The Rule in ***Browne v. Dunn***

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The rule in ***Browne v. Dunn***,[i] in essence, requires that a party intending to bring evidence to impeach or contradict the testimony of a witness must present the witness with that evidence and give him or her an opportunity to explain or answer it while on the witness stand. Sopinka, in *Law of Evidence in Canada*, 4th ed. (Toronto: LexisNexis, 2014), explains the rule as follows:

> §16.197 It appears that**, if the cross-examiner intends to impeach the credibility of a witness by means of extrinsic evidence, he or she must give that witness notice of his intention**. This was the rule laid down in *Browne v. Dunn*, in which Lord Herschell explained the reason for it as follows:
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> > Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and **not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.** My Lords, **I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him**; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.
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> Accordingly, if counsel is considering the impeachment of the credibility of a witness by calling independent evidence, **the witness must be confronted with**

> **this evidence in cross-examination while he or she is still in the witness box**. [Emphasis added]

Case law presents a similar understanding of the rule. In ***R. v. Werkman***, 2007 ABCA 130, 404 A.R. 378, the Court *per curiam* summarized it as follows:

> 7 [...] **The rule in Browne v. Dunn requires that counsel put a matter to a witness involving the witness personally if counsel is later going to present contradictory evidence**, or is going to impeach the witness' credibility: *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R 193, 316 N.R. 52 (para. 64). Though it is not necessary to cross-examine upon minor details in the evidence, a witness should be provided with an opportunity to give evidence on "matters of substance" that will be contradicted: *R. v. Giroux* (2006) 210 O.A.C. 50 at para. 46 (C.A.). **The purpose of the rule is to ensure that parties and witnesses are treated fairly; it is not a general or absolute rule**: *Lyttle* at para. 65; *R. v. Palmer* [1980] 1 S.C.R. 759 at 781, 30 N.R. 181. The rule also has exceptions. [Emphasis added][ii]

The scope of the rule was discussed in ***R. v. Dexter***, 2013 ONCA 744, [2013] O.J. No. 5686:

> 17 **The rule in *Browne v. Dunn* is not merely a procedural rule; it is a rule of trial fairness**. The rule was summarized by this court in *R. v. Henderson* (1999), 44 O.R. (3d) 628 (C.A.), at p. 636 as follows:
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> > This well-known rule stands for the proposition that if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given the chance to address the contradictory evidence in cross-examination while he or she is in the witness-box.
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> > **The cross-examiner gives notice by first putting questions to the witness in cross-examination that are sufficient to alert the witness that the cross-examiner intends to impeach his or her evidence, and second, by giving the witness an opportunity to explain why the contradictory evidence, or the inferences to be drawn from it, should not be accepted**: see the comments of Lord Herschell in Browne v. Dunn, at pp. 70-71.
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> 18 The application of the rule prevents a witness from being "ambushed". However, **it does not require the cross-examiner to "slog through a witness's evidence-in-chief putting him on notice of every detail the defence does not accept**": see *R. v. Verney* (1993), 67 O.A.C. 279, at para. 28. Only the nature of the

proposed contradictory evidence and its significant aspects need be put to the witness.

19 The rule is also a rule of common sense. **By enabling the trial judge to observe and assess the witness when he or she is confronted with contradictory evidence and given an opportunity to explain his or her position, the rule promotes the accuracy of the fact-finding process**. In doing so, it enhances public confidence in the justice system.

20 The effect that a court should give to a breach of the rule in *Browne v. Dunn* will depend on a number of factors. In deciding how to address a breach, a trial judge may consider:

- The seriousness of the breach;
- The context in which the breach occurred;
- The stage in the proceedings when an objection to the breach was raised;
- The response by counsel, if any, to the objection;
- Any request by counsel to re-open its case so that the witness whose evidence has been impugned can offer an explanation;
- The availability of the witness to be recalled; and
- In the case of a jury trial, whether a correcting instruction and explanation of the rule is sufficient or whether trial fairness has been so impaired that a motion for a mistrial should be entertained.

Thus, the extent of the rule's application is within the discretion of the trial judge after taking into account the circumstances of the case: see *R. v. Lyttle, 2004 SCC 5,* [2004] 1 S.C.R. 193, at para. 65; *R. v. Werkman*, 2007 ABCA 130, 404 A.R. 378, at para. 9. [Emphasis added]

Where a party has failed to cross-examine a witness, the remedies typically applied are either to allow the party to recall the witness, or take the failure to cross-examine into account in evaluating credibility or the weight to be given to various elements of evidence. This point was stated in ***R. v. Quansah***, 2015 ONCA 237, 125 O.R. (3d) 81, application for leave to appeal filed [2016] S.C.C.A. No. 203, File No.: 37013:

119 In the menu of remedies available to a trial judge who has determined that the rule in Browne v. Dunn has been breached are recall of the witness and an instruction to the jury about the relevance of the failure to cross-examine as a factor for them to consider in assessing the credibility of an accused as a witness and the reliability of his or her evidence: [...]

Similarly, in ***Pawlett v. Dominion Protection Services Ltd.,*** 2008 ABCA 369, 440 A.R. 241:

> 19 The Supreme Court of Canada has explained that, although designed to provide fairness to witnesses and parties, the rule is not fixed: *R. v. Lyttle*, [2004] 1 S.C.R. 193 at para. 65. The judgment continued in relation to the rule:
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> > The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case.
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> [...]
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> 21 It is within the discretion of a trial judge to diminish the weight of the evidence of the party failing to comply with the rule: *R. v. Werkman*, 2007 ABCA 130, 404 A.R. 378 at para. 10.

R v. Dexter has been recently applied by the Saskatchewan Court of Appeal in ***R. v. Know***, 2017 SKCA 8 as follows:

> **40** There are at least two permissive options to rectify a breach of the rule in *Browne v Dunn*. These were described in *R v Dexter*, 2013 ONCA 744, 313 OAC 226:
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> > [21] ... One is for the trial judge to take into account the failure to cross-examine when assessing a witness's credibility and deciding the weight to be given to that witness's evidence: see *Werkman*, [2007] A.J. No. 418 at paras. 9-11; *R v Paris* (2000), 138 O.A.C. 287, at para. 22. Another is to allow counsel to recall the witness whose evidence has been impeached without notice.

In ***R. v. Scheideman***, 2001 ABCA 94, 277 A.R. 331, the Alberta Court of Appeal expressly stated that the rule in ***Browne v. Dunn*** does not require the trial judge to accept as true any testimony that was not subject to cross-examination. Rather, the judge must weigh the testimony with other evidence presented at trial:

> 2 [...] To begin with, **the rule in Browne v. Dunn does not stand for the proposition that a trial judge must accept as true the evidence of a witness, merely because the witness was not cross-examined** on a particular point. **Where a witness's statement is inconsistent with other evidence adduced at trial, the trial judge is free to accept the other evidence, and find that the witness giving the implausible evidence is not credible. A judge is also free to give less weight**

> **to implausible evidence.** To require a judge to give implausible evidence the same weight given to plausible evidence proffered by credible witnesses, because a technical requirement for cross-examination had not been satisfied, would unjustifiably fetter the judge's ability to weigh evidence. [Emphasis added]

This point was reiterated in ***3058354 Nova Scotia Co. v. On*Site Equipment Ltd.,*** 2011 ABCA 168, 505 A.R. 289, leave to appeal refused [2011] S.C.C.A. No. 373, File No.: 34415:

> 33 The rule in Browne v. Dunn was expounded by Justice Herschell at 71 as follows:
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> > ... it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.
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> **The failure to follow this procedure does not result in an automatic exclusion of the trial testimony**, however. As the Supreme Court of Canada said in *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193 at para. 65, the rule remains a sound principle but "is not fixed" and "[t]he extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case". **It may be that other available evidence so clearly impeaches credibility that conclusions as to credibility may safely be reached even in the absence of cross-examination on earlier versions of the evidence given at trial**: see R. v. Palmer, [1980] 1 S.C.R. 759 at 782.
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> 34 In *R. v. Scheideman*, 2001 ABCA 94, 277 A.R. 331 at para. 2, Côté J.A. stated:
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> > ... the rule in Browne v. Dunn does not stand for the proposition that a trial judge must accept as true the evidence of a witness, merely because the witness was not cross-examined on a particular point. Where a witness's statement is inconsistent with other evidence adduced at trial, the trial judge is free to accept the other evidence, and find that the witness giving the implausible evidence is not credible. A judge is also free to give less weight to the implausible evidence. To require a judge to give implausible evidence the same weight given to plausible evidence proffered by credible witnesses, because a technical requirement for cross-examination had not been satisfied, would unjustifiably fetter the judge's ability to weigh evidence.
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> [...]

> 36 The extent of the application of the rule in Browne v. Dunn is within the discretion of the trial judge after taking into account all of the circumstances of the case: see *Lyttle* at para. 65; *R. v. Werkman*, 2007 ABCA 130 at para. 9, 404 A.R. 378. [...] [Emphasis added][iii]

The decision in ***Klemke Mining Corp. v. Shell Canada Ltd***., 2007 ABQB 176, 419 A.R. 1, affirmed 2008 ABCA 257, 433 A.R. 172, provides an example of how the rule may be applied to diminish or discredit evidence tendered in the absence of cross-examination:

> 16 I wholly reject the evidence of Mr. Clark who worked below Mr. Jonsson and Mr. Camarta in the Albian organization when he testified that he cut short his March 24 meeting with Mr. Klemke because he saw Mr. Klemke fabricating notes of their discussion as they sat together. The first time this came up was at trial although that meeting was examined upon at discovery. The alleged fabricated notes, which would have been made to assist the plaintiff, have not been produced by the plaintiff to get that assistance. The notes made by Mr. Klemke of this meeting which were produced are more or less faithful to two witnesses' evidence of the substance of that meeting. Mr. Clark has no notes to refresh his memory of that meeting.
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> 17 Further, this issue was not put to Mr. Klemke at trial, as it ought to have been, in my view, to provide adjudicative fairness since his credibility through the trustworthiness of his note taking was put directly in issue. The rule in Browne v. Dunn (1893), 6 R. 67 (U.K. H.L.) has been accepted in Canada for the principle that counsel who later intend to impeach a witness must give notice to that witness and provide that witness the opportunity to address the contradictory evidence in cross-examination while he or she is in the witness-box: R. v. Lyttle, [2004] 1 S.C.R. 193 at para. 64; Friskie v. Piovesan Estate, [1998] B.C.J. No. 1837 (B.C.S.C.) at para. 18. Lord Herschell in Browne v. Dunn at 70-71 explained the purpose of the rule:
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> > My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.
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> 18 Although the rule is not fixed, I apply it in this case. Since defence counsel wished to bring forward evidence that impeached Mr. Klemke's evidence with respect to his notes in the March 24 meeting, the contradictory evidence should have been put to Mr. Klemke to afford him the opportunity to address the allegations of fabrication.

The decision in ***Zahn v. Taubner***, 2012 ABQB 504, [2012] A.J. No. 845 provides an example of the types of circumstances that may justify application of the rule in ***Browne v. Dunn*** to diminish the weight given to testimony of one party with respect to the credibility of a witness called by the other party. (Note, however, that despite diminishing the weight of the defendants' evidence, the case was nonetheless decided in favour of the defendants):

> 166 The rule in Browne v. Dunn requires that a matter involving a witness personally be put to that witness if contradictory evidence is later going to be presented by counsel or counsel is later going to impeach the witness' credibility (Browne at 70-71).
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> 167 The rule is not absolute: the effect of a failure to cross-examine on a particular point goes to weight only, and the weight is within the discretion of the trier of fact (Palmer at paras. 36-37; McNeill at para. 491; Lyttle at para. 64; and Pawlett at para. 21).
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> 168 The Plaintiffs submit that during the course of the trial, numerous statements were raised by the Defendant concerning Nadia's credibility that were neither raised nor put to Nadia by counsel for the Defendant during Nadia's or Heather's cross-examination:
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> (a) Bob stated that Nadia had demanded additional back pay for services she had provided earlier to Paul and Anna Taubner;
> (b) Bob stated that Nadia claimed she had been presented with some other business opportunities and that she would need a higher wage to forego those other opportunities and stay and care for Ford;
> (c) Bob claimed that Nadia was having her daughter come in Nadia's place;
> (d) Bob claimed that Nadia was putting pressure on Bob, and demanded $2,500 for the down payment on a car;
> (e) Bob stated that Nadia stopped showing up to St. Joseph's, and Ford exclaimed that she knew it was too good to be true;
> (f) Ric stated that Nadia made strange displays, such as rushing over to Paul Taubner within 60 seconds of meeting him, kneeling and kissing his hand;
> (g) Ric stated that Nadia began making negative comments concerning Jennifer, the other caregiver in the house;
> (h) Ric stated that Nadia demanded retroactive back pay dating back a few months;
> (i) Ric stated that Ford had paid for Nadia to have an abortion;

(j) Ric stated that Heather had told him that "you had better watch that one" in reference to Nadia; and
(k) John Bradley stated that following Nadia's departure from St. Joe's, Ford had remarked that Nadia was not as she seemed and that when the money was gone, apparently so was she.

169 Taken in isolation, failure to cross-examine on any one of the points above would not have a significant impact. However, I agree with the Plaintiffs' submission that given the number of accusations made concerning Nadia's conduct and behaviour, the inflammatory nature of those comments, and the complete failure to put any of the accusations to Nadia (or any other Plaintiffs' witness) to be explained, it is appropriate to apply the rule in Browne v. Dunn and diminish the weight of the above evidence given by Bob, Ric and John Bradley, although more significantly with respect to Bob and Ric.

In ***Pawlett v. Dominion Protection Services Ltd***., supra, the rule was applied to reject one ground of attack on the plaintiff's credibility in a case alleging workplace sexual harassment:

9 The trial judge noted that the case rested entirely on credibility as the evidence of Pawlett and Ismail regarding his conduct was "irreconcilable" (para. 6). He found Pawlett to be more credible. He explained why he declined to make any adverse finding against Pawlett, notwithstanding inconsistencies, contradictions, admission of previous lies, collateral motives, exaggerations and understatements alleged by Dominion and Ismail. **The trial judge noted that in many instances counsel for the appellants had not followed the rule in *Browne v. Dunn*** (1893), 6 R. 67 (H.L.). He found there was clear and convincing evidence that Pawlett was telling the truth, and accepted her version of events.

[...]

20 Here, the appellants complain that in one instance, the trial judge misapplied the rule and found the omission to cross-examine Pawlett on a particular point affected "the credibility of Ismail and not Pawlett": para. 41.

21 **It is within the discretion of a trial judge to diminish the weight of the evidence of the party failing to comply with the rule**: *R. v. Werkman*, 2007 ABCA 130, 404 A.R. 378 at para. 10. However, even if the appellants are correct that the rule should not have been invoked in this instance, they have not demonstrated that any error in this regard influenced the trial judge in his overall assessment of the credibility of Pawlett versus that of Ismail.

> 22 The trial judge carefully explained his reasons for rejecting the attacks on the credibility of Pawlett, and found her evidence to be clear and convincing. With respect to Ismail, the trial judge observed at para. 44:
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> > ... much of Ismail's evidence reminds me of the person who "doth protest too much." Certainly his testimony regarding his piety was not convincing.
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> 23 Given the privileged position of the trial judge who saw and heard the witnesses in person, this appellate court has no basis for interfering with his finding of fact based on credibility, in the absence of palpable and overriding error. The appellants have failed to demonstrate any such error. [Emphasis added]

Similarly, in ***Grajewski v. McLean***, [2015] O.J. No. 624 (SCJ-small claims), the failure to cross-examine the plaintiff on a particular point of the defendant's contrary testimony led the court to give little weight to the defendant's evidence on that point:

> 149 Secondly, the defendant himself admitted that there were deficiencies, when he admitted that he or his workers "screwed up" while at the same time accepting his responsibility for the errors. He admitted that the neighbour's gas-line safety valve should be dug out. He was willing to replace the area of pooling between the plaintiff's house and garage. He admitted that something should have been done to the neighbour's window well to prevent leakage. He stated that the plaintiff told him that he, the plaintiff, would put a flange around it. However, this version of the facts was not put to the plaintiff during the plaintiff's cross-examination, as is required by the "rule" in Browne v Dunn. The defendant had not given the plaintiff an opportunity to respond to that suggestion. The rule is summarized in *R. v. McNeill* [2000] O.J. No. 1357; 144 C.C.C. (3d) 551 (Ontario Court of Appeal), at paragraph 44, as follows:
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> > 44 The rule in Brown v. Dunn was succinctly stated by Labrosse J.A. in R. v. Henderson, [1999] O.J. No. 1216, supra, at p. 141:
> >
> > This well-known rule stands for the proposition that if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given the chance to address the contradictory evidence in cross-examination while he or she is in the witness-box.
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> 150 The possible effect of not following the principle in Browne v. Dunn is stated at paragraph 49 of the McNeill decision:

> 49 In those cases where it is impossible or highly impracticable to have the witness recalled or where the trial judge otherwise determines that recall is inappropriate, it should be left to the trial judge to decide whether a special instruction should be given to the jury. If one is 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.
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> (Emphasis is added)

> 151 Consequently, in the instant case, the Court places little weight on the defendant's subsequent contradictory testimony on that matter.

The decision in ***Erco Industries Ltd. v. Allendale Mutual Insurance Co.,*** (1988), 62 O.R. (2d) 766, [1988] O.J. No. 2 (CA) is also interesting. In that case, the failure by the defendant to cross-examine the other party's expert on a particular point resulted in its own attempts to present contrary evidence being disallowed:

> 19 Dr. Eager was cross-examined extensively by counsel for Erco, who was also in possession of Dr. Eager's lengthy report. Dr. Eager based his evidence in part on calculations made as to the rate of flow of FP through narrow apertures. No objection was taken or challenge made to these calculations during the cross-examination. **Without any cross-examination upon the subject, Erco then sought to adduce evidence in reply which would challenge the calculations put forward by Dr. Eager. The trial judge carefully considered the request and then denied it. I believe he was correct in the position that he took**.
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> 20 **It would be unfair to permit the plaintiff Erco to call such evidence in reply, particularly as Dr. Eager would be deprived of any opportunity to explain the basis of his calculations, and as Erco had been given every opportunity to explore the validity of the calculations during the cross-examination**. Further, the trial judge indicated that the plaintiff would be granted an adjournment to consider the expert evidence and prepare for further cross-examination if it wished. Additionally, Erco could conduct further examinations for discovery if it saw fit to do so. In light of these circumstances, it was reasonable and appropriate for the trial judge to refuse to permit such evidence to be called by way of reply. It was argued that any unfairness to Dr. Eager could be rectified by permitting him to give evidence by way of rebuttal. However, to encourage such procedures would have the effect of making long trials interminable. [Emphasis added]

Finally, we note that since one of the remedies for failure to cross-examine may be to recall the witness, it has been held that in criminal cases, particularly those involving a jury, it is not an appropriate strategy for a party to wait until the end of trial to raise objections to the lack of cross-examination. In ***R. v. Kwandahor-Mensah***, 2006 ABCA 59, 205 C.C.C. (3d) 321, the Court *per curiam* expressed its disapproval of this tactic by the Crown in its closing address to the jury, and held that a new trial was warranted:

> 11 But when the prosecutor addressed the jury in closing, after defence counsel had done so, she made a complaint to the jury, as follows:
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> > "... defence counsel or I have a duty to put before our own, the other side's witnesses what our side is going to say. That means that defence counsel has, if he knows he'll be calling a different version of events, he has to ask the Crown's witnesses about those events so that they can respond. It's only fair. If that opportunity is not given to them, it has to affect the weight of the evidence that comes out later." (A.B. p. 272, ll. 22-29)
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> Crown counsel then listed for the jury four topics from the appellant's evidence which she said had been improperly omitted from defence counsel's cross-examination of Crown witnesses. She described them in detail.
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> [...]
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> 14 But what if one assumes for the sake of argument that those three topics should have been put to Crown witnesses? On appeal**, the Crown concedes that it would have been better for the prosecutor to have complained to the trial judge and not to the jury. We agree.** The sting of what the prosecutor told the jury went beyond an explanation for gaps in the Crown's evidence. It was an accusation of wrongdoing by defence counsel, and a suggestion that the jury's factual verdict be used to redress the misconduct. In concept, that is harsh medicine (even if worded delicately here). If it were to be administered, it should be by the trial judge, not counsel. It would have to be explained and hedged in much more carefully.
>
> 15 More fundamentally, any statement to the jury was completely unnecessary. **The situation did not have to be left until the end of the trial. A much better solution than punishment is repair. A deeper simpler remedy is to let the side who feels aggrieved by unexpected evidence recall its witnesses to explain the unasked topic.** A number of modern Canadian cases, civil and criminal, have made that point, including R. v. McNeill, supra, at 401-02 (C.R.) (paras. 46-49). [Emphasis added][iv]

A similar point was made in ***R. v. Quansah,*** supra:

> 122 A final point about the timing of a Browne v. Dunn objection is appropriate.
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> 123 The trial Crown did not raise his Browne v. Dunn complaint until the pre-charge conference. The basis for the complaint arose when the appellant testified. The trial Crown said nothing then and nothing during the remainder of the defence case. After the defence had closed its case, the trial Crown did not ask the trial judge to recall the affected witnesses so that contradictory evidence could be put to them and their response heard by the jury.
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> 124 Timely objection is consistent with the duty of Crown counsel under Boucher v. The Queen, [1955] S.C.R. 16, at pp. 23-24; Dexter, at para. 37. Lying in the weeds to seize upon the failure to cross-examine as a basis for instruction that counsel's default tells against the credibility of an accused is inimical to the Crown's duty of fairness. At the very least, Crown counsel should provide some explanation for the lack of timely objection: Giroux, at para. 49; Dexter, at para. 37. No special rule applies to inmates or otherwise problematic witnesses. **Absence of a timely objection to an alleged breach of the rule is a factor for the trial judge to consider in determining the nature of the remedy, if any, best suited to respond to the breach**. On appeal, the absence of a timely objection is also a factor to be taken into account in determining whether the lateness of the objection, coupled with the remedy applied, caused sufficient unfairness that a miscarriage of justice resulted. [Emphasis added]

<u>Conclusion</u>

The rule in ***Browne v. Dunn***, in essence, requires that a party intending to bring evidence to impeach or contradict the testimony of a witness must present the witness with that evidence and give him or her an opportunity to explain or answer it while on the witness stand.

Where a party fails to comply with the rule (i.e., fails to cross-examine and then attempts to bring evidence to contradict the witness' testimony), the standard remedies are either to permit the party to recall the witness for cross-examination if circumstances permit, or to allow the court to diminish the weight given to the arguments or evidence of the party who failed to cross-examine with respect to the particular point at issue. In doing so, the judge should take all

circumstances and evidence into account in order to arrive at a proper weighting, and may in fact entirely discredit the evidence of the party in breach of the rule.

Thus, as the above suggests, the failure to cross-examine goes to weight, and does not mean that the un-contradicted evidence is accepted at face value. Rather, the judge must weigh it against any other relevant evidence that has been presented.

END

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[i] (1894), 6 R. 67 (H.L.)

[ii] See similarly: ***R. v. Giroux*****,** (2006), 207 C.C.C. (3d) 512 at para. 42, [2006] O.J. No. 1375 (CA), leave to appeal refused [2006] S.C.C.A. No. 211, File No.: 31429; ***R. v. Abdulle***, 2016 ABCA 5 at para. 11, [2016] A.J. No. 14; ***R. v. Lyttle*****,** 2004 SCC 5 at paras. 65-66, [2004] 1 S.C.R. 193.

[iii] See similarly: ***R. v. Ryan*****,** 2014 ABCA 85 at para. 50, 569 A.R. 376; leave to appeal refused [2014] S.C.C.A. No. 296, File No.: 35915.

[iv] See also: ***R. v. McNeill,*** (2000), 48 O.R. (3d) 212 at paras. 44, 47-49, 144 C.C.C. (3d) 551.