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The Law of Evidence, 3rd ed. (2002)

CHAPTER 10, Methods of Presenting Evidence

5. REFRESHING MEMORY

5.1) Generally

Testifying is an unnerving experience for most people. This stress can increase the natural human tendency to forget things that are in fact stored in the human memory. A memory, however, can be jarred in a number of ways. "[A] song, a scent, a photograph, an allusion, even a past statement known to be false" can revive a memory. [FN10-47 below] More commonly, written statements believed to record facts accurately are relied upon to refresh a faded memory. The law enables counsel, subject to limits, to attempt to refresh the memory of a witness.

[FN10-47]

5.2) Prior to Trial

Witnesses are free to use whatever means they choose to refresh their memories prior to trial, although the means used can affect the weight that is given to their evidence.

Prior to the witness testifying, there are no limits on what can be done to improve his recall. [FN10-48 below] The law is unable to control effectively what occurs before the witness is in court. Opposing counsel is entitled to explore what means, if any, were undertaken to refresh a witness's memory. Where documents or real items have been consulted, the trial judge has a discretion to order them to be produced to opposing counsel. [FN10-49 below]

[FN10-48]

[FN10-49]

In some cases, witnesses have even been subjected to hypnosis or injected with sodium amytol, a supposed "truth serum," [FN10-50 below] in an effort to improve their memories. Some courts have held that the use of these techniques is a matter affecting the weight of the evidence but does not render it inadmissible. [FN10-51 below] Despite substantial controversy in the scientific community about the ability of these techniques to provoke accurate accounts of what happened, those who take this view consider it to be too harsh and blunt to simply jettison the evidence without admitting it and allowing it to be evaluated. Other courts, dealing particularly with hypnosis, however, have required the conduct of voir dieres to determine admissibility on a case-by-case basis, depending on

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the qualifications of the expert, and compliance with appropriate safeguards during the hypnosis. [FN10-52 below]

[FN10-50]

[FN10-51]

[FN10-52]

5.3) During Trial

Past Recollection Recorded

A witness may, with leave of the court, refresh her memory in court from a document or an electronic record that was recorded reliably. The witness must use the original, if it is available, but where it is not, an authenticated copy can be relied on. If the record is a document created by the witness, it must have been created at a time when the memory of the witness was sufficiently fresh to be vivid and probably accurate. If the record is a document created by another, or an electronic recording, that document or recording must have been reviewed by the witness at a time when his memory was sufficiently fresh to be vivid and probably accurate. The witness can rely on the document or electronic record to assist in presenting his testimony only if the witness is able to assert that the document or recording accurately represents his recollection at the time it was made.

Present Recollection Revived

There is authority to the effect that a witness may consult any document while testifying. As long as the document sparks an actual recollection of the event recorded, the witness can present oral testimony about the event remembered.

Transcripts and Depositions

A court may allow witnesses who cannot recall matters they have previously testified about to be shown transcripts of their earlier testimony or their depositions. There is no contemporaneity requirement, nor is there a need for the witness to have read over the transcript and to have verified that it accurately recorded her testimony.

As described above, questions alluding to events may stimulate the memory of a witness. Or counsel may even obtain leave to ask leading questions of her witness when the memory cannot otherwise be stimulated and it is in the interests of justice to permit such questions. Most often, documents will be relied upon.

5.3 (a) Past Recollection Recorded

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Provided certain prerequisites are met, a rule generally known as "past recollection recorded" permits witnesses to use, in court, documents (such as business records, or memoranda of events) or electronic recordings, [FN10-53 below] to assist them while giving their testimony. "The admission of past recollection recorded is an exceptional procedure and the conditions precedent to its reception should be clearly satisfied." [FN10-54 below]

[FN10-53]

[FN10-54]

First, this rule should not be used to permit a witness to use any document or electronic recording unless the witness actually needs to have his memory refreshed. The refreshing memory rules are intended to facilitate the supply of testimony that would otherwise be unavailable, not to bolster the testimony witnesses are able to give in any event. Nor should this rule be used to enable a party to control the evidence his witness will supply. In *R. v. Rose* the Crown presented a Crown witness with her written statement as soon as she took the stand and tried to use the record as a script for the testimony. This was inappropriate, and amounted to improperly leading the witness. [FN10-55 below]

[FN10-55]

Relying on *Wigmore on Evidence*, the Supreme Court of Canada has described the other prerequisites that apply where the doctrine of "past recollection recorded" is relied on:

1. The past recollection must have been recorded in some reliable way.
2. At the time [he made or reviewed the record, his memory] must have been sufficiently fresh and vivid to be probably accurate. [FN10-56 below]

[FN10-56]

3. The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time [he reviewed it]. The usual phrase requires the witness to affirm that he "knew it to be true at the time."
4. The original record itself must be used, if it is procurable. [FN10-57 below]

[FN10-57]

Although described as exceptional, this procedure is routinely used to enable police officers to use their police notes; given the precise nature of the evidence police officers

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have to provide and the repetitive nature of the work they do, police officers frequently require assistance to recall matters of detail pertaining to particular investigations. The usual series of questions is often presented in a leading fashion, and tends to follow this model:

"Do you wish to refer to your notes?"

"Do you need them to refresh your memory?"

"Were those notes made by you?"

"Were they made near the time of the events that they record?"

"Was your memory fresh at the time?"

"Do the notes accurately reflect your memory at the time?"

"Have there been any changes to those notes since then?"

Counsel then asks the court for permission to allow the witness to review the notes.

Once a witness has reviewed a document that contains "past recollection recorded," the information contained in the record does not become evidence in the case unless the witness incorporates the information into her testimony, or unless the document is admitted under some other rule of evidence, such as a business records exception to the hearsay rule.

It is not entirely accurate to refer to this procedure as "refreshing" the memory of the witness. There is no requirement that the witness who has viewed the document actually recall the event before testifying to it. It is permissible for him to testify that he does not remember, but that he knew the facts at the time the record was made and that they were accurately recorded. In this way, the recorded fact, which he does not remember, gets incorporated into his oral testimony. This is what occurred in the leading case of *Fleming v. Toronto Ry. Co.*, [FN10-58 below] where a witness who earned his living inspecting railway cars could not have been expected to remember his routine act of having inspected a particular railway car many months before. His oral testimony that the record was accurate and that it showed that he inspected the subject car was evidence that the inspection occurred. In *Fliss* the requirement that a witness must use in his testimony only those portions of the record that he now recalls, or that he authenticates as accurate at a time when his memory was fresh and vivid, was not satisfied. The officer had reviewed the transcript of a taped conversation shortly after the conversation took place, but could not recall everything that was said. He could not therefore authenticate the entire transcript as accurate. The trial judge erred by permitting the police officer to read into evidence from the transcript details that the officer could neither recall nor verify as accurate at the time the record was made. [FN10-59 below]

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[FN10-58]

[FN10-59]

Since "past recollection recorded" permits witnesses who have no personal memory of an event to rely on the contents of the record and to incorporate the contents of the record into their testimony, it is artificial to suggest that the witness is the immediate source of the evidence. The witness, who has no personal memory of the details and facts recorded, is vouching for the record, but it is the record that is supplying those details and facts. For this reason, many believe that "past recollection recorded" is actually a hearsay exception, with those portions of the record incorporated into the testimony serving as the evidence. [FN10-60 below] This is more realistic than pretending that the testimony of a witness who is simply parroting the document is original testimony.

[FN10-60]

In spite of this, the prevailing practice is for a witness who is being asked to refresh her memory to read the document to herself. Her attention can be drawn to relevant portions and, having refreshed her memory, she will then be asked relevant questions. It is generally considered inappropriate to simply ask the witness to read from the document. [FN10-61 below]

[FN10-61]

This practice makes perfect sense if it is intended to keep witnesses from reading in parts of the document that they do not recall or cannot authenticate as accurately recorded. On the other hand, a witness who does not recall the details in question after reviewing the record should be allowed to read from the record those portions that she can attest were recorded accurately and verified as accurate at the time. To make the witness present this information as independent oral testimony, as though it is her own current recall, is misleading. The trier of fact should know that the witness is relying entirely on the record. What better way to signal that than to have the witness read the relevant passages? Since the record is the real source of the evidence, what is the harm? Indeed, in many cases it will be impossible for the witness to do anything other than read from the record; consider the witness in *Fleming v. Toronto Ry. Co.* [FN10-62 below] who was being asked to recall the identification numbers on a railway car, information he depended entirely on the record to be able to provide. In practice, where details are important, witnesses typically read directly from the documents.

[FN10-62]

Having said this, in *R. v. Fliss*, in a concurring judgment in which she concluded that the requirements of "past recollection recorded" had been met, Madame Justice Arbour said that in the particular circumstances of that case, the trial judge contravened the common law rule by permitting the witness to read the document into the record, verbatim. [FN10-63 below] Justice Arbour did not explain precisely what those circumstances are, but this is a sensible result given that the document was a transcript of

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a conversation; there is no way the witness could actually verify that every word recorded was accurate based on his memory, even the day after the conversation. All he could reasonably be expected to certify was that when he reviewed the transcript while his memory was fresh, the conversation transcribed was, in essence, as he had remembered it. Where a witness has not personally recorded information, and where that information cannot be verified with precision, it should not be read into evidence, nor should the witness while testifying refer to the information that is not recalled or that was not authenticated with precision when his memory was fresh.

[FN10-63]

Although the conventional view is to the contrary, [FN10-64 below] some courts, recognizing that the document is actually the source of the evidence, permit the document itself to be admitted as an exhibit. [FN10-65 below] Where the document is the font or source of the information, permitting it to be filed as an exhibit is sensible unless the document contains otherwise inadmissible information, information that the witness cannot authenticate, or there is legitimate concern that it will be given undue weight if provided to a jury in the form of an exhibit. [FN10-66 below]

[FN10-64]

[FN10-65]

[FN10-66]

5.3 (b) Present Recollection Revived

Wigmore contended that there is a need to distinguish between cases where a witness relies on a record he authenticates as being an accurate recording ("past recollection recorded") and those cases where, having seen the record, the witness now professes to recall the matter or details recorded ("present recollection revived"). He urged that different rules should apply in these two situations. The distinction he drew is in fact commonly accepted in the United States, and is coming to be accepted in Canada. The primary significance of the distinction is that for cases where a review of the record does not inspire an actual recall of the facts recorded, the rigid requirements just described, those applicable to "past recollection recorded," are to be insisted upon. The document is in substance the evidence, and must therefore meet the requirements of time, verification, and accuracy of the "past recollection recorded" rule. If a witness views a record, however, and has her present memory revived and then testifies about the event, the record is not the evidence. Her testimony, based on her actual memory, is. The record was nothing more than an aide memoire, a trigger. As original testimony, the information supplied by the witness can be cross-examined on as effectively as any other original testimony. The cross-examiner is entitled and able to explore the extent to which the witness actually recalls matters, or actually depended on the record for that information. That being so, there is no reason why the document that is used as the memory trigger should have to meet the strict requirements of time, verification, and accuracy. In other words, subject to an exclusionary discretion where the document may be inappropriately

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suggestive, a witness should be entitled to inspect any document in court to see if it triggers an independent recall.

Wigmore's distinction generally goes unnoticed in Canadian courts. In fact, whether a witness has an independent recall or is simply parroting recorded information often remains unexplored. Increasingly, however, commentators are arguing in favour of this distinction, [FN10-67 below] and it has been relied on by some courts, [FN10-68 below] and acknowledged by others. [FN10-69 below] R. v. Heydon [FN10-70 below] provides an example. A lawyer kept jottings of comments made to him by his client. Six months later, when approached by investigators in a criminal matter, he made a complete memorandum. When the lawyer was called to testify and sought to rely on that complete memorandum rather than on the timely jottings, defence counsel objected because the memorandum was not made at a time when the lawyer's memory was fresh and vivid, but was constructed in reliance on his earlier notes. At best, the witness was trying to rely on a memorandum that itself depended on the lawyer refreshing his memory from still other documents. The Court held that the lawyer should nonetheless be entitled to review that memorandum. The decision is compelling to the extent that viewing the document would add to the witness's ability to testify by sparking his independent recall.

[FN10-67]

[FN10-68]

[FN10-69]

[FN10-70]

Despite the apparent risks of permitting witnesses to rely on documents that do not have the safeguards associated with "past recollection recorded," other safeguards should make it allowable for witnesses to testify about facts they claim to remember. In R. v. Shergill, [FN10-71 below] it was held that before allowing a witness in court to review a statement that does not meet the requirements of the "past recollection recorded" doctrine, the trial judge should examine the risks involved, including the reliability of the statement, its potential to convey erroneous information, how much time passed between the event and the record, and how suggestive the record is. If the risks are too pronounced, the attempt to revive the memory should not be permitted. In the circumstances of Shergill, the Court refused to allow a lay witness to review a police officer's notes about an interview with that witness, but allowed the witness to review a transcript of his evidence taken during the preliminary inquiry.

[FN10-71]

Of course, where a record viewed by a witness does not spark his memory, no use should be made of it unless the record is admissible under some other rule of evidence. Even if the document does spark the memory of the witness, the witness should not read from the record in chief, as the record is not the evidence; it is merely an aide memoire, and in no circumstances should the party using the record to spark a recollection be entitled to make that record an exhibit. Opposing counsel should be able, however, to use that record for the purposes of cross-examination, [FN10-72 below] and the judge should

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have the discretion to make that record an exhibit if required to enable the trier of fact to understand or fully appreciate the cross-examination.

[FN10-72]

5.3 (c) Transcripts and Depositions

It is also settled that a court may allow witnesses who cannot recall matters they have previously testified about to be shown transcripts of their earlier testimony or their depositions. These transcripts are not subject to the contemporaneity requirement for past recollection recorded. Nor is there a need for the witness to have read over the transcript and to have verified that it accurately recorded her testimony. [FN10-73 below] Again, the prevailing view is that the witness should be provided with the document, should read silently from it, and then answer questions about the event without reading from the document itself. [FN10-74 below]

[FN10-73]

[FN10-74]

5.3 (d) Refreshing Memory with Unconstitutionally Obtained Evidence

In *R. v. Fliss*, [FN10-75 below] a police officer refreshed his memory in court using the transcript of an electronic interception that was held to have been obtained in violation of section 8 of the Charter and was thereby excluded from evidence. The Supreme Court of Canada suggested in obiter dictum that the officer would have been entitled to refresh his memory prior to trial using that transcript. Moreover, the Court did not take issue with the propriety of the witness refreshing his memory from that transcript in court according to the doctrine of "past recollection recorded," had he done so properly.

[FN10-75]

With respect, the decision is troubling. It is settled law that evidence derived from unconstitutionally obtained evidence, is "derivative evidence" subject to exclusion under section 24(2), depending on the balance of competing factors. To the extent that a witness depends on an unconstitutionally obtained transcript to obtain the information needed to testify, that testimony is "derivative evidence." Dealing first with refreshing memory prior to court, general principles under section 24(2) jurisprudence should mean that those aspects of the testimony of the witness that are derived in this way should be subject to section 24(2) analysis. Where the intercepted communication is itself excluded because its admission would undermine the repute of the administration of justice, this analysis should normally require exclusion of the refreshed testimony as well. This is because the oral testimony is inextricably linked to the excluded transcript. What happens if the witness who has refreshed his memory using unconstitutionally obtained evidence testifies inconsistently with it? The accused either has to waive the benefits of the exclusionary ruling by using that transcript to cross-examine the witness, or sit idly by while inaccurate evidence is presented. Neither option serves the repute of the

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administration of justice. In cases where a witness attempts to use the unconstitutionally obtained evidence in court to refresh his memory, he should be stopped from doing so, altogether apart from section 24(2). This follows from the fact that by permitting a witness to refresh his memory in court with unconstitutionally obtained evidence, a court would be participating in the creation of unconstitutionally obtained derivative evidence (i.e., the testimony of the witness that is dependent for its very existence on reliance on the unconstitutionally obtained evidence.). Section 7 of the Charter should prevent a court from supporting the creation of unconstitutionally derived testimony. It is hoped that if the matter gets to the Court again, it will be willing to reconsider its decision.

Footnotes

- 47 *United States v. Rappy*, 157 F.2d 964 at 967 (2d Cir. 1946).
- 48 See *R. v. Dilling* (1993), 24 C.R. (4th) 171 (B.C.C.A.), leave to appeal refused (1994), 31 C.R. (4th) 406 (S.C.C.), where just before trial a police officer examined a photograph of the suspect that she had originally seen shortly after his arrest and upon which she had written his name. In *R. v. B.(K.G.)* (1998), 125 C.C.C. (3d) 61 (Ont. C.A.), it was held that no objection could be taken to witnesses, prior to court, rereading years after the event statements they had given to the police.
- 49 *R. v. Monfils* (1972) 4 C.C.C. (2d) 163 (Ont. C.A.). There is authority to the contrary (see, for example, *R. v. Kerenko* (1964), 45 C.R. 291 (Man. C.A.)), although, in the interests of full evaluation of the testimony, the Montfils approach is undoubtedly the better one.
- 50 *R. v. Allen* (No. 2) (1979), 46 C.C.C. (2d) 477 (Ont. H.C.J.). In *R. v. Moore* (1990), 63 C.C.C. (3d) 85 (Ont. Gen. Div.), a taped statement obtained from an accused who claimed no independent memory of the incident while she was under the influence of sodium amytol was admitted into evidence pursuant to the hearsay exception in *R. v. Khan*, above note 14.
- 51 *R. v. Terciera* (1998), 15 C.R. (5th) 359 at 388 (Ont. C.A.), affirmed on appeal on other grounds, [1999] 3 S.C.R. 866; *R. v. Gauld* (1994), 24 W.C.B. (2d) 275 (Ont. Gen. Div.) and *R. v. Clark* (1984), 40 C.R. (3d) 183 (Alta. Q.B.).
- 52 See *R. v. Savoy*, [1997] B.C.J. No. 449 where the B.C.C.A. suggested that such a voir dire be conducted at the retrial, and *R. v. Savoy*, [1997] B.C.J. No. 2747 (B.C.S.C.), where the trial judge excluded the testimony because guidelines developed in American case law had not been followed. This cast doubt on the reliability of the hypnosis, and made it impossible to identify what information was recalled independently of the hypnosis, thereby making cross-examination impossible. See also *R. v. Taillifer* and *Duguay* (1995), 100 C.C.C. (3d) 1 (Que. C.A.) and *R. v. K.* (1979), 10 C.R.

(3d) 235 (Man. Prov. Ct.).

- 53 R. v. Mills, [1962] 3 All E.R. 298 (C.A.), and in R. v. Fliss, [2002] S.C.C. 16, the Court endorsed the use of a transcript made from an electronic recording.
- 54 R. v. Fliss, *ibid.* at para. 64.
- 55 Above note 39.
- 56 We have modified the passage from Fliss by inserting the information in the square brackets, to reflect well understood components of the rule.
- 57 *Ibid.* at para. 63. Whether the requirement that the memory be fresh and vivid (the "reasonable contemporaneity requirement") is met, is a matter of degree. In R. v. Donovan (1991), 65 C.C.C. (3d) 511 (Ont. C.A.) a child sexual assault complainant was allowed to review notes she had made from a two-year-old tape-recorded statement, which itself was recorded two years after the alleged incident. The generous approach to admission of child evidence inspired the decision. Where the tape is a videotaped statement, however, the Ontario Court of Appeal has expressed doubt about whether the rule should be available. Parliament has provided expressly under section 715.1 of the Criminal Code of Canada for the use of such statements and the requirements of that section arguably should not be circumvented by using rules relating to refreshing memory: R. v. McBride (1999), 133 C.C.C. (3d) 527 (Ont. C.A.). The McBride Court also held that although exact contemporaneity between the record and the event is not required for refreshing one's memory, where there is reason to be concerned that a witness may have been tainted by the influence of others between the event and the recording, this may defeat the ability of the witness to use that record to refresh her memory. The decision in R. v. Silvini (1991), 9 C.R. (4th) 233 at 247 (Ont. C.A.), in keeping with concerns about full answer and defence, reflects a generous approach to the contemporaneity requirement where the accused is the witness.
- 58 (1911), 25 O.L.R. 317 (C.A.).
- 59 By reading portions from the transcript that the witness could neither recall nor authenticate, the witness was effectively using a non-authenticated transcript as the evidence.
- 60 R. v. Eisenhower (1998), 123 C.C.C. (3d) 37 at 74-75 (N.S.C.A.), leave to appeal to the Supreme Court of Canada denied, [1998] S.C.C.A. No. 144. In R. v. Rouse (1977), 39 C.R.N.S. 135 (B.C.C.A.), *aff'd* (sub nom. McInroy v. R.) (1978), 5 C.R. (3d) 125 (S.C.C.), the majority of the British Columbia

66 Court of Appeal treated past recollection recorded as a hearsay exception. The Supreme Court of Canada expressly refrained from deciding the point. See also the comments of Kerans J. in *R. v. Meddoui* (1990), 2 C.R. (4th) 316 at 323-24 (Alta. C.A.), affirmed without discussion of this issue, [1991] 3 S.C.R. 320. Based on this view, Justice Cromwell makes a compelling case in *Eisenhauer* that the use of "past recollection recorded" should not be confined to cases where there is a total memory loss. There should, in our view, however, be a sufficient degree of memory loss to satisfy the necessity principle normally used for the admission of hearsay evidence, before resort can be had to "past recollection recorded."

- 61 Although in *R. v. Rouse*, *ibid.*, the Crown read to the witness from the document. The British Columbia Court of Appeal split on whether this was proper, and the majority of the Supreme Court of Canada declined comment. Since the evidence is to be the evidence of the witness, having counsel read the document seems inappropriate. See *R. v. Green* (1994), 32 C.R. (4th) 248 (Ont. Gen. Div.) where Ferguson J. had evidence of past recollection recorded read to the jury.
- 62 Above note 58.
- 63 Above note 53 at 11.
- 64 *Young v. Denton* (1927), 21 Sask. L.R. 319 (C.A.).
- 65 This is the rule in New Zealand: *R. v. Naidanovici*, [1962] N.Z.L.R. 334 (C.A.). See *R. v. Simons* (1991), 68 C.C.C. (3d) 97 (Alta. Q.B.). The authors of *The Law of Evidence in Canada* support this position for "past recollection recorded." See J. Sopinka, S.N. Lederman, & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999).
- 66 Professor Delisle takes the view that a document used as "past recollection recorded" should not go to the jury because of the undue influence that an exhibit which is merely testimony in a different form could have on a jury. Annotation to *R. v. Green* (1994), 32 C.R. (4th) 248 at 249, relying on *R. v. McShannock* (1980), 55 C.C.C. (2d) 53 (Ont. C.A.).
- 67 R.J. Delisle, *Evidence: Principles and Problems*, 5th ed. (Toronto: Carswell, 1999) at 318-19; S. Schiff, *Evidence in the Litigation Process*, vol. 1, 4th ed. (Toronto: Carswell, 1993) at 194-204; P.K. McWilliams, *Canadian Criminal Evidence*, 3d ed. (Aurora, Ont.: Canada Law Book, 1995) at 36:20200-36:20230. To the contrary is J. Sopinka, S.N. Lederman, & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 924-31.

- 68 R. v. Bengert (No. 2) (1979), 15 C.R. (3d) 21 (B.C.S.C.), aff'd (1980), 15 C.R. (3d) 114 (B.C.C.A.); R. v. B.A.J. (1994), 90 C.C.C. (3d) 210 (Nfld. C.A.), reversed on other grounds (1995), 98 C.C.C. (3d) 95 (S.C.C.); R. v. Simons, above note 65; R. v. Green, above note 61.
- 69 Salutin v. R. (1979), 11 C.R. (3d) 284 (Ont. C.A.); R. v. Meddoui, above note 60 (Alta. C.A.); R. v. B.(K.G.) , above note 48.
- 70 R. v. Heydon, [1999] O.J. No. 4614 (Ont. Gen. Div.).
- 71 Above note 44.
- 72 R. v. Shergill, ibid.. In cases of "past recollection recorded" opposing counsel is entitled to inspect any record a witness is using in court to refresh his memory with, and to cross-examine the witness using that record: R. v. Alward (sub nom. Alward v. R.) (1976), 39 C.R.N.S. 281 (N.B.C.A.), aff'd (1977), 39 C.R.N.S. 281 at 306 (S.C.C.).
- 73 Reference re R. v. Coffin, above note 42 at 18-20; R. v. Shergill, above note 44.
- 74 R. v. Laurin (No. 5) (1902), 6 C.C.C. 135 (Que. K.B.).
- 75 Above note 53.