The Law and Practise of Out-of-Court Evidence

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Trials turn on evidence, for without evidence there is no proof and legal burdens are not met. The traditional route to get evidence on the record is through sworn testimony. Indeed, Rule 9-19(1) of the Saskatchewan *Queen's Bench Rules* expressly requires that trial witnesses be examined orally and in open court.

However, there are exceptions. These can be of great importance when a potential witness cannot attend a trial. This article surveys the use of "out of court" evidence under our Rules. Examples include read-ins from transcripts of questioning, evidence from prior proceedings, or even physical inspections by the Court itself. While these provisions may arise infrequently, they can prove crucial, and are ones with which any lawyer should become familiar.

1. Read-ins from the Questioning Transcript of the Opposing Party:

Perhaps the most common method of introducing "out of court" evidence is through read-ins from the transcript of an opponent's questioning. Under Rule 5-34 this may be done without putting the whole transcript in evidence. The relevant passages should be selected with care. If a read-in is unfavorable but uncontradicted, you will nevertheless be bound by it. Take further care to avoid reading-in a portion out of context, lest the opposing party ask the Court to consider additional parts of the transcript. The use of read-ins saves valuable trial time and can set up the factual context immediately. Moreover, they provide a crucial ammunition to impeach any opponent who strays from his prior evidence. Substantively, the read-ins of one defendant may even be used against a co-defendant, provided the relationship is such that one is bound by the admissions of the other. [2]

The days of actually reading the transcript out in open court may have passed however. Courts often prefer that read-ins be entered in written form, through filing a consolidated document containing only the relevant passages. Where there are numerous questions to read in, such an approach saves time and leaves a written version which the Court may thereafter review.

2. Read-ins from the Questioning Transcript of an Unavailable Witness:

Where a witness other than your own client is unable to testify due to death, illness or infirmity, Rule 9-16 permits a party to read in from the transcript of an unavailable witnesses' questioning.

> 9-16(1) In this rule, "**unavailable witness**" means a person questioned pursuant to Subdivision 3 of Division 2 of Part 5 who:
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> (a) has died; or
>
> (b) is unable to testify because of infirmity or illness.
>
> (2) Any party may, with leave of the trial judge, read into evidence all or part of the evidence given on questioning as the evidence of an unavailable witness to the extent that the evidence would be admissible if the unavailable witness were testifying in Court.
>
> (3) Subrule (2) does not apply to questioning pursuant to rule 5-20
>
> …

While Rule 9-16 does not enumerate specific factors to be considered, useful Ontario cases have been favorably referred to in our own province.[3] For instance, in *Toronto-Dominion Bank v. Leigh Instruments Ltd.* (*Trustee of*), [4] the Ontario Court of Justice permitted the defendant to read

in evidence from the examination for discovery of its deceased manager. The Ontario rule 31.11(7) identified the following as factors to be taken into account:

a. the extent to which the person was cross-examined on the questioning;
b. the importance of the evidence;
c. the general principle that evidence should be presented orally in court.

These are universal considerations and should be equally considered in Saskatchewan.

3. Trial Evidence Through Affidavit or Prior Depositions:

One may also apply to enter prior affidavits or out-of-court deposition transcripts. Such an order is not to be sought lightly however, as such evidence will likely lack any cross-examination. If admitted, this absence of testing will need to be dealt with as a matter of weight.

Rule 9-19(2) was used in *Bilinski v. Bilinski*[5] where the petitioner was refused a visa to enter Canada to attend trial. As such, the Court allowed the petitioner to give her evidence-in-chief in affidavit form. The petitioner supplemented her evidence via Skype, which allowed the respondent an opportunity to cross-examine. As the petitioner spoke only Russian and Ukrainian, an interpreter also attended the trial to translate between both languages.

The Saskatchewan Court of Queen's Bench has recently affirmed that affidavits from deceased witnesses will not be admitted as a matter of course. Rather, such evidence must first be assessed under the twin criteria of "reliability and necessity." In *Jans v. Jans*, the father to two litigating brothers suddenly passed away before the trial could reconvene. The executor of the deceased father applied under Rule 9-19(2) to read in an earlier affidavit sworn by the father in an interlocutory application in the same action.

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In determining whether to admit, the Court adopted a "necessary and reliable" analysis, reasoning that:

> [20] …affidavit evidence from a deceased witness should not be read in at trial unless it is both necessary and clears the hurdle of threshold reliability. That approach recognizes that affidavit evidence is hearsay, and as such, suffers from the shortcoming that presumptively excludes hearsay: that is, the inability to test its reliability. Rule 9-19 says the court "may" admit such evidence. It does not say it "shall" do so. The court should perform its gatekeeper function to decide whether it should do so.

While this ability to enter prior evidence is useful, it is not unlimited. Rule 9-19(3) provides that no out-of-court evidence may be introduced if the opposite party "reasonably desires the production of a witness for cross-examination and that the witness can be produced."

As recently as April of 2016, the Court of Queen's Bench in *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212*, explained why oral testimony is strongly preferred to use of affidavits:

> [16] I believe that the Rule [9-19] implicitly accepts that affidavit evidence is inimical to the long-held sanctity of an open court, oral examination, observation of witnesses, and the ability to cross-examine. Affidavits may be efficient in certain proceedings, but generally have been looked upon askance at trial, and for good reason. Affidavits are hearsay – they are out of court statements tendered for the veracity of their contents. They permit the ultimate leading of a witness's testimony, something disallowed during examination-in-chief at trial. Affidavits are polished, rehearsed and formal and offer little about the demeanour and character of the affiant. That is why Rule 9-19 opens with the direct premise that, "…the witnesses at the trial … must be examined orally and in open court."[6]

As such, an opposing party should have the right to a vigorous cross-examination whenever the witness can be produced. In *Good Spirit School Division* itself, the application to rely on affidavit evidence was declined. The moving party

sought to tender affidavits so as to shorten the trial by five days. The party was prepared to present the witnesses at trial to answer to cross-examination.

However, the court relied on the fact that any "necessity" was clearly absent, as the affiants would in fact be attending the trial themselves. Moreover, affidavits would "permit the ultimate leading of a witness's testimony, something disallowed during examination-in-chief at trial. Affidavits are polished, rehearsed and formal and offer little about the demeanour and character of the affiant."[7]

4. Telephone or Video Evidence:
What if the witness cannot travel to the trial itself? In such case, Rule 9-20 empowers the Court to admit oral evidence taken by telephone or any audio-visual method:

> **Evidence by telephone or audio-visual method**
> 9-20(1) The Court may order that the testimony of any witness taken orally by telephone or by any audio-visual method approved by the Court is admissible in evidence:
> (a) if the parties consent; or
> (b) if the Court so orders.

A number of prior decisions have considered this in the context of telephone evidence. In *Kapell v. Abel*[8] a plaintiff desired her out-of-country physiotherapist to give testimony by telephone conference call. Notwithstanding the inconvenience and cost of physical attendance, the Court declined to permit telephone testimony. This was because the expert testimony was expected to be important and therefore justified the expense of appearance. Moreover, both the examination and cross-examination would likely be lengthy, and the defendant might suffer prejudice if it was unable to show documents or exhibits to the physiotherapist during telephone cross-examination.

Other decisions have confirmed that inconvenience to a witness will not itself justify evidence by telephone. Cost and time to witnesses is a regrettable, but inevitable, effect of litigation. It can however be compensated by an order for costs if the trial judge concludes that personal attendance was unnecessary.[9] That said, telephone evidence will be admitted where the testimony is expected to be comparatively minor and disproportionate to the considerable expense or inconvenience of attendance.[10]

Video testimony is another matter. Video overcomes many of the defects of telephone evidence, capacity allowing one to observe the demeanor of the witnesses, or assess their credibility.

Where the parties consent, or where evidence is uncontroversial, videotaped evidence should be allowed.[11] Where there is no consent, the Court will likely consider the following:

a. Is there some good reason why the witness cannot be examined in Saskatchewan?
b. Is the evidence material?
c. Will the other party not be prejudiced unreasonably?[12]

If certain testimony will only be available by video, such will likely outweigh any prejudice suffered by the other party. A party seeking such an order should however be prepared to pay the up-front costs associated with the video-conferencing, including installation and rental of equipment, technician charges, etc.

In *S. (J.) v. Canada (Attorney General)*,[13] the Federal Government applied to examine two witnesses by live video-conference at the trial. The witnesses were out of Saskatchewan, and refused to attend for trial. The order to permit such video evidence was granted, it being in the interests of justice to permit such evidence to be entered. In its decision, the Court noted the benefits of live video-conferencing, especially its capacity to permit simultaneous visual and oral communication between the Court and witnesses.

5. Personal Inspection by the Court:
When there is particular difficulty in understanding a particular thing, a first-hand view can be worth a thousand words. Physical inspection by a judge is contemplated by Rule 9-28, which empowers the Court to inspect "any place, property or thing concerning which any question may arise."

This rule is rarely invoked. One of its few reported Saskatchewan uses came in *Sunnyside Nursing Home v. Builders Contract Management Ltd. et al.*, where the Court inspected a tower allegedly constructed deficiently. In so doing, the Court made clear that "taking a view" could only be

used to assist the Court to "better understand" the evidence of the parties themselves. In other words, the direct perceptions made by the judge on the "view" were not to be evidence. Instead, an inspection could only help to better understand and apply existing evidence.[15]

6. Reading of Evidence Taken in Other Causes:

Rule 9-22 allows a party to read-in evidence previously taken in another matter. Prior jurisprudence offer the following considerations for a court to assess:

a. Were the parties the same?; [16]
b. Were the issues the same?;
c. Was there a full opportunity of cross examination in the prior proceeding?; and
d. Is the witness is now unavailable to testify? [17]

7. Orders to Preserve Evidence Prior to Trial

Finally, where illness, infirmity or foreign residence suggest that a witness may be unavailable at trial, counsel should preserve the evidence.

Rule 6-29 allows for a witness to be examined at any place, either before the Court or any officer:

> Examination of witnesses and persons
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> 6-29(1) If the Court considers it necessary for the purposes of justice in any cause or matter, the Court may:
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> (a) order that any witness or person be examined on oath or affirmation:
>
> (i) before the Court, any officer of the Court or any other person; and
>
> (ii) at any place; and
>
> (b) permit any party to the cause or matter to give any deposition in evidence respecting the cause or matter on any terms that the Court may direct

Rule 6-29 also serves to allow a party to take evidence on commission (i.e. examining a witness outside the jurisdiction).[18] Relevant factors would likely include comparative convenience of the person to be examined, whether the person will be unavailable, whether the evidence will be controverted, and the importance of the proposed evidence.

Preserving evidence is a sensible safeguard with little downside. If the witness is in fact still alive at the date of trial, it remains open to the Court to require personal attendance.

Conclusion:

Eliciting evidence need not always depend on physical attendance or traditional oral testimony. The methods discussed above are critical weapons in the arsenal of any trial lawyer. When a key witness suddenly becomes unavailable, the above rules can help counsel successfully navigate the issue. ⚖

Footnotes:

1 With acknowledgments to Neva R. McKeague, *The Queen's Bench Rules of Saskatchewan: Annotated*, loose-leaf (2014 – Rel 1) 4th ed, (Regina: Law Society of Saskatchewan Libraries, 2013).

2 *Nowsco Well Service Ltd. v. Canadian Propane Gas*, 7 Sask R 291 (SK CA). Some basic examples include: a conspiracy case involving a common design (see *Culzean Inventions Ltd. v. Midwestern Broom Company Ltd.*, [1984] 3 WWR 11 (SK QB), or where the corporate defendant was vicariously liable for the defendant employee (see *Nowsco Well Service, supra*).

3 See again, for instance, *Jans v. Jans*, 2015 SKQB 226 (CanLII), [2015] 12 WWR 776 at para 32.

4 (1998), 17 CPC (4th) 388 (Ont Ct).

5 2009 SKQB 285 (CanLII).

6 2016 SKQB 148 (CanLII).

7 *Ibid* at para 16.

8 [1996] S.J. No. 573, 149 Sask. R. 46 (QB).

9 *Lefebvre v. Kitteringham* (1984), 37 Sask. R. 155 (Q.B.).

10 *Campagna v. Wong*, 2002 SKQB 97 (CanLII), 216 Sask R 142

11 *Onofrichuk v. Simpso, 1997* CanLII 11252 (SK QB).

12 *S. (J.) v. Canada (Attorney General)*, 2003 SKQB 31 (CanLII), 229 Sask R 227, at para 9

13 *Ibid.*

14 1985 CanLII 2311 (SK QB), [1985] 4 WWR 97.

15 See also *Triple A Investments Ltd. v. Adams Brothers Ltd.*, 23 D.L.R. (4th) 587 (NFLD CA).

16 See *Degenstein v. Riou*, 1981 CanLII 2143 (SK QB).

17 *Serediuk v. Kogan* [1976] 5 WWR 571 (Man CA) at para 7.

18 See N*orman G. Jensen Inc. v. Morris Rod Weeder Co.,* 12 A.C.W.S. (3d) 111, 70 Sask. R. 294 (QB), which discussed the predecessor Rule 289.