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The Art of a Deft Direct

THE HONOURABLE JUDGE JENNIFER LOPES – BRITISH COLUMBIA PROVINCIAL COURT, FRASER REGION (SURREY)

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Outline

Part 1: The Rule Against Leading Questions

Part 2: Preparation

Part 3: Execution

Part 1:

THE RULE AGAINST LEADING QUESTIONS

The Rule Against Leading Questions *Defined*

The Rule Against Leading Questions:

- “The chief rule of practice relative to the interrogation of witnesses is that which prohibits "leading questions," i.e., questions which directly or indirectly suggest to the witness the answer he is to give. The rule is, that on material points a party must not lead his own witnesses, but may lead those of his adversary; in other words, that leading questions are allowed in cross-examination, but not in examination-in-chief.”

  Maves v. Grand Trunk Pacific R. Co., 1913 CanLII 337 (ABCA)

The Rule Against Leading Questions *Broken Down* from *Regina v. Stanton*, 2006 BCSC 2122 (CanLii)

"Leading is not what it is generally thought to be, and secondly, when it is what it is thought to be, it operates in a different way than it does every day in courtrooms throughout this province."

A leading question is a question that suggests to the witness the specific answer that the examiner wishes the witness to give or which assumes a fact not stated by the witness earlier.

Counsel should lead the witness with respect to introductory matters.

With respect to matters that are not introductory in nature, counsel should not lead the witness.

It is not improper to take the mind of a witness to the subject on which testimony is desired.

The Rule Against Leading Questions *Broken Down* from *Regina v. Stanton*, 2006 BCSC 2122 (CanLii)

It is permissible to lead in the following areas:

- For the purpose of having the witness identify a person or thing.
- For the purpose of proving the oral statement of an earlier witness.
- Where counsel has tried to get the evidence with non-leading questions and it is obvious that the witness' memory fails the witness temporarily.
- Leading questions are required by the complicated nature of the matter.
- Where the witness simply does not understand, or is a child, or is one who has difficulty with the language or is ill.
- With the permission of the court where necessary in the interests of justice that leading occur, leading will occur.

The Rule Against Leading Questions *Broken Down* from *Regina v. Stanton*, 2006 BCSC 2122 (CanLii)

If a witness is relating a conversation and, in the mind of counsel, the witness seems to leave something out, counsel may ask him to repeat his evidence. If, at that point, counsel still feels something has been left out, he can suggest the missing subject matter. If that fails to bring out the evidence counsel desires, he may then put a question which is truly leading in nature, that is to say, contains the omitted bit of evidence.

Leading goes only to the weight of the evidence in any event.

Exceptions to the rule against leading questions: Cross-Examine the Adverse or Hostile Witness

***Regina v. Milgaard,* 1971 CanLII 792 (SKCA)**

***R. v. Figliola*, 2011 ONCA 457 (CanLII):**

[50] This jurisprudence confirms that an "adverse" witness is one who is opposed in interest or unfavourable in the sense of opposite in position to the party calling that witness, whereas a "hostile" witness is one who demonstrates an antagonistic attitude or hostile mind toward the party calling him or her. In R. v. Coffin, 1956 CanLII 94 (SCC), [1956] S.C.R. 191, [1956] S.C.J. No. 1, 114 C.C.C. 1, at p. 213 S.C.R., p. 24 C.C.C., Kellock J. described a hostile witness as one who does not give his or her evidence fairly and with a [page655] desire to tell the truth because of a hostile animus towards the prosecution.

[51] The common law right of a party to cross-examine his or her own witness at large with leave of the trial judge, if in the judge's opinion the witness is "hostile", is not affected by s. 9(1) of the Canada Evidence Act: Cassibo, per Martin J.A., at p. 302 O.R. Section 9 makes no reference to a witness "proving hostile" and contains no suggestion of a right to cross-examine at large. As Porter C.J.O. pointed out in Wawanesa, a declaration of hostility and its consequences are something that arise "in addition [to]" a finding of adversity. At pp. 507-508 O.R., after reviewing the steps to be taken by a judge in deciding whether to make a declaration of adversity and the factors to be considered, he stated that "[t]he Judge, if he declared the witness hostile, might, in addition permit him to be cross-examined" (emphasis added). It follows that a declaration of adversity pursuant to s. 9(1) was not, itself, sufficient to trigger a right in the Crown to cross-examine Ms. Pignatelli generally as to all matters in issue

Part 2:

PREPARATION

Preparation Tips

Early & Thorough

Your Objectives Should Drive Your Content & Order of Topics

- Enhance Witness Credibility
- Prove Elements of the Offence/Defence
- Tell a Compelling Narrative
- Avoid Unnecessary Objections

Preparation Tips

Meeting with the witness ahead of trial:

- Establish comfort/rapport
- Help them to understand the process
- Prepare them for the exhibits that will be entered through them
  - Establish familiarity with substance & process
  - Pre-mark if necessary
- Explain why embarrassing/uncomfortable topics may be covered in direct
- Help them anticipate cross-examination

Preparation Tips

Laying out your examination questions/outline on paper:

- Full sentence questions?
- Point form?
- Answers only?

  (A matter of personal preference)

Part 3:

EXECUTION

The Witness - Not the Examiner - Tells the Story

Get out of the witness's way.

Don't interrupt the flow of a compelling witness.

Telling the witness' story for them will detract from the Court's ability to assess your client's credibility.

Direct the Witness to the Evidence You Want

Maintain control – keep the witness on topic.

Avoid the “and then what happened” direct examination (boring).

Break up the stream of consciousness.

Stop the narrative and loop back for detail.

Refresh the Memory of a Forgetful Witness

General Rule: A Trial Judge may permit the memory of a witness to be refreshed while the witness is testifying.

1. When the witness appears to be struggling or has forgotten a point, counsel may ask the witness if the witness made or reviewed an earlier record and from there proceed to establish that this was done at a time when the memory would reasonably be expected to have been fresh.
2. The witness can be asked if it would be of assistance to review the aide-memoire.
3. If the witness responds in the affirmative or if circumstances make it clear than an objective witness would probably be assisted, then counsel should ask the trial judge for permission to place the aide-memoire before the witness.
4. Upon permission being granted, counsel can proceed with the examination in chief and the witness can testify while clanking at the aide-memoire from time to time as may be necessary or even reading from the same.

Regina v. Shergill, (1997), 13 C.R. (5^{th}) 160; *On Trial*, pg. 131

Proceeding by Way of “Past Recollection Recorded”

Past Recollection Recorded is similar but *different* from Refreshing Memory.

This applies to a situation where the witness has absolutely no recollection as to the fact that has been recorded in a record and merely showing the note to the witness does not refresh the memory in any way. The witness can only swear that because the particular fact was recorded by him at a time when he had actual knowledge, then the record itself must be accurate in terms of what it discloses.

The record upon which the past recollection is recorded, as opposed to the *viva voce* testimony, specifically becomes the evidence.

PRR is a recognized exception to the hearsay rule.

“There is a distinction between looking at notes previously made by a witness at a time when his memory was fresh in order to refresh a present memory of the previous fact and looking at notes which do not refresh an actual memory of a fact noted but from which the witness can say, as in the p resent instance, I do not remember the number on the watch case even though I noted it at the time, but because I wrote the number on the sales slip I am certain that is the case number on the watch which I sold to Mr. Willet.”

- *R v. Alward* (1977), 73 D.L.R. (3d) 290

Handling Unsavoury of *"Vetrovec"* Witnesses

Blunt the cross-examination attack by leading the bad stuff.

Establish that the witness is attending because of a subpoena.

Don't get too cozy.

Stand Down (and Speak Privately) with a Struggling/Difficult Witness

Benefit: Get the witness back on track.

Risk: The potential for an allegation of “woodshedding”.

Re-Examine the Witness

Seeking Leave to Speak to the Witness Prior to Re-Examination

"No matter what the position may be elsewhere, the weight of opinion in this province favours allowing counsel to discuss the evidence with his or her witness after cross-examination is ended and before re-examination. This allows counsel to correct honest mistakes, clear up ambiguities, and clarify points left obscure during cross-examination without the risk of unanticipated, and perhaps unresponsive, answers from the witness. Forbidding any communication between counsel and a witness before re-examination has a considerable chilling effect on counsel's willingness to re-examine at all. Given the almost universal antipathy to asking a question where one does not know what the answer will be, many counsel will simply forego re-examination if unable to discuss the evidence in advance. While there will be situations (as in ***Peruta***, *supra*) where any communication at all would be inappropriate, I would not adopt a prohibition on communication as a general rule. In my view, the trial process is better served by a more flexible approach.

I am persuaded that the practice should be that expressed by Macdonald, J. in his article written subsequent to the decision in ***Emil Anderson***. Counsel are not permitted to speak to their witnesses after cross-examination and before or during re-examination about the evidence or issues in the case without leave of the court. In most cases, leave will be given readily. This practice has the advantage of permitting the trier of fact to take into account, when weighing evidence in re-examination, whether a discussion with counsel has taken place. In some exceptional cases, leave to talk to the witness will be refused.

Nothing I have said here should be taken as having application to defence counsel's right to discuss the evidence with the accused in a criminal case after cross-examination and before his or her re-examination. I am inclined to the view that the special vulnerability of an accused person in a criminal case requires that he or she be permitted to discuss evidence to be given in re-examination without the necessity for leave of the court: see Mewett, *supra*, page 6-6. However, this aspect was not fully argued before me so the question remains open."

R. v. Montgomery, 1998 CanLII 3014 (BCSC)

Re-Examine the Witness (cont.)

"The right to re-examine exists only where there has been cross-examination, and must be confined to matters arising in cross-examination. New facts cannot be introduced in re-examination. The judge may, however, in his or her discretion, grant leave to introduce new matters in re-examination and the opposite party may then cross-examine on the new facts. In re-examination leading questions may not be asked."

R. v. Violette, 2009 BCSC 75 (CanLII)

"The law concerning re-examination was succinctly stated by Watt J.A. for the court in *R. v. Candir* (2009), 2009 ONCA 915 (CanLII), 257 O.A.C. 119, at para. 148:

> It is fundamental that the permissible scope of re-examination is linked to its purpose and the subject-matter on which the witness has been cross-examined. The purpose of re-examination is largely rehabilitative and explanatory. The witness is afforded the opportunity, under questioning by the examiner who called the witness in the first place, to explain, clarify or qualify answers given in cross-examination that are considered damaging to the examiner's case. The examiner has no right to introduce new subjects in re-examination, topics that should have been covered, if at all, in examination in-chief of the witness. A trial judge has a discretion, however, to grant leave to the party calling a witness to introduce new subjects in re-examination, but must afford the opposing party the right of further cross-examination on the new facts."

R. v. Sipes, 2011 BCSC 1906 (CanLII)

Style

Your own.

Conversational.

Short, direct questions (avoid long and complicated questions).

Not too ‘cute’ / Not too formal.

Key Takeaways

Tips for Deft Direct Examination:

1. Be prepared: know your case
2. Organize your examination logically
3. Use plain language
4. Focus your witness
5. Listen to the witness's testimony
6. Ask for explanations where necessary
7. Anticipate cross-examination
8. Know the Rules of Evidence (Refreshing memory; PRR; Authenticating Exhibits; Admissibility; Hearsay etc.)
9. Be prepared: know your case