THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

INTRODUCING EVIDENCE AT TRIAL:
A BRITISH COLUMBIA HANDBOOK – THIRD EDITION

EXCERPT FROM CHAPTER 21

Statements—Prior Consistent

I. WHAT IS A PRIOR CONSISTENT STATEMENT? [§21.1]

A prior consistent statement is an out-of-court statement that is consistent with the testimony of a witness, party, or an accused. Generally, prior consistent statements are not relevant and therefore not admissible.

II. THE RULE—SELF-SERVING STATEMENTS ARE INADMISSIBLE [§21.2]

Generally, prior consistent statements of a witness or accused are inadmissible evidence because they are self-serving, self-corroborative, and lack probative value and because they constitute hearsay when adduced for the truth of their contents (*R. v. Dinardo*, 2008 SCC 24 at para. 36).

Prior consistent statements are not more trustworthy because of the repetition of a version of events by a witness (*R. v. Stirling*, at para. 5). Repetition does not make a statement more likely to be correct (*R. v. Stirling*, 2008 SCC 10 at para. 12). Consistency is just as agreeable to lies as to the truth (*R. v. Laramee* (1991), 65 C.C.C. (3d) 465 at 484 (Man. C.A.)).

As a result, a witness or accused cannot testify to or put into evidence his or her own, out-of-court, previous statements made to other persons simply to show consistency. Neither can the witness tender into evidence an unsworn statement without being put on oath and subject to cross-examination (*R. v. Simpson* (1988), 38 C.C.C. (3d) 481 at 496 (S.C.C.); *R. v. MacAulay* (1997), 120 C.C.C. (3d) 353 at paras. 21 and 22 (B.C.C.A.)). The accused cannot call other persons as witnesses to testify as to prior statements that he or she made out of

court (*R. v. V. (J.M.)*, 2000 BCSC 1151 at para. 130). Such evidence is not only self-serving, it is hearsay and would enable an accused, unlike other witnesses who provide evidence at trial, to escape the testing of the evidence in cross-examination.

III. EXCEPTIONS TO THE RULE AGAINST SELF-SERVING STATEMENTS [§21.3]

The prior consistent statement(s) of a witness may be relevant and admissible in evidence, although not necessarily for the truth, for one of the following purposes:

(1) The statement(s) provide evidence as to the physical, mental or emotional state of the witness (narrative exception).

(2) The statement(s) show the early reporting of an incident to rebut an allegation of recent fabrication.

(3) The statement(s) clarify the degree to which the witness or accused has provided contradictory or inconsistent evidence.

(4) The statement(s) are part of a spontaneous exclamation or the *res gestae*.

(5) The statement(s) show prior identification of an accused by a witness.

(6) The statement(s) record a past recollection.

For a discussion of statements on prior identification, see chapter 22 (Statements—Prior Identification) and for past recollection recorded, see chapter 24 (Statements—Refreshing Memory and Past Recollection Recorded).

A. NARRATIVE EXCEPTION—THE STATE OF THE WITNESS [§21.4]

The narrative exception recognizes that a witness's statement or statements to other persons about an incident may show the physical, mental, or emotional state of the witness. In such instances, the fact that the witness made a prior consistent statement is a "narrative exception" and admissible evidence. Such evidence assists the trier of fact in understanding how the witness's allegations were initially disclosed, and in assessing the truthfulness or credibility of the witness (*R. v. Dinardo*, 2008 SCC 24 at para. 37).

The fact that the witness made the statement(s); when the witness made the statement(s); why the witness made the statement(s); and why the witness didn't make the statement(s) at the earliest opportunity, remain relevant and admissible information to demonstrate the conduct of the witness. From the conduct of the witness, the trier of fact can draw inferences to determine the credibility of the witness (*R. v. Hughes*, 2001 BCCA 424; *R. v. Ay* (1994), 93 C.C.C. (3d) 456 (B.C.C.A.)).

Prior consistent statements may be admissible as circumstantial evidence of the state of mind of the witness as well as narrative to explain the conduct of the witness, and thus, they provide context to assess the truthfulness of the witness (*R. v. E. (M.)*, 2015 BCCA 54).

The actual content of the prior complaint remains inadmissible for the truth of the assertion within the statement (*R. v. Hughes*).

For jury instructions in a criminal trial, see G. Ferguson, et al., *Canadian Criminal Jury Instructions*, 4th ed. (CLEBC, 2005–), Instruction 4.86.

B. RECENT FABRICATION EXCEPTION [§21.5]

1. RECENT FABRICATION OF WITNESS [§21.6]

A recent fabrication is one made or invented after the time within which a person would normally complain (*R. v. F. (H.)* (1990), 55 C.C.C. (3d) 286 at 311 (Alta. C.A.), affirmed [1991] 3 S.C.R. 322). It is not necessary that a fabrication be particularly recent, as it is not the currency of the fabrication but whether the witness made up a false story at some point after the event about which the witness is testifying.

The allegation of recent fabrication need not be made during the cross-examination of the witness. Other evidence led by the defence which enables the trier of fact to draw the reasonable inference that the witness recently fabricated his or her evidence can amount to an allegation of recent fabrication (*R. v. Billy*, [1990] B.C.J. No. 2566 (QL) (C.A.)). Indeed, the allegation may be inferred from the whole circumstances of the case and the way the trial has unfolded (*R. v. Pangilinan* (1987), 39 C.C.C. (3d) 284 (B.C.C.A.)). The allegation of recent fabrication need not be expressly made (*R. v. Stirling*, 2008 SCC 10 at para. 5).

When an allegation of "recent fabrication" has arisen, a witness may be examined either in-chief or on re-examination about a prior statement that is consistent with his or her testimony, provided the statement pre-dates the event which is alleged to have caused the recent fabrication. The prior statement is admitted not for the truth of the contents but on the issue of the credibility of the witness in rebutting the allegation of recent fabrication (*R. v. B. (A.J.)*, [1995] 2 S.C.R. 413 at 414). The prior consistent statement has probative value where it illustrates "...that the witness's story was the same even before a motivation to fabrication arose" (*R. v. Stirling* at para. 5). The prior statement must not be used to assess the truth of its contents, or to show the witness is more likely telling the truth (*R. v. Stirling* at para. 7). The use of prior consistent statements involves the risk that evidence of this kind can be easily fabricated. However, such risk is a matter of weight to be ascribed to the evidence by the trier of fact (*R. v. Soares* (1987), 34 C.C.C. (3d) 403 at 434 (Ont. C.A.)).

2. RECENT FABRICATION OF ACCUSED [§21.7]

The Crown may allege that the accused, a co-accused, or a witness testifying on behalf of the accused, recently fabricated a version of events (that is, the accused or the defence witness was first offering at trial, and not before, facts which are exculpatory for the accused).

When an allegation of recent fabrication is made, a prior consistent statement of the defence witness (*R. v. V. (J.M.)*, 2000 BCSC 1151), or a prior consistent statement of the accused, may be tendered into evidence at trial to rebut the allegation (*R. v. Wannebo* (1972), 7 C.C.C. (2d) 266 (B.C.C.A.)).

The time at which such statements are made remains relevant to whether the accused concocted or fabricated the "story" or his or her version of events. The probative value of the statements correlates to the time when the statements were made in relation to the offence or alleged incident (*R. v. MacAulay* (1997), 120 C.C.C. (3d) 353 at para. 24 (B.C.C.A.)).

To rebut an allegation of recent fabrication, the defence may call a second defence witness who was present at the time that the first defence witness or the accused made the prior consistent statement. This second witness would provide the following evidence:

(1) that the first defence witness or the accused made a statement to the second witness at an earlier date; and

(2) that the statement made to this second witness was made before the first defence witness and the accused had an opportunity or motive to concoct a story.

This evidence would rebut the allegation of recent fabrication if the statement testified to by the second witness provided the same "story" or same version of events as that to which the first defence witness or the accused testified in court.

For jury instructions on recent fabrication in a criminal trial, see *Canadian Criminal Jury Instructions*, Instruction 4.89.

C. RECENT COMPLAINT IN RELATION TO SEXUAL OFFENCES [§21.8]

The recent complaint doctrine permitted evidence of both the fact of a recent complaint and the content of a recent complaint by a complainant to be admitted at trial in order to show the complainant's credibility as a witness. This doctrine no longer exists for the purpose of bolstering the credibility of the complainant.

Section 275 of the *Criminal Code* disallows evidence of recent complaint because persons who have been victims of sexual offences do not behave in a predictable fashion. Their reactions vary, and prompt complaint

at the first opportunity does not always indicate that a complainant was indeed wronged (*R. v. M. (T.E.)* (1996), 110 C.C.C. (3d) 179 at para. 10 (Alta. C.A.)). Timing of a complaint is simply one factor that a trier of fact may consider in assessing a complainant's credibility (*R. v. D. (D.)*, 2000 SCC 43 at para. 65). Other factors that a trier of fact may consider in determining whether the complainant behaved in a manner consistent with his or her version of events include the complainant's state of mind, the complainant's age and maturity level, the complainant's confidence and composure, and the complainant's relationship to the alleged abuser (*R. v. M. (T.E.)* at 183).

While s. 275 disallows recent complaint evidence, the fact of a complaint may fall within another exception and be admissible evidence—to rebut an allegation of recent fabrication, as part of the *res gestae*, or as evidence of the state of the witness (a narrative exception).

D. SPONTANEOUS EXCLAMATIONS OR RES GESTAE [§21.9]

Spontaneous exclamations fall within an exception to the hearsay rule and are admissible if they are made close in time to the event in question.

The contemporaneity of a spontaneous exclamation or *res gestae* statement to an event make the statement inherently credible for two reasons:

(1) the immediacy of the exclamation relative to the event in question prevents the person uttering the statement from reflecting on the matter and conjuring a falsehood; and

(2) the memory of the person uttering the statement will be fresh as only a short time will have lapsed between the act in question and the exclamation.

The principles surrounding the relevance, weight, and admissibility of a spontaneous exclamation or *res gestae* statement of a witness apply to accused persons as well.

The following instances exemplify prior consistent spontaneous exclamations which are admissible to support an accused's defence:

(1) an exculpatory statement made by an accused when police recover an incriminating article, such as controlled substances (*R. v. Risby* (1976), 32 C.C.C. (2d) 242 (B.C.C.A.), affirmed [1978] 2 S.C.R. 139);

(2) an exculpatory statement made by an accused when police find the accused with recently stolen property (*R. v. Graham* (1972), [1974] S.C.R. 206); and

(3) an exculpatory statement made by an accused in the immediate aftermath of a motor vehicle accident (*R. v. MacAulay* (1997), 120 C.C.C. (3d) 353 at para. 19 (B.C.C.A.)).

In British Columbia, the law remains unsettled as to the admissibility of an accused's prior exculpatory spontaneous statement tendered to show his reaction when first confronted by the authorities, even if the accused testifies and is subject to cross-examination (*R. v. Dockerill*, 2013 BCSC 1454 at paras. 47–52. Such statements have been ruled admissible in Ontario (*R. v. Edgar*, 2010 ONCA 529, leave to appeal refused 2011 CanLII 19612 (SCC); *R. v. Liard*, 2015 ONCA 414, leave to appeal refused 2016 CanLII 13758 (SCC)).

For further discussion of spontaneous statements, see chapter 10 (Hearsay Evidence).

E. CLARIFICATION OF CONTRADICTORY OR INCONSISTENT EVIDENCE [§21.10]

In some circumstances, counsel may apply to the court to re-examine a witness on a prior statement in order to give context to emphasize the consistencies and the extent of contradictions made by the witness in cross-examination.

1. CLARIFICATION OF WITNESS'S EVIDENCE [§21.11]

The truthfulness of a witness's evidence at trial cannot be proven by showing that the witness's evidence is consistent with a prior statement. That is to say, prior consistent statements cannot confirm in-court

testimony. However, in some cases, prior consistent statements may be admissible to provide context for assessing the credibility of a witness (*R. v. Dinardo*, 2008 SCC 24 at para. 39).

The admission of the prior consistent statement is not allowed simply to show consistency (and thus, probable truthfulness of the witness) merely because cross-examination has shown inconsistency. The admission into evidence of the prior consistent statement can be used by the trier of fact only to understand the number or extent of contradictions or inconsistencies in the witness's evidence (*R. v. Rodney* (1988), 46 C.C.C. (3d) 323 at 331 (B.C.C.A.), affirmed on other grounds [1990] 2 S.C.R. 687).

Where the accuracy of the record of the prior consistent statement is in issue, the court may permit the challenging party to adduce proof as to its reliability (*R. v. Pickton*, 2007 BCSC 1444 at para. 9).

In criminal trials, the statutory authority to cross-examine a witness on a previous statement made by the witness is s. 10(1) of the *Canada Evidence Act*. For further discussion on cross-examination on a previous statement, see chapter 23 (Statements—Prior Inconsistent). In civil trials, the statutory authority to cross-examine on a previous statement in writing of a witness is s. 13 of the *Evidence Act*, R.S.B.C. 1996, c. 124.

Practice Point—Re-examination on Prior Statement

The following steps outline the process to tender a witness's prior consistent statement:

- The witness has testified in examination-in-chief.
- The witness has been cross-examined, and parts of the witness's statement(s) were put to the witness to suggest contradiction between the witness's evidence at trial as compared to the statement(s).
- The party re-examining the witness (often, the Crown) applies to the court to re-examine the witness on a prior consistent statement(s) made by the witness and tells the court why. The Crown may also seek to tender into evidence the witness's prior consistent statement (in whole, part, or an edited part).
- If the party who cross-examined the witness (often, defence counsel) objects to the re-examination or tendering of the statement(s), then the Crown should request that the judge hold a *voir dire* in order for the judge to hear arguments and to rule on the admissibility of the statement(s).
- The trial judge rules as to the admissibility of the prior consistent statement. If the trial judge rules that the statement is admissible, the statement as a whole, in part, or in an edited version, will be admitted into evidence.

2. CLARIFICATION OF ACCUSED'S EVIDENCE [§21.12]

"[O]ne of the best pieces of evidence that an innocent man can produce is his reaction to an accusation of a crime" (*R. v. McCarthy* (1980), 71 Cr. App. R. 142 at 145 (H.L.)). However, the difficulty lies in tendering a prior consistent statement of an accused in the accused's case.

Generally, only the Crown can introduce prior statements of an accused after the court finds that the accused made the statement voluntarily. Usually the statements are inculpatory. This evidence is admitted as evidence against the accused, not as evidence for the accused (*R. v. MacAulay* (1997) 120 C.C.C. (3d) 353 at para. 22 (B.C.C.A.); *R. v. Simpson*, [1988] 1 S.C.R. 3 at para. 22).

However, in limited circumstances the accused may introduce an exculpatory statement. The fact that an accused provided an exculpatory statement (rather than the content of that statement) to police *may* be admissible evidence at trial. An accused person has the right to remain silent when being questioned, arrested, or accused of a crime by police.

An accused cannot seek to tender into evidence a denial or exculpatory statement made by him to authorities. However, if an accused made a statement, an accused can testify that he made a statement to the police after

his arrest, and that that statement was similar to the evidence he gave at trial (*R. v. Lucas* (1962), [1963] 1 C.C.C. 1 (S.C.C.); *R. v. Liu* (2003), 172 C.C.C. (3d) 79 (Ont. S.C.J.)).

In British Columbia, the law remains unsettled as to the admissibility of an exculpatory spontaneous statement made by an accused showing his reaction when first confronted by the authorities (if the accused testifies and opens himself to cross-examination) *R. v. Dockerill*, 2013 BCSC 1454 at paras. 47–52). However, such statements have been held to be admissible in Ontario (*R. v. Edgar*, 2010 ONCA 529, leave to appeal refused 2011 CanLII 19612 (SCC); and *R. v. Liard*, 2015 ONCA 414, leave to appeal refused 2016 CanLII 13758 (SCC)).

The content of a prior exculpatory statement of an accused may be admissible at trial in rare circumstances. The defence may use a prior consistent statement of an accused in instances similar to the occasions when the Crown uses a prior consistent statement of a witness under the principles outlined in s. 10 of the *Canada Evidence Act*, and in the case of *R. v. Rodney* (1988), 46 C.C.C. (3d) 323 at 326 (B.C.C.A.), affirmed on other grounds [1990] 2 S.C.R. 687. See §21.11.

a. Tendering a Prior Consistent Statement when the Accused Testifies at Trial [§21.13]

When the accused testifies at trial, the Crown may adduce a prior inconsistent statement of the accused provided that the statement meets the rules for the admissibility of statements by accused persons. The Crown may seek to cross-examine the accused on this prior inconsistent statement, but not seek to tender that statement as part of the Crown's case. The Crown is not adducing the statement as proof of the facts contained in the statement. Rather, the Crown is seeking to use the statement to cross-examine the accused to discredit his or her testimony only.

In these situations, the defence can rely on portions of the accused's prior statement for clarification as to the number and extent of contradictions between the accused's evidence at trial and the prior statement, or for an explanation as to why the accused gave an inculpatory prior statement. The defence would seek to have the prior statement of the accused (as a whole, in part, or an edited version) tendered into evidence under s. 10 of the *Canada Evidence Act* (*R. v. Rodney* at 326; *R. v. Fischer*, 2005 BCCA 265 at paras. 47 to 49, leave to appeal refused [2005] S.C.C.A. No. 308 (QL)).

As with statements of other witnesses, the extent to which the judge admits the statement of an accused—either all of it, part of it, or edited parts of it—depends on the extent of cross-examination by the Crown (*R. v. Fischer* at para. 48).

When the accused testifies at trial, cross-examination of the accused reduces the inherent dangers surrounding the self-serving nature of exculpatory statements (*R. v. Suzack* (2000), 141 C.C.C. (3d) 449 at para. 183 (Ont. C.A.), leave to appeal refused [2000] S.C.C.A. No. 583 (QL)). Caution must be taken in the way the trial judge instructs the jury on the use of such statements.

b. Tendering a Prior Consistent Statement when the Accused Does Not Testify at Trial [§21.14]

The defence may seek to adduce exculpatory statements even when the accused does not testify at trial. In such instances, if a witness for the defence or for the Crown testifies about a statement made by the accused, the defence may seek to adduce through that witness, or through other witnesses, further exculpatory statements made by the accused in order to clarify or qualify the statement about which the first witness testified (*R. v. Suzack* at paras. 178 to 182).

The defence's application to adduce such evidence may occur even during the Crown's case (*R. v. Suzack*).