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truth of the statement, nor does it matter that as a result of such cross-examination the witness is then declared hostile. The act of cross-examining one's own witness without leave is a serious impropriety regardless of what that cross-examination produces.[26]

(c) Cross-Examination Permitted Upon the Statement Alone

Section 9(2) makes it clear that permission is given to "cross-examine the witness as to the statement". A finding that the statement is inconsistent with the evidence and the granting of subsequent permission to cross-examine does not open the door to a cross-examination of the witness at large unless the witness is subsequently declared to be adverse pursuant to the provisions of section 9(1).[27]

18.05 THE ADVERSE WITNESS: AN EXPLANATION OF SECTION 9(1) OF THE *CANADA EVIDENCE ACT* AND SECTION 23 OF THE *ONTARIO EVIDENCE ACT*

(a) General Note

The two above-noted sections, in spite of a minor difference in the wording of each, are of largely the same import and effect, and judicial interpretation of one appears to apply with equal force to the other.[28] These sections deal with oral and written statements. Section 23 of the Ontario *Evidence Act* covers the whole field of prior inconsistent statements by one's own witness in proceedings governed by that Act.[29] As has been previously noted, section 9(2) of the *Canada Evidence Act* provides an expeditious procedure for cross-examination with respect to a prior written inconsistency, and thus the practical use of section 9(1) is generally reserved for oral statements.

The main feature of both of these sections is that each requires a finding by the trial judge that the witness is "adverse" before any cross-examination at all of the witness can take place.[30] Therefore, the entire object under each section is to have the witness declared "adverse" so that cross-examination may take place. The declaration must be made before any cross-examination can take place.

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[26] *R. v. Gwozdowski*, [1973] 2 O.R. 50, 10 C.C.C. (2d) 434 (C.A.); *R. v. McCormick* (1961), 35 C.R. 222, 130 C.C.C. 196 (B.C.C.A.); *R. v. Darlyn* (1947), 3 C.R. 13 (B.C.C.A.).

[27] *McInroy v. R.*, *supra*, note 16, at 599; see also *R. v. Cooper*, [1970] 3 C.C.C. 136 (Ont. C.A.); see also *R. v. Cassibo* (1982), 39 O.R. (2d) 288 (C.A.).

[28] *Wawanesa Mutual Insurance Co. v. Hanes*, *supra*, note 1, at 526.

[29] *Ibid.*

[30] *Ibid.*

(b) What is an Adverse Witness?

The meaning of the word "adverse" is a matter of some importance as it directly affects who can be cross-examined. An unduly restrictive definition will result in the right to cross-examine some witnesses on prior inconsistent statements being denied (unless s. 9(2) of the *Canada Evidence Act* is available), and the court may be deprived of information reasonably needed to assess credibility. An interpretation that is too liberal carries with it the danger that counsel may be permitted, in effect, to easily cross-examine a witness that he has called.

Over the years there has been "a divergence of judicial opinion as to the precise meaning to be attached to the word 'adverse' as used in the section of the *Common Law Procedure Act*, 1854,"[31] which is the predecessor of section 9(1) of the *Canada Evidence Act* and section 23 of the Ontario *Evidence Act*. "Adverse" has been held to denote, on various occasions, anything ranging from a witness who is "hostile"[32] to one who is merely unfavorable in the sense of opposite in position[33] or to something in between those two terms.[34] On many occasions, the same judge[35] has used the words "adverse" and "hostile" interchangeably in the same judgment, and frequently different judges of the same court in a single case will each use one of those words to describe precisely the same witness.[36] It is clear that the confusion is still with us.[37]

It appears that the modern trend[38] is to consider "adverse" to mean opposite in position as opposed to "hostile" and to declare a witness adverse where it appears in the interests of justice that the witness should be compelled to explain his change of story. This modern trend stems from the extensive review of the entire issue by the Ontario Court of Ap-

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31 *Boland v. Globe & Mail Ltd.*, [1961] O.R. 712, at 732 (C.A.), *per* Schroeder J.A.

32 See, for example, Roach J.A. in *Wawanesa Mutual Insurance Co. v. Hanes*, *supra*, note 1, at 516 (C.A.) and the cases cited therein, and see dissenting judgment of Cartwright J. in *Wawanesa Mutual Insurance Co. v. Hanes*, [1963] S.C.R. 154, 36 D.L.R. (2d) 718.

33 See, for example, *Wawanesa Mutual Insurance Co. v. Hanes* (C.A.), *ibid.*, at 505, *per* Porter J.A.

34 *Boland v. Globe & Mail Ltd.*, *supra*, note 31, at 734, *per* Schroeder J.A.

35 See, for example, *R. v. Milgaard*, *supra*, note 17, at 222, *per* Culliton C.J.S., where he said, "The determination of whether a witness is hostile is a matter solely for the learned trial Judge. It is when the learned trial Judge is of the opinion that the witness proves adverse that s-s. (1) of s. 9 comes into play. The declaration of hostility, as provided for in s-s. (1), is an entirely different matter from that of permitting cross-examination under s-s. (2)".

36 *Deacon v. R.*, [1947] S.C.R. 531, at 534, where Kerwin J. uses the word "adverse" to describe the witness, and at 536, where Rand J. uses the word "hostile".

37 *Skender v. Barker* (1987), 18 B.C.L.R. (2d) 57 (S.C.).

38 But see cases to the opposite effect such as *R. v. Wyman* (1958), 28 C.R. 371 (N.B.C.A.) and *R. v. McIntyre*, [1963] 2 C.C.C. 380 (N.S.S.C.), where "adverse" was taken to mean "hostile" in the traditional sense without considering the matter.

peal in *Wawanesa Mutual Insurance Co. v. Hanes*,[39] wherein the two majority decisions both favoured the view that "adverse" meant opposite in position. This view has subsequently been adopted in cases such as *Boland v. Globe & Mail Ltd.*[40] and *R. v. Gushue (No. 4)*.[41]

Current judicial leaning is to declare a witness "adverse" and thus permit cross-examination where the ends of justice would be best attained by allowing such cross-examination regardless of the exact definition of "adverse". The ultimate test as to whether a witness ought to be declared "adverse" appears to be that laid down by Porter C.J.O. in *Wawanesa*,[42] where he stated that the judge hearing the matter should 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."[43]

This leaning or sentiment towards requiring a witness to explain a serious inconsistency was put thus by MacKay J.A. in *Wawanesa Mutual Insurance Co. v. Hanes*:

> The only purpose at trial, in so far as the facts of a case are concerned, is to ascertain the truth of the matters in issue and it seems to me that this purpose might well be defeated if a party were not permitted to show that a witness called by him in good faith, on reliance of the witness's previous statement, has told a story in the witness-box inconsistent with his previous statement in respect of the same facts. In such case, it is of the utmost importance, in the interests of justice, that such a witness should be compelled to explain his change of story.[44]

As a practical matter there are very few judges who would not want to see a witness confronted with any sort of relatively serious inconsistency, both as a matter of fairness to the witness so that the witness can explain the inconsistency if possible and also in order that the trial judge may properly assess the credibility of the witness. In the final analysis, it seems reasonably safe to conclude that if the inconsistency is of a serious nature and cannot reasonably be explained by usual factors such as a failure of recollection or emotional upset or the like, then the inconsistency standing alone will probably lead to a declaration that the witness is adverse so as to enable counsel to cross-examine that witness and allow the trier of fact to fully judge the credibility of the witness. There is no question that

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[39] *Supra*, note 1.
[40] *Supra*, note 31, at 720, *per* Porter C.J.O. and at 733, *per* Schroeder J.A.
[41] (1975), 30 C.R.N.S. 178, at 183 (Ont. Co. Ct.).
[42] *Wawanesa Mutual Insurance Co. v. Hanes*, *supra*, note 1, at 508.
[43] This test was specifically adopted by the Ontario Court of Appeal in *R. v. Carpenter*, *supra*, note 21, at 265, *per* Grange J.A.
[44] *Supra*, note 1, at 534.

if the inconsistency is a minor one or is perhaps credibly explained by the witness in some way, then a declaration of adversity should not be made because it has been consistently held that such statements are not to be admitted indiscriminately,[45] apparently so that parties are not at easy liberty to cross-examine their own witnesses.

(c) Evidence on the Application to Declare a Witness Adverse

In all cases where an application is made to declare a witness "adverse" on the ground that he has made a prior inconsistent statement, the court is entitled to review the statement in deciding upon the question of "adversity".[46] There is a line of cases holding that the statement could not be used as evidence on the issue of adversity;[47] however, these cases preceded the introduction of section 9(2), which clearly allows the statement to be considered as evidence of "adversity" on an application under section 9(1), and there can really be no valid reason for interpreting and applying section 23 of the Ontario *Evidence Act* in any different fashion.

A single inconsistency standing alone is acknowledged to be a sufficient basis upon which a witness may be found to be "adverse".[48]

The evidence to be used in determining the question of adversity is not limited to the prior inconsistent statement alone. The court may take into account such factors as any possible motive of the witness to deceive,[49] or the like. Other matters of importance include whether the statement can clearly be proven to have been made and whether the inconsistency is on a vital issue and whether it could be explained by emotional upset at the time of the making of the statement, or other similar circumstances, together with any relationship between the witness and any party he apparently intends to favour, etc.[50]

The entire matter of the evidence to be considered on the issue of adversity is summarized as follows:

> In cases where application is made to introduce a prior inconsistent statement under the Act, the Judge should determine whether a witness is adverse, consider the testimony of the witness, and the state-

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[45] *Ibid.*, at 508; *Boland v. Globe & Mail Ltd.*, *supra*, note 31, at 720.

[46] There can be no doubt that the trial judge is entitled to review and take into account the prior inconsistent statement in considering the question of adversity. See *Boland v. Globe & Mail Ltd.*, *ibid.*, at 734, *per* Schroeder J.A.; *R. v. Cassibo*, *supra*, note 27; *R. v. Hannah* (1983), 44 N.B.R. (2d) 107 (C.A.).

[47] See, for example, *R. v. May* (1915), 23 C.C.C. 469 (B.C.C.A.); *R. v. Brennan*, [1963] 3 C.C.C. 30, 40 C.R. 329 (P.E.I.S.C.).

[48] *Wawanesa Mutual Insurance Co. v. Hanes*, *supra*, note 1, at 508; *Boland v. Globe & Mail Ltd.*, *supra*, note 31, at 720; *R. v. Williams*, *supra*, note 19, at 335.

[49] *Wawanesa Mutual Insurance Co. v. Hanes*, *ibid.*, at 507-508, *per* Porter C.J.O.

[50] See, for example, *R. v. Cassibo*, *supra*, note 27.

> ment, 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.[51]

It is, of course, necessary, as can be seen from the above passage, that the judge must believe that the prior inconsistent statement was in fact made by the witness before there is anything that can be considered to be an inconsistency.[52]

(d) The Significance of the Declaration of Adversity: Cross-Examination at Large

There was formerly some doubt as to whether a declaration that a witness is adverse led to a full cross-examination of the witness on all issues before the court or merely on the inconsistencies themselves.

This doubt appeared to spring from both of the majority decisions in *Wawanesa Mutual Insurance Co. v. Hanes*,[53] which gave a strong indication that the only right provided by section 23, once the witness had been declared adverse, was a right to prove that the witness had made the prior inconsistent statement and perhaps a further right to cross-examine upon the inconsistencies. Porter C.J.O. appeared to indicate that the only right was to prove the statement itself, and only when the witness was declared to be actually "hostile", in the sense of showing a hostile animus, could cross-examination at large proceed. MacKay J.A. again emphasized the right to prove the prior inconsistent statement,[54] and he went on to indicate that "under the statute, if he is adverse, the only right given is to prove the prior inconsistent statement and cross-examination should be limited to the prior inconsistent statement only".[55] The court did not have to consider that precise point in *Wawanesa*, and the judgments on that point can be considered to be *obiter*.

Better authority, however, strongly indicates that cross-examination at large is to be permitted once a witness had been declared "adverse".

In *R. v. Deacon (No. 3)*[56] Dysart J.A. said, "In my opinion, which conforms with that of the other judges of this court, a witness who is declared by the court to be adverse, and therefore to be subject to cross-

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[51] *Ibid.*, at 302-303.
[52] *R. v. Williams*, *supra*, note 17, at 335.
[53] *Supra*, note 1, at 538.
[54] *Ibid.*, at 532, *per* MacKay J.A.
[55] *Ibid.*
[56] (1948), 5 C.R. 356, at 370 (Man. C.A.), *per* Dysart J.A.

examination, is subject to such cross-examination as fully and freely as though he were the witness of the opposite party". Rand J. in the same case in the Supreme Court of Canada stated "that the whole field of cross-examination, in the discretion of the court, is opened and the matters of the statement can thus be brought within the test of the testimonial response of the witness."[57]

The practice referred to in Manitoba in 1984[58] was reiterated as being the practice in Ontario in a much later case,[59] where it was stated that:

> It is clear, in my judgment, that a declaration of hostility or adversity enables the party obtaining the declaration to cross-examine at large; that the party obtaining the declaration is not limited to contradicting the witness by other evidence, nor is the party obtaining the declaration limited to cross-examination upon an inconsistent statement. I think that matter is sufficiently clear that authority is not necessary.

The matter appears to have been completely settled by *R. v. Milgaard*,[60] where it was held that once the witness had been declared to be adverse, then the right to cross-examine was not restricted. The word "hostile" was used in that case, but it was clear that the court was referring to a declaration of adversity pursuant to section 9(1) in holding that the right to cross-examine is not restricted, and this was specifically compared to section 9(2), where the right to cross-examine was restricted to cross-examination upon the inconsistencies. This judgment was approved without reservation in the Supreme Court of Canada in *McInroy v. R.*[61]

It is troubling to think that in the case of oral statements (or written statements in cases governed by the Ontario *Evidence Act*), an inconsistency may be serious enough to warrant proof and cross-examination on same but not serious enough to warrant a declaration of adversity. Does this mean cross-examination even on the inconsistency is foreclosed? It is respectfully submitted that in such situations a trial judge has a discretion in the interests of promoting a fair trial, to declare the witness adverse and permit cross-examination upon the prior inconsistent statement only and not at large. This is consistent with the previously mentioned statement of Rand J. that "the whole field of cross-examination, *in the discretion of the court*, is opened"[62] and would bring the practice respecting oral

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[57] *Deacon v. R.*, *supra*, note 36, at 538, *per* Rand J.

[58] *R. v. Deacon (No. 3)*, *supra*, note 56.

[59] *R. v. Gushue (No. 4)*, *supra*, note 41, at 181, *per* Graburn Co. Ct. J.

[60] *Supra*, note 17, at 220, *per* Culliton C.J.S.; see also *R. v. Koester* (1986), 70 A.R. 369, at 373 (C.A.), *per* Lieberman J.A.; *R. v. Marshall* (1972), 4 N.S.R. (2d) 517, 8 C.C.C. (2d) 329 (C.A.).

[61] *Supra*, note 16.

[62] *Deacon v. R.*, *supra*, note 36, at 538.

statements in line with that governing written statements as set out in section 9(2).

(e) The Procedure for Declaring a Witness Adverse and the Subsequent Cross-Examination

It seems reasonable to suggest that the appropriate procedure for obtaining a declaration of adversity pursuant to section 9(1) of the *Canada Evidence Act* or section 23 of the Ontario *Evidence Act* is one along the following lines:[63]

1. Counsel should advise the court that he is making an application pursuant to section 9(1) or section 23, whereupon the jury ought to retire.
2. The applicant's counsel should then advise the trial judge of the particulars of the statement and show the trial judge a copy if it is in writing or reduced to writing.
3. The trial judge should then hear submissions as to whether there is any *prima facie* inconsistency, and if he rules that there is no inconsistency, then that ends the matter. If there is an inconsistency, then a *voir dire* must be undertaken.
4. Upon the *voir dire*, the applicant will first examine in chief[64] the purported adverse witness and place before the witness the particulars of the making of the statement and of the statement itself (the actual document should be placed before the witness if the statement is in writing), all in an effort to obtain an admission that the statement was made. He may also examine further to obtain any other evidence to support the issue of adversity. The respondent's counsel has a right to cross-examine the purported witness either on the issue as to the making of the statement or the circumstances under which it was made or any other evidence bearing upon adversity.
5. The applicant's counsel is then permitted to call any other witnesses to prove that the statement was made, if denied, and to give any other material evidence on the issue of adversity, and, of course, the respondent's counsel may cross-examine those witnesses and adduce his own evidence on these issues.
6. The trial judge must then hear submissions and make a decision as to the following:

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[63] See especially *R. v. Cassibo, supra,* note 27; *Wawanesa Mutual Insurance Co. v. Hanes, supra,* note 1, at 508, 528, 534-53.

[64] There is to be no cross-examination at this stage; *R. v. Cassibo, ibid.*