that he is unworthy of belief on his oath. By calling the witness, a party represents him to the court as worthy of credit, or at least not so infamous as to be wholly unworthy of it; and if he afterwards attack his general character for veracity, this is not only *mala fides* towards the tribunal, but, say the books, it 'would enable the party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him with the means in his hand of destroying his credit if he spoke against him'. A party might, however, discredit his own witness collaterally, by adducing evidence to show that the evidence which he have was untrue in fact. This does not raise the slightest presumption of *mala fides*; and it would be in the highest degree unjust and absurd if parties were bound by the unfavourable statements of witnesses with whom they may have no privity, and who are frequently called by them from pure necessity.
>
> This passage fairly states, I think, the common law of which the first two branches of the section are declaratory.
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> Best continues:
>
> > But whether it was competent for a party to show that his own witness had made statements out of court inconsistent with the evidence which he had given in it, was an unsettled point, on which, however, the weight of authority was in favour of the negative.[22]

After examining a number of authorities, Chief Justice Porter came to the following conclusion on the purpose of s. 24 of Ontario's *Evidence Act* and other statutes like it:

> From these authorities it would appear that at common law questions could have been put to a witness by the party calling him as to former inconsistent statements if it were not done with the object of impeaching the credit of the witness, although consequentially it might have this effect. The cases illustrated the obvious difficulties in

20 *Task Force Report*, *supra* note 19 pp. 323 to 324.
21 [1963] 1.C.C.C. 176 (Ont. C.A.) ("*Wawanesa (OCA)*"), varied on appeal, [1963] S.C.R. 154 ("*Wawanesa (SCC)*").
22 *Wawanesa (OCA)*, *supra* note 21 at pp. 181 and 182.

> drawing a line of distinction. It is clear that a former statement could not be put with the object of impeaching the credit of the witness.
>
> It is also evident from these authorities that at common law, where such a witness denied having made such a statement, it was an open question whether other evidence could be adduced to prove that he had made it. It was in the light of these uncertainties of the common law, and the injustice likely to arise as a result of them, that the statutes were enacted.
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> …
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> The general purpose of the statutes was to clarify the uncertainties of the common law but at the same time, by giving discretion to the Judge, to guard against the possible dangers inherent in the admission of such statements. As Lord Denman, C.J., said, in *Wright v. Beckett*, 1 M. & Rob. at p. 418: "For it is impossible to conceive a more frightful iniquity, than the triumph of falsehood and treachery in a witness, who pledges himself to depose to the truth when brought into Court, and, in the meantime, is persuaded to swear, when he appears, to a completely inconsistent story." Lord Denman then suggests the possible dangers, such as collusion, and also the danger that the statement, which is admissible only to contradict the witness, may be taken as substantive proof in the cause. Best on Evidence, *supra*, at pp. 566-7 mentions other possible dangers, such as that the admission of such evidence might tend to multiply issues and that it may tend to induce a witness to maintain by perjury in Court any false or hasty statements made out of it. On the other side, Best quotes from Taylor on Evidence, 1st ed., x. 1047:
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> > The ends of justice are best attained by allowing a free and ample scope for scrutinizing evidence and estimating its real value; and that in the administration of criminal justice more especially, the exclusion of the proof of contrary statements may be attended with the worst consequences.[23]

It is clear that s. 9(1) of the *CEA*, its provincial counterparts and English antecedents were enacted to clarify whether a party could use a prior inconsistent statement to impeach the credibility of a witness called by that party. At common law, if a party's witness *admitted* making an inconsistent statement, the party could cross-examine that witness with respect to why the witness contradicted their earlier statement. However, when the witness *denied* making the previous statement, the party's ability to introduce, prove and cross-examine the witness on the inconsistent statement became uncertain. The English Parliament enacted s. 22 of the *Common Law Procedure Act* and s. 3 of the *Criminal Procedure Act* to resolve the uncertainty in favour of allowing a party to cross-examine his or her own witness on a prior inconsistent statement, upon proof that the witness is 'adverse'. Those English provisions were subsequently adopted by the Parliament of Canada, and now exist in the form of s. 9(1) of the *CEA*.

### (4) The Operation of Section 9(1) of the *CEA* Prior to the Enactment of Section 9(2)

*Greenough v. Eccles*[24] was the first case to consider s. 22 of the *Common Law Procedure Act*. The issue there was the meaning of the word 'adverse'. All three Justices agreed that the word 'adverse' ought to be understood to mean 'hostile'.[25] In arriving at that conclusion, Justice Williams made the following comments on the operation of s. 22 of the *Common Law Procedure Act*:

> **… the section requires the Judge to form an opinion that the witness is adverse, *before* the right to contradict or prove that he has made inconsistent statements is to be allowed to operate.** This is reasonable, and indeed necessary, if the word "adverse" means "hostile," but wholly unreasonable and unnecessary if it means "unfavourable." On these grounds we think the preferable construction is, that in case the witness shall, in the opinion of the Judge, prove "hostile," the party producing him may not only contradict him by

23 *Wawanesa (OCA)*, *supra* note 21 at pp. 184 and 186.
24 (1859), 28 L.J.C.P 160 ("*Greenough v. Eccles*").
25 *Greenough v. Eccles*, *supra* note 24, *per* Justice Williams at pp. 162 and 163, Justice Willes at p. 163 and Chief Justice Cockburn at pp. 163 and 164.

> other witnesses, as he might heretofore have done, and may still do, if the witness is unfavourable, but may also, by leave of the Judge, prove that he has made inconsistent statements.
>
> …
>
> Whatever is the meaning of the word "adverse," the mere fact of the witness being in that predicament is not to confer the right of discrediting him in this way. The section obviously contemplates that there may be cases where the Judge may properly refuse leave to exercise the right, though in his opinion the witness prove "adverse." And as the Judge's discretion must be principally, if not wholly, guided by the witness's behaviour and language in the witness-box (for the Judge can know nothing, judicially, of his earlier conduct), it is not improbable that the legislature had in view the ordinary case of a Judge giving leave to a party producing a witness who proves hostile to treat him as if he had been produced by opposite party, so far as to put to him leading and pressing questions, and that the purpose of the section is to go a step further in this direction, by giving the Judge power to allow such a witness to be discredited by proving his former inconsistent statements, as if he were a witness on the other side.[26]

*Greenough v. Eccles* holds that a party is not allowed to use a prior inconsistent statement to demonstrate the 'adversity' of their witness. Rather, s. 22 of the *Common Law Procedure Act* required a judge to declare a witness 'adverse' before an inconsistent statement could be put to that witness for the purpose of challenging his or her credibility. Therefore, while s. 22 of the *Common Law Procedure Act* resolved the common law debate respecting a party's ability to a prior inconsistent statement to challenge the credibility of his or her own witness, the overall result of the ruling in *Greenough v. Eccles* was the creation of a procedural 'conundrum' or 'catch-22' since a party calling a witness might often need to use a prior inconsistent statement to prove adversity of that witness, but is prohibited from relying on the prior statement until adversity is proven by other means.

The procedural conundrum in s. 9(1) of the *CEA* (and its English antecedents and Commonwealth counterparts) was regularly noted in cases decided after *Greenough v. Eccles*. See, for instance, *R. v. May*[27], where the issue of using a prior statement to prove adversity under s. 9(1) of the *CEA* was considered and decided in the negative by a majority of the Court. However, some of the Courts that recognized the procedural 'catch-22' arising from *Greenough v. Eccles* began interpreting the section in a manner that would remedy the defect.[28] Three of those cases were *The People (Attorney-General) v. Hannigan*[29], *R. v. Hunter*[30], and *Wawanesa (OCA)*[31].

*Hannigan* concerned an application for leave to appeal a trial judge's decision to declare as adverse a witness called by the prosecution. The witness' evidence at trial was the same as his evidence at the deposition. However, the witness had made a prior oral inconsistent statement to a prison guard. Counsel, seeking leave, argued that it was wrong for the trial judge to consider, in the absence of the jury,

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26 *Greenough v. Eccles*, *supra* note 24 at pp. 162 and 163.

27 (1915) 23 C.C.C. 469 (BCCA) ("*May*"). *Greenough v. Eccles* was followed in Canada by the majority of the British Columbia Court of Appeal in *May*.

28 Alan Bryant states that '[i]n Australia, Canada, England and Ireland, courts have recognized the principle that a prior inconsistent statement or other extrinsic evidence is admissible to prove the witness is adverse in the statutory sense': see *The Statutory Rule*, *supra* note 11 at p. 120; Bryant cites a number of cases from these jurisdictions (including many decided prior to 1970) to support this proposition : (i) Australia – *R. v. Hunter* [1956] V.R. 31 and *McLellan v. Bowyer* [1962] A.L.R. 243; (ii) England – *R. v. Fraser & Warren* (1956), 40 Cr. App. R. 160; *Pound v. Wilson* (1865) 4 F. & F. 301; 176 E.R. 574; *Martin v. The Travellers Insurance Company* (1859) 1 F. & F.301; 175 E.R. 828; *Dear v. Knight* (1859)1 F. & F. 433; 175 E.R. 796; *Faulkner v. Brine* (1858) 1 F. & F. 254; 175 E.R. 715; and *Amstell v. Alexander* (1867) 16 L.T. 830; (iii) Ireland – *R. v. Hannigan*, [1941] Ir. R. 252; and (iv) Canada – *Wawanesa Mutual Insurance Co. v. Hanes*, [1961] O.R. 495; *Boland v. Globe and Mail*, [1961] O.R. 712; *R. v. Cohen* W.W.N. 336; *R. v. Collerman* [1964] 43 C.R. 118; *R. v. Lessard*, [1968] R.L. 186. See also A. Snelling, "Impeaching Own Witness" (1954) 28 A.L.J. 70 and H.H. Bell, "Impeaching Own Witness" 34 A.L.J. 200.

29 [1941] Ir. R. 252 (Irish Court of Criminal Appeal) ("*Hannigan*").

30 [1956] V.L.R. 31 (a decision of the Full Court of the Supreme Court of Victoria in Australia) ("*Hunter*").

31 *Wawanesa (OCA)*, *supra* note 21.

an unwritten statement made by the witness in determining adversity. Counsel opposing leave argued that s. 26 of the *Common Law Procedure Amendment (Ir.) Act, 1856*, would be meaningless if the trial judge did not consider the inconsistent statement in the determination of adversity. The Criminal Court of Appeal did not accept the argument of counsel seeking leave. Rather, it endorsed the trial Judge's decision to hold the inquiry respecting adversity on a *voir dire* in the absence of the jury and held as follows:

> …one of the material circumstances to be considered in estimating whether a witness is adverse is the fact that he had made a statement inconsistent with his evidence.
>
> …
>
> The fact that evidence as to such a statement was heard in the absence of the jury is attributable to the desire of the learned Judge that the jury should not be made aware of the contents of the statement until he decided that this witness was adverse.[32]

In *Hunter*, a witness called by the Crown gave evidence at trial which was in conflict with a statement he previously gave to the police. If true, the evidence given at trial would have substantially assisted the defence. Accordingly, the Crown sought leave to cross examine the witness. The trial judge allowed the Crown to ask the witness if he had made a prior statement inconsistent with his present testimony during a *voir dire* in the absence of the jury. The witness admitted that he had done so and explained that he had been intimidated into making such a statement by the police. The judge held that the witness was adverse and allowed the witness to be cross-examined on the prior inconsistent statement before the jury. The defence applied for leave to appeal the trial judge's decision with respect to the statement and his ruling of adversity.

In coming to its conclusion that the procedure adopted by the trial judge was proper, the Supreme Court of Victoria stated as follows:

> The practice in New South Wales appears to be to admit evidence of the prior inconsistent statement as part of the material in establishing the hostility of the witness. *Russell v. Dalton*, (1883) 4 L.R. (N.S.W.) 251, was decided in 1883, not many years after the enactment in New South Wales of what is now sec. 32 of the Victorian *Evidence Act* 1928. At the trial a witness called by the plaintiff gave evidence different from statements taken down by the plaintiff's attorney before he was called. The trial Judge allowed the witness to be asked (in the presence of the jury but without disclosing to them the contents of the statement) if he had made such a prior inconsistent statement. This question was objected to but allowed. The witness said he did not remember. The person to whom the statement had been made was then called and deposed to the making of the inconsistent statement and the learned trial Judge ruled that in his opinion the witness was hostile and might be cross-examined. On appeal to the Full Court it was held that the Judge was right in the course he took. Sir James Martin C.J., at p. 265, said:
>
> > Ordinarily the only way to do so is by the demeanour of the witness, but there are other means which the Judge may adopt in order to satisfy himself as to whether the witness is hostile or not.
>
> He then went on to approve of what was done at the trial as related above. Windeyer J. said, at p. 268:
>
> > If the judge could only determine whether a witness was hostile by his demeanour, it seems to me that the object of the statute would be defeated by a witness of cool demeanour, such as would deceive the presiding Judge. The best evidence of a witness being hostile is that he deceives the attorney of the side that calls him as to the evidence which he is about to give.
>
> …

32 *Hannigan*, *supra* note 29 at p. 254.

> **From the foregoing cases and a consideration of what is necessary in the proper administration of justice we are satisfied that there is no rule of law nor any established practice which prohibits a trial Judge from considering a prior inconsistent statement (verbal or written) as part of the material to establish the fact that a witness is hostile. In some cases it may in itself be sufficient to establish that fact. It is for the trial Judge say whether he is so satisfied. If a prior inconsistent statement is to be used for this purpose, the inquiry should be on the *voir dire*, as was done in this case, or in such a manner that the jury does not know of the contents of the statement until the trial Judge has ruled on the question of adversity of the witness and has announced he is prepared to admit the statement as evidence under sec. 32, as was done in *Russell v. Dalton* (*supra*).** We are therefore of the opinion that the learned trial judge was not in error in the course which he pursued in this case and that his determination that the witness Hunter was a hostile witness cannot be called into question.[33]

One hundred and four years later, the majority in the Ontario Court of Appeal in *Wawanesa (OCA)* rejected the decision in *Greenough v. Eccles*. In particular, the majority rejected the meaning of 'adverse' and the procedure for proving adversity laid down in that case. It held instead that a party producing a witness was entitled to rely on a prior inconsistent statement to prove 'adversity' under the Ontario counterpart to s. 9(1) of the *CEA*.[34] It is worth noting that all three judges in *Wawanesa (OCA)* considered *Hannigan* and *Hunter* in their decisions.[35]

Chief Justice Porter stated as follows at page 187 of *Wawanesa (OCA)*:

> The first case in which the meaning of "adverse" was considered was *Greenough v. Eccles*, *supra*, where "adverse" was held to mean "hostile". …
>
> I find it difficult to appreciate this reasoning. If it had been intended that a witness must be shown to be hostile in mind before the statement could be admitted, the statute could have said so. The word "adverse" is a more comprehensive expression than "hostile". It includes the concept of hostility of mind, but also includes what may be merely opposed in interest or unfavourable in the sense of opposite in position.[36]

He went on to state:

> In cases where application is made to introduce a prior inconsistent statement under the Act, the Judge should [*sic*] to determine whether a witness is adverse, consider the testimony of the witness, and the statement, and satisfy himself upon any relevant material presented to him that the witness made the statement. He should consider the relative importance of the statement, and whether it is substantially inconsistent. I think the Judge is entitled to consider all the surrounding circumstances that may assist him in forming his opinion as to whether the witness is adverse. It would be proper and the safer course, if such an enquiry becomes necessary, to conduct it in the absence of the jury, if the case is being tried by a jury. If after due enquiry the Judge is satisfied that the witness is adverse, he may consider whether under all the circumstances, and bearing in mind the possible dangers of admitting such a statement, the ends of justice would be best attained by admitting it. The section does not contemplate the indiscriminate admission of statements of this kind. If he exercises this discretion in favour of giving leave, he should in the presence of the jury, direct that the circumstances of the making of the statement be put to the witness and that he be asked whether he made the statement. Then, in the presence of the jury, he should allow the statement to be proved but he should instruct the jury that the prior statement is not evidence of the facts contained therein, but is for the purpose of showing that the sworn testimony given at the trial could not be regarded as of importance: *R. v. Duckworth*, 26 C.C.C. at p. 351, 37 O.L.R. at p. 234, per Masten, J., and *R. v. Harris*, *supra*. It is for the jury, upon all the evidence before them, to decide whether

33 *Hunter*, *supra* note 30 at pp. 32 to 34. Section 32 of the Victorian *Evidence Act* 1928 is equivalent to section 9(1) of the *CEA*: see Justice MacKay's judgment in *Wawanesa (OCA)*, *supra* note 21 at p. 220.

34 Alan Bryant submits that the line of reasoning and test applied in the majority's ruling in *Wawanesa (OCA)* is the preferable interpretation of s. 9(1) of the *CEA* and its provincial and commonwealth counterparts: *The Statutory Rule*, *supra* note 11 at p. 123.

35 Per Justice Porter at p. 189; per Justice MacKay at pp. 218 and 219; and per Justice Roach at pp. 202 to 204. *Wawanesa (OCA)*, *supra* note 21.

36 *Wawanesa (OCA)*, *supra* note 21 at p. 187.

> the prior statement had in fact been made by the witness, and if so whether it did affect the credibility of the evidence given at the trial. The Judge, if he declared the witness hostile, might, in addition permit him to be cross-examined.[37]

Justice MacKay wrote a separate opinion, concurring in the result reached by Justice Porter. In doing so, he considered what evidence would be relevant and admissible in proving adversity and the form such an inquiry should take.[38] He also relied on *Hunter*:

> The history of the section passed in 1854 together with many of the cases both before and after the passing of the section, were discussed and considered in the Australian Court of Appeal for Victoria in the case of *R. v. Hunter*, [1956] V.L.R. 31, **and it was held, overruling an earlier Australian case, that the trial Judge may admit evidence of a prior inconsistent statement as part of the material to establish that a witness is hostile**. If leave to cross-examine is granted, the witness may be cross-examined on all matters relevant to the issue before the Court and the leave is not limited only to proving that the witness had made a previous inconsistent statement. **It was also held that if a prior inconsistent statement is to be used to establish hostility, the inquiry should be made on a *voir dire* or in such manner that the jury does not know of the contents of the statement until the trial Judge has ruled on the question of the adverseness of the witness and has announced that he is prepared to admit evidence of the statement under s. 32 of the *Evidence Act*.**[39]

Justice MacKay concluded his judgment by providing a procedure to be used in connection with determining adversity under the legislation:

> After consideration of the authorities (on the assumption that the word 'adverse' in the section means 'hostile') I have come to the following conclusions:
>
> 1. That if 'adverse'" as used in s. [24] of the *Evidence Act* is to be treated as meaning 'hostile' it means 'hostility of mind'.
>
> 2. Whether a witness is hostile in mind is a question of fact. To determine this collateral issue a trial Judge should hear all and any evidence relevant to that issue. The fact that a witness has made a previous contradictory statement is relevant, admissible and most cogent evidence on that issue and that evidence alone may be accepted by the Judge as sufficient proof of the hostility of the witness irrespective of the demeanour and manner of the witness in the witness-box. (It is also of course, open to a trial Judge to rule that a witness is hostile solely be reason of his manner of giving evidence and demeanour in the witness-box.)
>
> 3. That if the case is being tried with a jury, the evidence relevant to the issue of hostility should be heard in the absence of the jury.
>
> 4. If the prior contradictory statement is to be proved by oral evidence, the Judge may hold a *voir dire* to determine this issue.
>
> 5. If the prior contradictory evidence is to be proved by written statement signed by the witness, the witness may be asked if he signed the statement and if he admits having signed it, the Judge may look at the statement for the purpose of arriving at a decision as to the adverseness or hostility of the witness.[40]

37 *Wawanesa (OCA)*, *supra* note 21 at pp. 190 to 191.
38 *Wawanesa (OCA)*, *supra* note 21 at pp. 219 to 224.
39 Emphasis added. *Wawanesa (OCA)*, *supra* note 21 at pp. 219 to 220.
40 Emphasis added. *Wawanesa (OCA)*, *supra* note 21 at pp. 222 and 223.

Justice Roach wrote a dissenting opinion which followed *Greenough v. Eccles*. His judgment is important because a dissenting member of the Supreme Court of Canada endorsed it on appeal.[41] It states as follows:

> Both [section 24 of the *Ontario Evidence Act* and section 9 of the *CEA*] have been adopted from the *Common Law Procedure Act*, in England, 1854, 17 & 18 Vict., c. 125, s. 22. That Act was the result of a report made by the Common Law Practice Commissioners in 1853.
>
> …
>
> It is important to keep in mind what the law in England was at the time the Common Law Practice Commissioners made their report and up to the enactment of the *Common Law Procedure Act* in 1854. If a witness called by one of the parties, in the opinion of the trial Judge, was hostile, leave might be given by the trial Judge to cross-examine him. That was one of the rules of evidence that had grown up in England as the result of practice so as to become the law of the land. As far as I know there was no statutory authority for the rule. Even today there is no statutory authority for the rule in this Province and yet it is a well recognized rule. We in this Province did not create it; we adopted it or inherited it. The rule applied then, as it applies now, to any witness called by a party and who proved hostile to the party calling him. "Hostile" had a very particular meaning. For the moment it will suffice to say that it did not mean merely 'unfavourable'. The rule applied to any witness called by a party and who proved hostile and with respect to whom leave to cross-examine was granted by the trial Judge. What had been doubted prior to the *Common Law Procedure Act* was whether in addition to cross-examining that witness affirmative evidence could be adduced that he had made a prior inconsistent statement. The Act was aimed at the witness who not only was hostile but had also made a prior inconsistent statement. The statute did not use the word 'hostile'; it used the word 'adverse'.
>
> …
>
> The decisions in England subsequent to *Greenough v. Eccles* have been divers. They have been collected in the third edition of Wigmore on Evidence, Vol. III, in note 2 to s. 905, pp. 402-3. Without here reviewing them, it will suffice to say that in my respectful opinion the great weight of authority in England supports the interpretation given in the *Greenough* case [i.e., that the witness must be shewn to be 'hostile' before he can be cross-examined by the party calling him].[42]

Justice Roach then went on to consider the procedure for determining 'adversity' under the statute. In doing so, he reviewed *Hannigan*[43] and *Hunter*[44] and stated as follows:

> The next question is, – how is hostility determined? Until that question cropped up in this case I did not think there was any doubt as to how it would be determined. It would be determined, so I thought and still think, by the Judge observing the witness as he gave his evidence in the witness-box, his demeanor and his general attitude and the substance of his evidence. It is now said that, in addition to the indicia which the trial judge would have available to him from that source, it would be proper to place before him in evidence on a *voir dire* the fact that the witness had made on some earlier occasion a statement inconsistent with his then evidence. My attention has been called to two cases that support that proposition: *The People (Attorney-General) v. Hannigan*, in the Court of Criminal Appeal in Ireland, [1941] Ir. R. 252, and *R. v. Hunter*, a decision of the Full Court of the Supreme Court of Victoria, [1956] V.L.R. 31. I propose to respectfully analyze those decisions because, there being no decision to the contrary binding on this Court, I think it would be open to this Court to adopt the reasoning in those cases if we find them persuasive.
>
> …

41 Justice Cartwright endorsed Justice Roach's judgment at the Supreme Court: see *Wawanesa (SCC)*, *supra* note 21 at pp. 165 to 174. However, Justice Cartwright was the lone dissenter in that decision and the only Justice to consider the issue of 'adversity' and s. 24 of Ontario's *Evidence Act*.

42 *Wawanesa (OCA)*, *supra* note 21 at pp. 195 and 199 to 200.

43 *Hannigan*, *supra* note 29.

44 *Hunter*, *supra* note 30.

The Supreme Court of Victoria in *R. v. Hunter*, [1956] V.L.R. 31, cites with approval the decision of the Court of Criminal Appeal in the *Hannigan* case and quotes the portion of Chief Justice Sullivan's reasons in which he said (p. 33) – 'one of the material circumstances to be considered in estimating whether a witness is adverse is the fact that he had made a statement inconsistent with his evidence.'

O'Bryan, J., who delivered the reasons of the Supreme Court of Victoria in the *Hunter* case, said (p. 33): 'The practice in New South Wales appears to be to admit evidence of the prior inconsistent statement as part of the material in establishing the hostility of the witness.' …

The Court then concluded that part of its reasons thus (p. 34):

> From the foregoing cases and a consideration of what is necessary in the proper administration of justice we are satisfied that there is no rule of law nor any established practice which prohibits a trial judge from considering a prior inconsistent statement (verbal or written) as part of the material to establish the fact that a witness is hostile. In some cases it may itself be sufficient to establish that fact. It is for the trial Judge to say whether he is so satisfied.

**Commenting most deferentially on those reasons, I say, first, there is no practice in Canada of admitting in evidence a prior statement as part of the material in establishing the hostility of a party's own witness.** … At the risk of repetition I again extract:

> If the witness in the opinion of the judge …. proves adverse, such party [that is, the party producing him] may, by leave of the judge …. prove that the witness made at some other time a statement inconsistent with his present testimony.

**It seems to me that by that language the Legislature, as clearly and plainly as language could do it, has laid down a condition on the fulfillment of which a specified right may be exercised and without the fulfillment of which the right cannot be exercised, the condition that the witness proves hostile, and the right being the right to prove a prior inconsistent statement. The Irish and Victoria cases that I have been discussing in effect lay down this proposition, namely – Proof of the prior inconsistent statement satisfies in whole or in part the very condition upon which the right to give any evidence of that statement at all is founded. That type of reasoning to my mind, moves in a circle and is fallacious. To first prove the prior inconsistent statement on a *voir dire* and later prove it again in the exercise of the right as part of the case does not wipe out the fallacy.**

The Legislature, in my opinion, has made it clear that it is for the Judge to decide whether the witness is adverse and, if he so decides, with his leave evidence may be given by some other person or persons that the witness at some other time made a statement inconsistent with his present testimony. It is for the jury, when the case is being tried by a jury, to assess the evidence of those other persons and decide whether or not their evidence should be accepted. Quite contrary to the plain meaning of the Act, so it seems to me, the Irish and Victoria cases hold the judge in the first instance has jurisdiction to decide whether or not the witness has made such a prior inconsistent statement and the jury has jurisdiction to later decide that very same question.

In my opinion, the phrase, 'if the witness …. proves adverse' means if he then and there shows himself to be adverse. The Irish and Victoria cases proceed on the basis that the phrase is wide enough in its meaning to include this, namely, if it is shown by other independent evidence either alone or in conjunction or contrasted with evidence of the witness at the trial that his is adverse then the condition is satisfied. I do not agree with that interpretation and a reference to s. 21 is some indication that such interpretation was not intended. If the prior inconsistent statement was in writing and the Legislature had intended that the Judge could conduct a *voir dire* and follow the procedure approved in those two cases, then one would have expected that the legislature would have included in [s. 24 of the Ontario *Evidence Act*] a provision somewhat similar to that contained in s. 21 where it is provided that, – 'the judge …. may require the production of the writing for his inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he thinks fit. The fact that such a provision is contained in s. 21, which has nothing to do with the examination of a witness by the party calling him, and has been omitted from [s. 24 of the Ontario *Evidence Act*], which deals with the examination of such a witness by the

> party calling him, indicates rather forcefully, I think, that hostility, if there is any, is to be determined not by proving the prior inconsistent statement but by the other indicia to which I earlier referred.[45]

*Wawanesa (OCA)* was appealed to the Supreme Court of Canada; the appeal was heard by a five member panel. The four member majority decided the appeal on grounds unrelated to the *Ontario Evidence Act* and found it 'unnecessary' to interpret the phrase 'proves adverse' and comment on the procedure under the statute.[46] However, in his dissenting opinion, Justice Cartwright endorsed Justice Roach's dissenting reasons from *Wawanesa (OCA)*:

> The witnesses in question were William Joseph Dake and Doctor Pember Alton MacIntosh. In the case of each application the learned trial Judge said that nothing had occurred up to that point to cause him to think that the witness was hostile; counsel then asked the learned trial Judge to look at the statement to assist himself in forming the opinion whether or not the witness was hostile. After hearing full argument the learned trial Judge held, following *Greenough v. Eccles* (1859), 5 C.B. (N.S.) 786, 141 E.R. 315, that "adverse" as used in the section means hostile and said:
>
> > I should state it is my view of the law that a witness must be proved to be hostile and the hostility must be gathered by the judge from the demeanour, the language, the witness' manner in the witness box, and all those elements which are indefinable, but which nevertheless do convey an impression to the judge whether or not a witness is hostile. I am unable to find such hostility in this case.
>
> The learned trial Judge declined to look at the statements or consider their contents. In my opinion, both of these rulings were correct.
>
> In the Court of Appeal, … Roach, J.A., dissented. He agreed with the learned trial Judge that "adverse" means hostile and held that he was right in deciding not to look at the statements for the purpose of forming his opinion as to whether the witnesses were hostile. He would have dismissed the appeal. On this branch of the matter I agree with the conclusions of Roach, J.A., and (subject to one reservation to be mentioned in a moment) I am so fully in agreement with his reasons that I wish simply to adopt them.
>
> The reservation referred to is in regard to a reference made by the learned Justice of Appeal to s. 9 of the *Canada Evidence Act*, R.S.C. 1952, c. 307, in which he says [at pp. 195-6 C.C.C., p. 403 D.L.R., p. 512 O.R.]:
>
> > It will be noted that under the *Canada Evidence Act* a party calling a witness may not contradict by other evidence unless in the opinion of the court the witness proves adverse, while under the *Ontario Act* a party calling a witness may contradict him by other evidence regardless.
>
> This observation was not necessary to his decision and does not affect it. With respect, I am of opinion that s. 9 of the *Canada Evidence Act* has been correctly construed as not restricting the right of a party calling a witness to contradict him by other evidence to cases in which in the opinion of the Court the witness proves adverse.[47]

Justice Roach's dissent in *Wawanesa (OCA)* and Justice Cartwright's endorsement of Justice Roach's decision in *Wawanesa* (SCC) have not been uniformly followed as the definitive pronouncement on s. 24 of the Ontario *Evidence Act* and s. 9(1) of the *CEA*. For instance, in *R. v. Cassibo*[48], the Ontario Court of Appeal affirmed the principles laid down by the majority in *Wawanesa (OCA)*. However, *Sopinka* states that '[n]otwithstanding the *Wawanesa* case, a number of criminal cases adhered to the notion that the previous inconsistent statement was not admissible to establish hostility.'[49] *Sopinka* goes on to note,

45 Emphasis added. *Wawanesa (OCA)*, *supra* note 21 at pp. 201 to 206.
46 *Wawanesa (SCC)*, *supra* note 21.
47 *Wawanesa (SCC)*, *supra* note 21 at pp. 166 and 167.
48 (1982), 70 C.C.C. (2d) 498 (Ont. C.A.) ("*Cassibo*").
49 *Sopinka*, *supra* note 13 at para. 16.58.The following cases are cited in support of that proposition: *R. v. McIntyre*, [1963] 2 C.C.C. 380 (NS C.A.); *R. v. Collerman* [1964] 3 C.C.C. 195; and *R. v. Brennan*, [1963] 3 C.C.C. 30 (PEI S.C.) .

however, that '[t]o overcome the rigours of this interpretation, the *Canada Evidence Act* was amended in 1969 by adding subs.(2) to s. 9 which permits a party to cross-examine a witness on a prior inconsistent statement.'[50]

### (5) The Purpose and Intent Behind the Enactment of Section 9(2) of the *CEA*

The academic commentary focuses on the ruling in *Greenough v. Eccles* to explain the reason for the enactment of s. 9(2) of the *CEA*:

> The last clause of s. 9(1) in fact implies that one cannot assume that a witness is adverse and not to be believed, even if the witness has made a prior inconsistent statement – he or she may be a perfectly honest but forgetful witness and there is absolutely no reason why a *bona fide* attempt should not be made to "refresh the memory" of that witness. This is why the section first of all requires the party to try that route by asking the witness if he or she remembers making such a statement, giving the witness a chance to change his or her testimony. It is only if the witness denies making it or persists in his present testimony, that more drastic measures are required.
>
> The first step is to obtain the court's opinion that the witness has proved adverse. One might have thought that this would be a simple step in view of the fact that one is dealing with a witness who has just testified contrary to the interest of the party making the application, but unfortunately the whole topic was, for many years, complicated by the decision in *Greenough v. Eccles* which, as we have just seen, equated "adverse" with "hostile". This led to the result that the court there ruled that in determining whether the witness was adverse, the trial judge could not consider the contents of the allegedly inconsistent statement since that could not be tendered in evidence until after there had been a ruling on adversity. Adversity had, therefore, to be decided only on the facts then before the trial judge: the witness's demeanor and the content of his or her oral testimony. The conundrum was, however, that unless the content of the alleged prior statement was considered, one would not know whether one had an honest, even forgetful witness trying to be helpful or one that was adverse to the party calling him or her.
>
> In an attempt to remedy the situation, section 9 of the *Canada Evidence Act* was amended in 1968 to include s. 9(2) which is not, itself, a model of clear draftsmanship.[51]

Parliamentary statements prior to the enactment of s. 9(2) of the *CEA* are also insightful in discerning the purpose and intent of the provision.[52] Bill S-3, the bill that contained proposed s. 9(2) of the *CEA*, originated in the Senate and received second reading in that chamber on November 20, 1968.[53] The Honourable David Walker made the following comments regarding the purpose and function of the proposed amendment to section 9 of the *CEA*:

> We come next to clause 2 which amends section 9 of the act. This is very important. Hitherto, you could be at trial and you could call your first witness thinking that he was your best witness because you have a signed statement from him. But, lo and behold, you find that somebody has got to him in the meantime. Senator Croll will understand about that. And when you call him, he gives an entirely different story from the one he has given in the signed statement. As the law now stands, nothing can be done about it. You are taken by surprise; you

50 *Sopinka*, *supra* note 13 at para. 16.58. See also para. 16.61, where Sopinka states that the procedure crafted by the Saskatchewan Court of Appeal in David Milgaard's appeal is substantially the same as that set out in *Wawanesa (OCA)* with a few exceptions, including the right of opposing counsel to cross-examine on the circumstances under which the statement was made.

51 *Witnesses*, *supra* note 15 at p. 14-6 and 14-7. See also *McWilliams*, *supra* note 17 at paras. 36:40320 and 36:40330.

52 At page 50 of *Driedger*, *supra* note 8, Sullivan states that legislative purpose can be established using descriptions of purpose emanating from authoritative sources like *Hansard*. 'Statements made about a statute in the legislature, especially by Ministers introducing or defending it, are admissible and may be considered sufficiently reliable to serve as direct or indirect evidence of legislative purpose': See *Driedger* at page 52. 'The advantage of establishing purpose in this way is that the result is authoritative; it is not something made up by the courts but comes from the legislature itself or from some other credible source': *Driedger*, page 50.

53 Debates of the Senate (19 November 1968) at 569 (the "Senate Debates").

> can appeal to the judge, but nothing can be done. The witness appears to be very pleasant, and is not any way nasty, and cannot be described as hostile, but he gives a story which is the direct antithesis to that contained in his signed statement. Under this amendment it will be possible for counsel to cross-examine his own witness on a statement which he has previously made and signed.[54]

Bill S-3 and the amendments to the *Canada Evidence Act* were given about an hour of debate in the House of Commons on January 20, 1969.[55] The justice minister of the day, John Turner, made the following introductory remarks regarding Bill S-3 and the purpose of the proposed amendment to section 9 of the *CEA*:

> The bill is also designed to assist the courts in reaching the truth by removing an obvious impediment in the way of a proper assessment of the credibility of witnesses. At present a party who produces a witness is not permitted to prove that the witness had previously made a written or oral statement inconsistent with the testimony that he is giving the court unless that witness, in the opinion of the court, upon the application of the party who has introduced the witness's testimony, is adjudged adverse.
>
> For the benefit of those who do not practice law as a profession, or did not do so before entering the house, I should mention that the word 'adverse' here means that a witness has a hostile animus, or a hostile bearing or intent, toward the party who calls him and is not prepared to give his evidence fairly, or with the appropriate desire to tell the truth.[56]

After describing the law surrounding the permitted uses of prior inconsistent statements and s. 9 of the *CEA*, the Justice Minister went on to state:

> The defect in the present law is that the courts have generally held that in deciding whether or not the witness is adverse they are not entitled to consider any previous statements made by the witness. They have restricted themselves to considering such matters as the demeanour of the witness, the way he is testifying in the court, and so on. The indefensible result of all this is that the highly polished witness, the highly polished prevaricator, frequently dazzles the court into deciding that there is absolutely no justification for holding that he is adverse.
>
> …
>
> In these circumstances it is proposed to amend section 9 of the act to empower the court to permit a party to cross-examine his witness as to a previous inconsistent statement, but only if that statement is reduced to writing, so that the court can consider the results of the cross-examination and, on the basis of that previous inconsistent written statement, decide whether the witness in fact is adverse. Such cross-examination would, of course, be limited to that previous written statement. If the court decides the previous statement is not inconsistent with the present testimony, that is the end of the matter. But if there is an inconsistency, then the party who calls that witness may discredit the witness by contradicting him with the statement in question or any other previous oral or written statement, or may establish from the testimony of the witness under oath that all or part of the previous statement represents the truth.[57]

From these comments, it appears that s. 9(2) of the *CEA* was enacted as a reformatory measure designed to resolve the procedural 'catch-22' respecting the technical requirements of s. 9(1) and the judicial consideration surrounding that provision. The Justice Minister's remarks before the Standing Committee for Justice and Legal Affairs tend to fortify this view:

> *Mr. Turner*: Mr. Chairman, section 9 of the present *Canada Evidence Act* prohibits a party producing a witness from impeaching the credit of that witness unless in the opinion of the court the witness proves to be adverse or

54 Senate Debates, *supra* note 53 at pp. 577 to 588.
55 House of Commons Debates (20 January 1969) at 4494 ("Commons Debates").
56 Commons Debates, *supra* note 55 at p. 4495.
57 Commons Debates, *supra* note 55 at pp. 4494 to 4497.

> hostile; and for the purposes of establishing that a witness that a party calls is adverse or hostile, that witness cannot at the moment be cross-examined on any previous inconsistent statement made by him.
>
> Therefore, it is proposed to add a new subsection (2) to section 9 of the *Act*, whereby it will be possible, with leave of the court but without establishing first that a witness is adverse, to cross-examine one's own witness on any previous inconsistent statement that has been reduced to writing.
>
> And the court may consider such cross-examination in determining whether in fact the witness is adverse or hostile.
>
> In other words, the court will still be able to weigh the demeanour of the witness, or the attitude of the witness, or the bearing of the witness, but it will also now be able to refer to this cross-examination on a previous inconsistent statement reduced to writing.
>
> The proposed amendment relates not only to statements made in writing by the witness, or signed by him, but also to statements made by the witness and reduced to writing by some other person – a stenographic record.
>
> Representations in support of this proposed amendment have been received from the Manitoba and Saskatchewan association of the Canadian Bar Association. In addition, the following resolution was passed by The Canadian Bar Association at its annual meeting on September 9, 1967:
>
> > WHEREAS there appear to be conflicting decisions as to whether a party may put to his witness a prior inconsistent statement until after a ruling of adverseness has been made by the Court; RESOLVED: that Section 9 of the *Canada Evidence Act* be amended to provide (a) that by leave of the Court a party might cross-examine his witness as to prior inconsistent written statements before a finding of adverseness; (b) that such examination might be used by the Court in determining whether a witness is adverse.[58]

At least three conclusions can be drawn from the enactment of s. 9(2) of the *CEA* and the Justice Minister's comments before the House of Commons and Standing Committee. First, the Justice Minister's comments indicate that the enactment of s. 9(2) was directly connected to resolving the conflicting jurisprudence surrounding the issue of proving adversity under s. 9(1). Second, it appears that the Justice Minister intended s. 9(2) of the *CEA* to act as a remedial device designed to cure the procedural 'catch-22' created by the language of s. 9(1) of the *CEA*. Finally, Parliament's enactment of s. 9(2) of the *CEA* signals a marked departure from the decision in *Greenough v. Eccles* and tended (if only implicitly) to approve and bring Canadian law in line with the rulings of Justices Porter and MacKay in *Wawanesa (OCA)* and similar rulings in other jurisdictions, namely *Hannigan* and *Hunter*. Quaere, however, whether Parliament's enactment of s. 9(2) of the *CEA* also constituted a tacit endorsement of the procedure followed in *Wawanesa (OCA)*, *Hannigan* and *Hunter*, where courts followed the practice of allowing counsel to use previous inconsistent statements to prove adversity under statutes similar to s. 9(1) of the *CEA* but only in the context of a *voir dire* conducted in the absence of the jury.

### (6) The Relationship Between Sections 9(1) and (2) of the *CEA*

Academic commentary supports the view that s. 9(2) of the *CEA* was intended to function in unison with and as a remedial legislative adjustment to s. 9(1). As Judge Delisle stated in "Witnesses – Now and Later":

> The meaning of adverse has produced some controversy since the traditional view is to equate adverse with hostile and the manner in which the witness gives his evidence is all important: see *Regina v. McIntyre*, [1963]

58 See also R. Delisle, "Witnesses – Competence and Credibility" (1978) 16 Osgoode Hall L.J. 2 at 346 ("*Competence and Credibility*"). Judge Delisle refers to Mr. Scollin's remarks before the Standing Committee For Justice and Legal Affairs (Mr. Scollin was the Director of the Criminal Law Section at the time of the proposed amendment to s. 9) at pp. 346 to 347 of *Competence and Credibility*.

> 2 C.C.C. 380 (N.S. C.A.); but see *Regina v. Gushue* (No. 4) (1975), 30 C.R.N.S. 178 (Ont.). The majority of the Ontario Court of Appeal in *Wawanesa* recognized that this was the prevailing view but decided that the same word in the Ontario counterpart to section 9 should be given a broader interpretation to include not only hostility but also opposition in interest to the party calling him. That Court went on to conclude that evidence of a prior inconsistent statement could be taken into account in determining adversity [under section 9(1)]: see *Regina v. Collerman*, 43 C.R. 118, 46 W.W.R. 300, [1964] 3 C.C.C. 195 (B.C. C.A.), taking a similar position in a criminal case. Despite the seeming circularity of such a position I suggest that a similar position now exists in federal matters by virtue of section 9(2). **I recognize that some believe that subsection 9(2) is a new procedure for discrediting a witness, completely independent of subsection 9(1), but I suggest it is merely a preliminary device to enable counsel to demonstrate the adversity mentioned in 9(1) which might then permit proof of the prior statement. If my suggestion is correct then (despite *Regina v. Milgaard*, 14 C.R.N.S. 34, [1971] 2 W.W.R. 266, 2 C.C.C. (2d) 20, leave to appeal refused C.C.C. (2d) 566n (Can.)) the cross-examination mentioned in s. 9(2) ought to take place in the absence of the jury and if the trial judge on witnessing that cross-examination concludes that the witness is adverse the party may ask his leave to prove the statement in front of the jury. To permit such cross-examination in the presence of the jury, as *Milgaard* suggests, appears to make s. 9(1) largely redundant as counsel may thereby normally accomplish what he seeks without the necessity of any ruling of adversity.** I am reinforced in this view by the concluding words of s. 9(2) that: 'the court may consider such cross-examination in determining whether in the opinion of the court the witness is adverse'. If we are to seek Parliament's intention we might also consider the remarks of the then Minister of Justice, Mr. Turner, and the then director of the Criminal Law Section, Mr. Scollin, when they appeared before the Standing Committee on Justice and Legal Affairs (28th January 1969). Those remarks also provide what McWilliams terms the 'unaccountable reason' for confining s. 9(2) to statements in writing: see *McWilliams on Evidence* at p. 611.[59]

By focusing on the conundrum surrounding the operation of s. 9(1) of the *CEA* and the conflicting jurisprudence that prompted the enactment of s. 9(2), Judge Delisle's comments seem to grasp the relationship that Parliament intended for ss. 9(1) and (2) and s. 9(2)'s intended function as a remedial provision designed to enhance the operation of s. 9(1).[60] Indeed, Judge Delisle's assessment provides a coherent and integrated approach between the two provisions that accounts for the judicial interpretation surrounding s. 9(1) of the *CEA* and the historical circumstances surrounding the enactment of s. 9(2).

However, Judge Delisle's view of the legislation did not become the accepted position in Canada.[61] Rather, s. 9(2) of the *CEA* has been construed as an independent procedure under which a judge could,

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59 Emphasis added. R. Delisle, "Witnesses – Now and Later" (1976), 34 C.R.N.S. 1 at p. 4 ("*Witnesses – Now and Later*"). Judge Delisle reiterated these comments in *Competence and Credibility*, *supra* note 58 at p. 346.

60 As stated in *Driedger*, *supra* note 8 at p. 41: "… in the context of reform legislation the intention to reform can only be understood in terms of existing law and the mischief or defect for which the law did not provide. The primary interpretive challenge, then, is to master the relationship between the new rules and existing law. And in keeping with this concern the primary interpretive values are integration, continuity and coherence."

61 Judge Delisle acknowledged that his view was in the minority in his case comment on *R. v. McInroy & Rouse*, [1979] 1 S.C.R. 588, "Cross-examination of Own Witness on Previous Inconsistent Statement – s. 9(2) *Canada Evidence Act*" (1978-79), 21 *Crim. L.Q.* 162 at p. 163:

> There were formerly two views regarding the purpose of s. 9(2) of the *Canada Evidence Act* and the consequent procedure to be followed in its application. The majority view (e.g., *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206), 14 C.R.N.S. 34 (Sask. C.A.); *R. v. Tom* (1976), 3 W.W.R. 391 (Man C.A.)) is that the subsection is an independent device open to counsel to explore inconsistencies between present testimony and a previous written statement and that such exploration through cross-examination ought to take place in the presence of the jury. The other view (e.g., *R. v. Cronshaw and Dupon* (1976), 33 C.C.C. (2d) 183 (Ont. Prov. Ct.); R. Delisle, 'Witnesses – Competence and Credibility', 16 Osg. Hall L.J. 337 (1978)) is that the subsection only provides a technique for gaining a declaration of adversity under s. 9(1) and that the cross-examination spoken of in s. 9(2) therefore should take place in the absence of the jury; if the witness is declared adverse then, and only then, the witness may be cross-examined in the presence of the jury. The decision in this case is clearly in favour of the majority view and is therefore a welcome settlement of the dispute.

in his or her discretion, permit a party to cross-examine his own witness on an inconsistent statement in the absence of a declaration of adversity.[62]

For instance, in *Cassibo*, counsel unsuccessfully advanced an argument endorsing the view of s. 9(2) of the *CEA* put forth by Judge Delisle. There, the issue was whether an oral inconsistent statement could be used to discredit a witness under s. 9(1) of the *CEA* notwithstanding the express wording of s. 9(2) of the *CEA*. Justice Martin summarized the position of counsel and stated as follows:

> … the decision of [the Ontario Court of Appeal] in *Wawanesa Mutual Ins. Co. v. Hanes*, [1963] 1 C.C.C. 176, 28 D.L.R. (2d) 386, [1961] O.R. 495, … , concludes the matter in this court, unless s. 9(2) of the *Canada Evidence Act* has, as Mr. Gold contended, altered the law as stated in that case. Mr. Gold's argument depends upon the premise that s. 9(2) represents a compromise between two conflicting streams of authority and that Parliament struck a balance between the competing lines of authority by providing that previous inconsistent statements could be taken into account on an application under s. 9(1) in deciding whether the witness was adverse but restricting the kind of statements that could be so used to statements in writing or reduced to writing.
>
> There would be considerable force in this argument if s. 9(2) were to be construed only as providing a procedure to be used in deciding whether a witness was adverse within s. 9(1): see R.J. Delisle, 'Witnesses – Now and Later' (1976), 34 C.R.N.S. 1 at p. 7. This has not, however, been the construction placed upon s. 9(2). It is now well established that s. 9(2) provides an independent procedure under which the judge may permit a party to cross-examine his own witness as to a statement previously made in writing or reduced to writing without any necessity for a declaration that the witness is adverse.[63]

## (7) The Evidentiary Value of Proving Prior Inconsistent Statements Under Section 9 of the *CEA*

### (a) Evidentiary Value of Inconsistent Statements Proved Under Section 9(1) of the *CEA*

*Sopinka* provides a general summary of the law on this point at paragraph 16.67:

> Prior to the decision in *R. v. B. (K.G.)*, there was a great deal of controversy concerning the evidential value of a proved prior inconsistent statement. Under the traditional rule of common law (as it existed before *R. v. B. (K.G.)*), a proved prior inconsistent statement could not be used as evidence of the truth of its contents unless the witness admitted the truth of the statement. Where the truth of the statement was not admitted, the statement's only permissible use was to impeach the credibility of the witness. This rule applied regardless of whether the statement was by a party's or opponent's witness (except where the witness was a party.) Although the proved inconsistent statement could be used to discredit the witness, the traditional rule was an absolute bar to the use of the statement for the purpose of proving the truth of the statement's contents. Academic condemnation of the traditional rule was nearly universal, the best known judicial attack being Estey J.'s stinging dissent in *McInroy and Rouse*.[64]

In *R. v. Duckworth*[65] three Crown witnesses had provided evidence at trial contradicting or denying the truth of their testimony at an inquest (the inquest evidence contained highly incriminatory statements against the accused). At trial, the three witnesses were cross-examined against their depositions from the earlier proceeding. On appeal, defence counsel raised an issue respecting the trial judge's charge and the use that could be made of the prior inconsistent statements of the three witnesses. Although s. 9(1) of the *CEA* was not specifically invoked during the trial, the Supreme Court of Canada decided the case on the basis that leave to cross-examine would have been granted under the section.

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62 See *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206 (Sask. C.A.) ("*Milgaard (CA)*"), leave to appeal refused, 4 C.C.C. (2d) 566n (S.C.C.) ("*Milgaard (SCC)*"); *R. v. McInroy*, [1979] 1 S.C.R. 588 (S.C.C.), *R. v. Carpenter*, (1982) 142 D.L.R. (3d) 237 (Ont. C.A.) ("*Carpenter*"); *Cassibo*, *supra* note 48.

63 Emphasis added. *Cassibo*, *supra* note 48 at pp. 519 to 520.

64 *Sopinka*, *supra* note 13 at para. 16.67.

65 (1916), 26 C.C.C. 314 (SCC) ("*Duckworth*").

Justice Clute, a member of majority, stated as follows:

> … [section 9(1) of the *CEA*] in my mind did not make the production of the evidence taken at the inquest evidence of the facts therein contained as proof against the prisoner; and the trial Judge was bound, I think, if such evidence for the purpose of contradiction was admitted, carefully to caution the jury that they were not to receive it as proof of the facts pointing to the prisoner's guilt, but solely as proof of contradiction of the witness' statement at trial, and that they ought not to convict the prisoner unless they were satisfied that there was sufficient evidence of his guilt without reference to that contained in the depositions of the witness at the inquest.
>
> …
>
> None of these sections [i.e., section 9, 10 and 11 of the *CEA* (as they read at the time)] was intended, in my opinion, to make that evidence of the facts of the case which would not otherwise be evidence thereof; the plain intention of the statute being to enable counsel to attack the credibility of the witness by showing that he had previously made a different statement.[66]

In a concurring judgment, Justice Riddell stated as follows:

> Dr. Wigmore, in his able and exhaustive work on Evidence, gives a history of the practice of discrediting one's own witness, vol. 2, pp. 1017 et seq., paras. 896 et seq., which I do not enter into. He says however, in answering an objection, that 'we are not asked to believe his' (the witness's) 'prior statement as testimony, and we do not have to choose between the two … We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other, but without determining which one … We do not in any sense accept his former statement as replacing his present one; the one merely neutralises the other … The prior contradiction is not used as a testimonial assertion to be relied upon.' The learned author continues: 'Prior self-contradictions, when admitted, are not to be treated as assertions having any substantive or independent testimonial value; they are to be employed merely as involving a repugnancy or inconsistency; otherwise they would in truth be obnoxious to the Hearsay Rule:' para. 1018.
>
> …
>
> I think that the evidence must be confined in its effect to the discrediting of the witnesses who had proved adverse.
>
> That evidence rightfully admitted for one purpose may not be evidence for another is too clear for argument.[67]

Chief Justice Meredith dissented on the issue of whether the accused deserved a new trial based on the trial judge's charge. However, he concurred with the majority on the evidentiary value of a prior inconsistent statement and added that the contents of a statement could be accepted as the truth if the witness adopted the statement as true during cross-examination.

Justice Lennox also dissented on the issue of whether the accused deserved a new trial based on the trial judge's charge, but he concurred with Justice Riddell's ruling on the evidentiary value of prior inconsistent statements. However, he also made the following comments on a jury's ability to disregard the contents of prior inconsistent statements:

> As to these witnesses the initial and paramount question for the jury necessarily was: 'Are they telling the truth, can you believe them?' In these circumstances, was it reasonable or unreasonable, nay, was it wrong or right, that the Judge, after cautioning the jury not to give heed to anything except what had fallen from the lips of witnesses in Court, and referring to the evidence of these witnesses at the trial and their previous statements, should say to the jury: 'Now, it will be for you to come to a conclusion on these statements, whether the particular witness has told the truth to-day, or told it on another occasion under oath.' Surely it was a matter for

66 *Duckworth*, *supra* note 65 at p. 330.
67 *Duckworth*, *supra* note 65 at p. 339 and 340.

> the consideration of the jury, and one which, in considering their verdict, they were not at liberty to ignore. If the former statements were not true, it is possible, but not probable, that the evidence of these witnesses in Court was true; but if the repudiated statements were true, the evidence given in Court by other witnesses as well as these three could not be true. Was it not a matter upon which the jury could be – should be – asked to dwell and come to a conclusion on in considering their verdict?
>
> …
>
> It has often been said, and might be repeated in this case: 'Once the statements are repeated in Court they cannot be effaced from the mind of the jury.' It is all true; and no caution, and no explanation of the laws of evidence, that any Judge could give, could make it otherwise. But, all the same, it is express statutory law that inconsistent statements of adverse witnesses may be disclosed, and the preponderance of judicial opinion was only crystallized in the statute, after almost centuries of discussion and with clear apprehension and full notice and knowledge that when disclosed it must sometimes happen, and sometimes with a measure of rough justice too, and none the less, perhaps, because the Judge has learnedly and laboriously dwelt upon the fine distinction between evidence of the statement and evidence of the facts stated, that some alert juryman, *unlearned in the law*, will say: 'I just can't make it out, the Judge says it's evidence and it isn't evidence, and there was a mighty lot of fuss about it, so it must be important, but I tell you we know this much anyway, it just fits snugly *with things we all know are true*.'[68]

*Duckworth* affirms the basic principle that a prior inconsistent statement proved under s. 9(1) of the *CEA* cannot be used as evidence of the truth of its contents unless the witness admits the truth of the statement. Rather, inconsistent statements are to be used to enable 'counsel to attack the credibility of the witness by showing that he had previously made a different statement'[69] and 'for the purpose of nullifying the effect of the testimony then being given by such witnesses'[70]

The common law rule respecting cross-examination of a hostile witness on a prior inconsistent statement was at issue in *R. v. Francis & Barber*[71]. The Saskatchewan Court of Appeal approved the evidentiary principle that an inconsistent statement put to a hostile witness cannot be used as evidence of the truth of its contents unless the witness admits the truth of the statement. The Court also confirmed that the principle applied to prior sworn and unsworn statements.[72]

The issue respecting the evidential value of a prior inconsistent statement arose before the Supreme Court of Canada again in *R. v. Deacon*[73], but this time s. 9(1) of the *CEA* was squarely before the Court. In *Deacon*, a witness for the Crown gave evidence contradicting earlier statements made to the police and at a coroner's inquest. The Crown applied for and received a declaration of adversity under s. 9(1) of the *CEA* and proceeded to cross-examine the witness on her prior inconsistent statements. Defence counsel also cross-examined the witness on her prior inconsistent statements. The majority held that a witness' prior inconsistent statements can only be used to impeach the credit of the witness and are not evidence against the accused, even though defence counsel cross-examines the witness on the statements.[74] Accordingly, *Deacon* adds the principle that a defence counsel's cross-examination of a witness on a prior inconsistent statement remains limited to credibility, and does not constitute substantive evidence unless the witness adopts the contents of the statement.

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68 Italics in original. *Duckworth*, *supra* note 65 at pp. 363 and 370.
69 *Duckworth*, *supra* note 65 at p. 330 *per* Justice Clute.
70 *Duckworth*, *supra* note 65 at p. 353 *per* Justice Masten.
71 (1929), 51 C.C.C. 343 (SK C.A.) ("*Francis & Barber*").
72 *Francis & Barber*, *supra* note 71 at p. 350.
73 [1947] S.C.R. 531 ("*Deacon*").
74 *Deacon*, *supra* note 73 at pp. 534 and 535.

### (b) Evidentiary Value of Inconsistent Statements Proved Under Section 9(2) of the *CEA*

The evidentiary value of prior inconsistent statements proved under s. 9(2) of the *CEA* was considered by the Supreme Court of Canada in *McInroy*[75]. Although *McInroy* was decided approximately eight years after the Supreme Court of Canada dismissed David Milgaard's application for leave to appeal, the case is considered here because it was the first Supreme Court of Canada decision to discuss the evidentiary value of prior inconsistent statements proved under s. 9(2) of the *CEA* and the first case containing a judgment that openly critiqued a jury's ability to follow the limitation respecting the use of prior inconsistent statements.[76]

The majority of the Supreme Court in *McInroy* held that the value of a witness' prior inconsistent statement under s. 9(2) of the *CEA* was limited to assessing the witness' credibility. Like s. 9(1) of the *CEA*, a prior inconsistent statement proved under s. 9(2) cannot be used as evidence of the truth of its contents unless the witness admits the truth of the statement. Where the truth of the statement is not admitted, the contents of the statement can only be used for the purpose of testing the credibility of the witness.

However, Justice Estey dissented on the evidentiary value of a prior inconsistent statement proved under s. 9(2) of the *CEA*. His judgment is skeptical of a jury's ability to disregard the substantive contents of an inconsistent statement:

> … [I]n my view of s. 9 of the *Canada Evidence Act*, R.S.C. 1970, c. E-10, and of the common law relating to the admissibility of prior inconsistent statements, the jury is entitled, and should have been so instructed here, to take into their consideration the contents of the prior inconsistent statement not only on the issue of determining the credibility of the witness St. Germaine, but also in determining the issues of fact arising in the trial to which the contents of the prior statement may be relevant. … **It is in my respectful view both an error in law and an offence against common sense to instruct the jury that the witness's prior statement, particularly when given in the circumstances of this case, may be considered by the jury only on the issue as to credibility of the of the witness, St. Germaine, and must be disregarded on the issues of fact arising in this statement; and, more precisely, that the jury must be told that the prior statement may not be considered by them as proof or even as some evidence relating to the matters asserted in that statement.**
>
> …
>
> Section 9(2) was added to the *Canada Evidence Act* in 1968 (1968-69, c. 14, s. 2). It comes into the Act without legislative history. The subsection has not been subjected to judicial analysis to my knowledge from the side of the question raised in this appeal. The subsection, while providing a procedural mechanism for the admission of the prior contradictory statement, is silent as to the substantive use, if any, to which such evidence may be put. Taken by itself and in isolation from the judicial and academic debates of the past, the section, in my view, supports the simple interpretation that, given their plain meaning, the words adopted by Parliament reveal an intention that the evidence is, upon compliance with the prescribed procedure, admitted to the record for application by the tribunal in the same way as other evidence and without any specific limitation.[77]

Justice Estey goes on to cite Justice Lennox's observations regarding a jury's ability to disregard the substantive content of a prior inconsistent statement from *Duckworth* and continues his critique of the rule:

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75 *McInroy*, *supra* note 62.

76 *McInroy* also provides guidance on the meaning of 'inconsistency' under s. 9(2) of the *CEA*. The facts of the case and the aspect of the case on the meaning of 'inconsistency' will be considered in detail in Part IV, section 8 of this memorandum. At this point, it suffices to say that the witness' statements were found to be 'inconsistent' with her testimony at trial and she was cross-examined under s. 9(2) of the *CEA*.

77 Emphasis added. *McInroy*, *supra* note 62 at pp. 606 and 609.

The English Criminal Law Revision Committee, under the chairmanship of Davies, L.J. in its Eleventh Report on Evidence (General), 1972 at p. 149, observed that the rule permitting the use of the prior inconsistent statement on the issue of credibility of the witness but prohibiting the use of the statement for proof of the matters therein asserted is 'wholly unrealistic and difficult for a jury to appreciate'. The American judicial view is predominantly to the same effect. In *Di Carlo v. United States* (1925), 6 F. 2d 364, Justice Learned Hand wrote at p. 368 of the situation as it prevailed under the common law where the Court has granted permission to cross-examine upon finding a witness to be hostile:

> Not only may the questions extend to cross-examination, but, if necessary to bring out the truth, it is entirely proper to inquire of such a witness whether he has or not made contradictory statements at other times. He is present before the jury, and they may gather the truth from his whole conduct and bearing, even if it be in respect of contradictory answers he may have made at other times.
>
> The possibility that the jury may accept as truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of the words uttered under oath in court.

Certiorari was denied by the United States Supreme Court, 368 U.S. 706. Friendly, Cir. J. giving the judgment of the Court in U.S. *De Sisto* (1964), 329 F. 2d 929 (certiorari denied, 377 U.S. 979), makes the same point [at p 933]:

> The rule limiting the use of prior statements by a witness subject to cross-examination to their effect on his credibility has been described by eminent scholars as "pious fraud," "artificial," "basically misguided," "mere verbal ritual," and an anachronism "that still impede(s) our pursuit of the truth" … The sanctioned ritual seems peculiarly absurd when a witness who has given damaging testimony on his first appearance at a trial denies any relevant knowledge on his second; to tell a jury it may consider the prior testimony as reflecting on the veracity of the latter denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this the orthodox rule defies the dictate of the common sense that "The fresher the memory, the fuller and more accurate it is … Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy … [but] the greater the lapse of time between the event and the trial, the greater the change of exposure of the witness to each of these influences."

…

In Cross on Evidence, the learned author at pp. 416-7 makes this observation concerning the restricted use of the prior statement:

> The objections to the reception of prior inconsistent statements as evidence of the facts stated are that the statements were not made on oath and the witness swears that they are untrue. The court and the jury will generally be well advised to ignore both the statement and the testimony, but, in rare cases, such as those in which the witness has been 'got at' since he made the statement, there may be excellent reasons for accepting it as true.

Professor Wigmore in vol. 3, 3rd ed. (1940), 1018(b), pp. 687-8, after setting out the rule in *Deacon v. The King*, *supra*, goes to the heart of the issue:

> (b) It does not follow, however, that Prior-Self Contradictions, when admitted, are to be treated as having no affirmative testimonial value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the Hearsay rule. But the theory of the Hearsay rule is that an extrajudicial statement is rejected because it was made out of Court by an absent person not subject to cross-examination (post, 1362). Here, however, by hypothesis the witness is present and subject to cross-examination. There is amply opportunity to test him as to the basis for his former statement. The whole purpose of the Hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal

> from giving such testimonial credit to the extrajudicial statement as it may seem to deserve. Psychologically of course, the one statement is as useful to consider as the other; and everyday experience outside of courtrooms is in accord.

To the same effect, vide Professor E.M. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" 62 Har. L. Rev. 177 at p. 196 (1948). As in the case of Wigmore on Evidence, the learned author goes on to conclude: "Consequently there is no real reason for classifying the evidence as hearsay". Finally, McCormick on Evidence, 2nd ed. (1972), joins the almost unanimous parade of legal writers when the author states at pp. 603-4:

> It is hard to escape the view that evidence of previous inconsistent statement, when the declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony. Allowing it as substantive evidence pays an added dividend in avoiding the ritual of a limiting instruction unlikely to be heeded by a jury. Accordingly, jurisdictions which shy away from admitting prior inconsistent statements of witnesses generally may not hesitate to admit when the statement is inconsistent with already-given testimony.
>
> …

Whatever may be the correct interpretation of s. 9(1) (in these proceedings it is not necessary to determine that question), there is nothing combined in s-s. 9(1) which has any controlling influence over the provisions of s-s. (2). Furthermore, there is nothing in the wording employed in s-s. (2) which limits the use or application of the contents of prior inconsistent statements admitted in the manner prescribed in s. 9(2), in the determination of the truth of the matters therein asserted. Put more specifically, in the context of these proceedings, there is nothing in s-s. (2) which indicates that the subsection is procedural only and that the evidence thereby adduced is inadmissible on the substantive issues in the proceedings.

Section 9(2) of the *Canada Evidence Act* then falls to be examined in the light of the old common law rule and the cases decided thereunder, but as to what the proper interpretation of the statutory provisions may be nowhere does the Legislature reveal an intention to limit the impact of s. 9(2) to procedural or mechanical matters only. Certainly, nothing emerges from the terminology of the two subsections to indicate a positive intention to preclude the application of these provisions to substantive law or principle. It follows therefore that, unencumbered by the earlier cases under the common law, the proper interpretation of the statute emerges, that is to say matters elicited on cross-examination including the existence of the prior inconsistent statement form part of the evidence going to the trier of fact for such application as that tribunal might make of all such evidence in reaching conclusions on the facts.

…

In my view, the law was enunciated in *Deacon v. The King* (1947), 89 C.C.C. 1, [1947] 3 D.L.R. 772, [1947] S.C.R. 531, appears to follow from the state of affairs prevailing under the common law and, as adopted in the United Kingdom authorities, as being the continuing principle to be applied after the advent of what is now s. 9(1). Section 9(2) did not come into the law until 1968, long after the *Deacon* case was settled. In my view, the proper interpretation of s. 9(2) permits the trier of fact, once the procedural requirements of the subsection have been met, to take into its appreciation all the testimony given by the witness including his explanations and denials with reference to the proven prior inconsistent statements. Any other conclusion not only lacks the ring of reality but is transparently a rule adopted for comfort in the full awareness by the Court that regardless of the instructions to the jury, the content of the prior inconsistent statement will be weighed by the jury along with the testimony of the witness given in Court in the process of determining which statements and evidence of the witness (if any) are to be believed and incorporated in their findings or conclusions on the facts.[78]

78 Emphasis added. *McInroy*, *supra* note 62 at pp. 615 to 620.

Justice Estey's dissenting opinion in *McInroy* was a major component in the Supreme Court of Canada's 1993 watershed decision on the substantive admissibility and evidentiary value of prior inconsistent statements under s. 9 of the *CEA* in *R. v. B(K.G.)*[79].

### (8) The Meaning of 'Inconsistency' Under Section 9(2) of the *CEA*

An issue respecting the meaning of the term 'inconsistency' under s. 9(2) of the *CEA* arose in *McInroy*, a murder trial involving multiple accused. A key Crown witness, Kathy St. Germaine, provided a statement to the police indicating that she had a conversation with one of the accused, Howie McInroy. Her statement indicated that McInroy confessed to the murder during their conversation. At McInroy's trial, held seven months after she gave her statement to the police, St. Germaine was called by the Crown and testified that she could not recall the conversation. The Crown argued that her testimony was inconsistent with her prior statement to the police and made an application to cross-examine St. Germaine on the statement under s. 9(2) of the *CEA*.

During the *voir dire*, St. Germaine acknowledged her initials on each page of the statement and acknowledged her signature at the end of the document. She also testified that she recalled giving the statement to the police. However, when questioned on the contents of the statement, she maintained that she could not remember the conversation with the accused.[80] At the conclusion of the *voir dire*, the trial judge initially rejected the Crown's application to cross-examine St. Germaine in the presence of the jury, but subsequently reversed himself and granted the application. Accordingly, the Crown cross-examined St. Germaine on her statement in front of the jury and she again testified that she could not recall her conversation with the accused. Near the end of the cross-examination, she agreed with Crown counsel that she did not lie, and had told the police the truth at the time she gave the statement. However, she maintained that she could not recall her conversation with the accused.

Justice Martland, who wrote for the majority, stated as follows at pages 602 to 605:

> In his charge to the jury the trial Judge said:
>
> > Now, as to evidence concerning what she said in the statement, I must ask you to bear in mind that the only evidence you can consider from her is the evidence she gave in this courtroom. She has had questions and answers put to her that were made at some earlier time and she has, in most cases, rejected them in the sense that she says she simply cannot remember them. Those questions and answers put to her which she could not remember, do not constitute evidence because she has not accepted what has been said to her, and I must expressly direct you that those portions of that prior statement are not to be taken as evidence of the truth of the statements contained therein, but merely serve to test her credibility as a witness, so once again I repeat that in light of her continued inability to remember those questions and answers, they do not form part of her evidence and accordingly are not to be taken as evidence of the truth of what is contained therein, but are only to be considered by you in testing or determining her credibility as a witness.
>
> The Court of Appeal unanimously held that the trial Judge had erred in permitting Crown counsel to cross-examine Mrs. St. Germaine concerning the statement. The reason given by Chief Justice Farris is as follows [at p. 264]:

79 [1993] 1 S.C.R. 740 ("*B(KG)*").

80 The portion of the case containing Crown counsel's cross-examination of St. Germaine on the *voir dire* is located at pages 595 to 601 of the judgment: see *McInroy*, *supra* note 62. It is noteworthy that Justice Martland (for the majority) concluded that the questions and answers on the *voir dire* were "very similar to those which are cited in the Milgaard case, at pp. 218-9": see *McInroy*, *supra* note 62.

> In my view, the Judge was in error in ruling that the witness could be cross-examined by the Crown as an adverse witness. At the stage when the application was made initially to cross-examine on the basis of s. 9(2), the evidence of the witness can be summarized as follows:
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> (1) That McInroy and Jordan had returned to her house at approximately the time as Jordan said they did.
>
> (2) That she had a conversation in the kitchen with McInroy.
>
> (3) That she had gone for a ride with McInroy and he had instructed her to throw a paper bag out of the window.
>
> There could be no reason for the Crown to challenge these three items of evidence. The Crown's purported purpose in using the previous statement was on the issue of her credibility. But credibility was not in issue. **Mrs. St. Germaine had testified to nothing damaging to the Crown's case. She had simply disclaimed any present relevant testimonial knowledge of the conversation with McInroy.** In such a case a prior inconsistent statement of facts favourable to the proponent of the witness may not be used to impeach her.

With great respect, I am not in agreement that there was error in this case on the part of the trial Judge. The basis for the Court's conclusion that there was error is stated in the first sentence of the passage quoted "in ruling that the witness could be cross-examined by the Crown as an adverse witness'. Following this statement reference is made to the evidence given by Mrs. St. Germaine prior to questions and answers leading to the Crown's application. Her earlier evidence was not adverse to the Crown's position. The inference is that this prevents her from being regarded as an adverse witness.

Section 9(2) is not concerned with the cross-examination of an adverse witness. That subsection confers a discretion on a trial Judge where the party producing a witness alleges that the witness has made, at another time, a written statement inconsistent with the evidence being given at the trial. The discretion is to permit, without proof that the witness is adverse, cross-examination as to the statement.

The task of the trial Judge was to determine whether Mrs. St. Germaine's testimony was inconsistent with her statement to the police. In my opinion, he was properly entitled to conclude that it was. At trial Mrs. St. Germaine swore that she could not recall any part of the conversation with McInroy in the kitchen of her house on the night of the killing, although only some seven months earlier she had given to the police, in her written statement, the details of that conversation, including McInroy's admission that he was the murderer. **If her statement at trial as to her recollection was true, inconsistency would not arise, but the trial Judge saw Mrs. St. Germaine and heard her evidence on the *voir dire*. It was quite open to him to conclude that she was lying about her recollection and to form his own conclusions as to why she was refusing to testify as to her true recollection of a conversation, and what was contained in her written statement, i.e., a detailed recollection of it.**

…

**The granting of the Crown's application was a matter for the sole direction of the trial Judge and, in my view, he had adequate grounds for exercising that discretion as he did.** Having granted the application the Crown was entitled to cross-examine Mrs. St. Germaine before the jury. The trial Judge was careful to explain, in the passage I have already quoted, the limited extent to which that cross-examination might be considered by the jury. [Emphasis added].

*McInroy* holds that where a witness claims that he or she has no recollection of the matters contained in a prior statement, it is within the sole discretion of the trial Judge to find that the witness is lying about his or her lack of recollection and conclude that there is an 'inconsistency' between the witness' testimony and the prior statement.[81] That is, an 'inconsistency' will arise under s. 9(2) of the *CEA* even when a witness

81 See also the excerpt from *Witnesses*, *supra* note 15, containing an explanation of the *McInroy* case and comments on meaning of the term 'inconsistency' .

does not expressly contradict the contents of a prior statement, but testifies to a lack of recollection regarding the statement that the Judge, in his or her discretion, finds unworthy of belief.