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# "Putting" *Browne v Dunn* into Perspective

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**Case commented on:** *R v KWG*, 2014 ABCA 124

The century old rule in *Browne v Dunn* (hereinafter "the rule") holds that if counsel intends to present evidence contradictory to a witness's testimony as part of his or her argument, he or she must put this version of events to the witness during cross-examination. But just how far must counsel go to satisfy this requirement? The Alberta Court of Appeal has recently shed some light on this question.

The rule is summarized in *R v Pasqua*, [2009] AJ No 702, 2009 ABCA 247: "there is a general duty on counsel to put a matter directly to a witness if counsel is going to later adduce evidence to impeach the witness' credibility or present contradictory evidence." The purpose of the rule is well-grounded; witnesses should be given an opportunity to respond to competing versions of events. Applying a rigid interpretation to *R v Pasqua*, it would appear as if during cross-examination, counsel would have to say the words "I put to you …" before presenting the witness with contradictory evidence. This formal and rigid interpretation of the rule has now been clarified, and a more flexible approach adopted.

In the British Columbia Court of Appeal decision *R v Drydgen*, 2013 BCCA 253 the court was unanimous in its interpretation of the rule. The case involved a home invasion. Despite allegations that the accused had pointed a silver handgun at the resident of the home, the police did not find a handgun on or near the accused. This fact became a central issue at trial. The victim was cross-examined extensively on the reliability of his evidence; however defence counsel did not suggest to him that he was mistaken about the existence of the handgun. On appeal, Justices Ian Donald, Mary Newbury, and Harvey Groberman ruled that the trial judge had erred in applying *Browne v Dunn* to the case. The relevant paragraphs from the British Columbia Court of Appeal decision are reproduced below:

17 While a problem of fairness could theoretically arise from a failure to cross examine on a point later advanced in argument, the concern will almost always be considerably attenuated. This is especially so when the argument flows naturally from the direction taken in cross-examination, rendering any suggestion of ambush illusory: see *R v Ali*, 2009

BCCA 464 at para. 39. The confrontation must be a meaningful exercise rather than merely the performance of a ritual where the witness is invited to agree with a proposition later to be argued to the effect that his testimony is unreliable. I refer in this regard to the remarks of Chief Justice McEachern in *R v Khuc*, 2000 BCCA 20, 142 CCC (3d) 276:

> [44] Crown counsel's point is well taken. There can be no doubt that the general rule is that counsel must confront a witness with any new material he or she intends to adduce or rely on after the witness has left the box. However, the rule does not go so far as to require counsel to ask contradicting questions about straightforward matters of fact on which the witness has already given evidence that he or she is very unlikely to change.
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> (Emphasis original)

The position taken by the British Columbia Court of Appeal was adopted unanimously by the Alberta Court of Appeal in *R v KWG*. This case involved allegations that the accused had sexually-touched his step-daughter when she was 10-11 years old. On appeal, the appellant argued that the crown prosecutor did not expressly put allegations of collusion, perjury, and witness-coaching to him and his wife. It was argued that by not expressly putting these allegations to the appellant, the crown prosecutor had violated *Browne v Dunn*. In response, the Alberta Court of Appeal cited *R v Drydgen* and concluded that "[n]ot every matter of contradicting evidence or comment needs to be put to a witness. Therefore, the prosecutor was not required to expressly put allegations of collusion to the defence of other witnesses." (at para 45) Rather, witnesses must be "appropriately confronted" (at para 46) in order to avoid a scenario where the opposing party is surprised by allegations.

These rulings make it clear that at times the rule can be overzealously applied. *Browne v Dunn* persists as a precedent, however the rule can be easily satisfied. During cross-examination, counsel must appropriately confront the witness with the competing theory or story. He or she need not explicitly put all contradicting evidence to a witness. If a question is truly redundant, it need not be asked. Finally, the magic words "I put it to you …", need not be said.

In the situation that the rule is broken, the question turns to the appropriate remedy. *R v McNeill*, [2000] OJ No 1357, 144 CCC (3d) 551 provides two potential remedies. The primary remedy, and the one to be considered first, is to recall the witness. The aggrieved party can then either accept or decline the recall of their witness. Should they decline it, the secondary option need not be considered. In situations where it is impossible or highly impracticable to recall the witness, the secondary remedy is for the trial judge to consider giving the jury special instructions. If special instructions are warranted, the jury should be told that in assessing the weight to be given to the uncontradicted evidence, they may properly take into account the fact that the opposing witness was not questioned about it. The jury should also be told that they may take this into account in assessing the credibility of the opposing witness.