LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

WRITTEN COMMENTS RECEIVED

FROM THE PUBLIC

RELATING TO

THE LAWS OF EVIDENCE

1976

WRITTEN COMMENTS RECEIVED

FROM THE PUBLIC

RELATING TO

THE LAWS OF EVIDENCE

Prepared by:

Neil Brooks

Jean-Louis Baudouin

1976

INTRODUCTION

Most of the areas covered by the Evidence Code proposed by the Law Reform Commission of Canada were the subject of Study Papers prepared by the Law of Evidence Project. These Study Papers were widely circulated and many comments pertaining to them were received. In this paper we have collated the written comments we received to the sections in the proposed Evidence Code. Those comments were of great assistance to us in preparing the Code and we feel that they will be of equal value to anyone studying the Code.

The comments were made, in the main, in response to the Law of Evidence Projects' Study Papers. Since in drafting the Code we did not necessarily follow the Project's initial recommendations - in many instances because of the comments received - in order for some of the comments to be totally meaningful the reader will have to refer to the relevant Project Study Paper. However, all the comments reproduced shed light on the problems posed by the proposed sections.

Also because we only reproduce under each individual section that part of a particular letter or brief that

seemed to be relevant to the specific problems raised by the section, in some instances the context of a comment may appear missing. While that is unfortunate, we thought little would be gained by including under each section the whole of the brief or letter from which the comment came. We believe that each quote we use fairly gives the author's thoughts on the particular problem. Of course we are aware that if asked for specific comments on the section as now proposed the author might word them differently. We did not attempt in this paper to summarize or comment on the respondent's remarks.

These comments are not reproduced here in order to reveal the professions or the public's sentiments about the Code or any particular section of it. Obviously our sample is much too small and selective to permit any meaningful conclusion to be drawn about the acceptability of the recommendations. The purpose of collating the comments is to enable the reader studying the Code to quickly learn the practical problems and concerns perceived and expressed by our respondents. Indeed in many cases the comments will assist the reader in understanding the relevant section since we too were persuaded by the comment to alter the Evidence Project's initial recommendations. Thus if a respondent simply stated that he or she agreed or disagreed with a recommendation we did not include in these materials that concurrence or dissent. As a matter

of interest, since those who agreed with a recommendation seldom elaborated, the comments reproduced here tend to reveal an attitude toward the Code that is more negative then would be the case if all comments received were noted.

As well as from written letters and briefs the members of the Evidence Project and the Commissioners learned a great deal at various meetings which they attended and at which the Evidence Project papers were discussed. While we often discussed oral comments made about the Projects' recommendations in our deliberations, it was felt that it would be impractical to attempt to reproduce or summarize those comments in this paper. Needless to say, however, as well as those who send us written comments we are deeply indebted to those who arranged and took part in the many meetings we attended.

Some areas of the proposed Code were not the subject of Project Study Papers. Therefore no comments were received on them, and this is simply noted in the following document after each such section. These are areas that we thought would be relatively uncontroversial.

We have reproduced the names of all those who

wrote to us, except those who expressly or inpliedly wished their comments to remain confidential.

INDEX OF PEOPLE WHO SUBMITTED WRITTEN COMMENTS RELATING TO EVIDENCE

CANADIAN Bar Association, Civil Justice Subsection, Manitoba, brief, January 29, 1974.

CANADIAN Bar Association, Study Group, (Ketchum, McDonald, Fridman, Mousseau, M. Fadzen, Abbott, Wright, Weir, Rubin, Henkel) Edmonton, presented briefs on all Evidence Project Study Papers.

CANADIAN Psychiatric Association, Committee on Psychiatry and Law, Nucleus Committee Privileged Communications, brief, May 6, 1974.

CLARK, M.G., Professor of Philosophy, Toronto, letter, March 20, 1974.

COMMISSION des Services Juridiques, Province de Québec, Mémoire du 31 octobre 1973.

COTE, Omer, Juge des Sessions de la Paix, St. Jérome, Mémoire du 25 octobre 1972.

COWPERTHWAITE, D.J., Scotland, letter, July 28, 1975.

CRAWFORD, M.G., letter, April 9, 1975.

DAVEY, H.W., Justice British Columbia Court of Appeal, letter, November 10, 1972.

DUBINSKY, J.L., Justice Supreme Court of Nova Scotia, letter, October 27, 1972.

FITZGERALD, P., Professor Department of Law, Carleton University, letter, November 1, 1972.

FREMETTE, O., Juge de la Cour Provinciale, Hull, Québec, lettres du 7 septembre 1973 et du 20 janvier 1975.

FULTON, J.D., Christian Science Federal Representative for Canada, letter, April 9, 1975.

GOSSE, R., Professor of Law, University of British Columbia, letter, March 19, 1973.

GOODWIN, L.H., Crown Attorney, St. Catherines, letter, May 11, 1972.

GRAY, R.G., lawyer, Ottawa, letter, April 9, 1974.

GREGORY, J.E., Chief Constable Police Department, Victoria, letter, November 1, 1972.

HAINES, E., Justice Supreme Court of Ontario, letter, August 6, 1975.

HARE, M.B., Ontario, letter, August 25, 1975.

HATTERSLEY, J.M., lawyer, Edmonton, letter, January 4, 1974.

HEMNERICK, W.J., lawyer, letter, October 8, 1975.

HONSBERGER, H.S., Judge, letter, February 14, 1975.

HURLBURT, W.H. lawyer, Edmonton, letter, September 10, 1972.

JARVIS, K., lawyer, Toronto, letter, August 26, 1974.

JODOUIN, A., Professeur à la faculté de droit section de droit civil, Université d'Ottawa, lettre du 29 janvier 1975.

JUDGES and Justices of the Courts of Manitoba, brief and transcript of meeting, October 3, 1972.

JUDGES: Committee of County and District Judges, Association of Ontario, brief, October 2o, 1973.

JUDGES: Ontario Council of Judges, minutes of meeting, December 11, 1972.

JUDGES: Ontario Provincial Judges' Association, brief, March 26, 1973.

JUDGES: Provincial Judges, Association of the Province of British Columbia Law Reform Committee, brief, 1972.

JUSTICES of the Supreme Court of British Columbia, briefs, November 27, 1972.

JUSTICES of the Supreme Court of Ontario, brief, December 1, 1972. (Committee on Submissions to Federal Law Reform Commission,)

LAVALLEE, Jean P., Juge en Club Cour du Bien Etre Social - Montréal, lettre du 16 octobre 1972.

LAWLOR, J.F., Chief of Police, St. John's, letter, November 1, 1972.

McDIARMID, N.A., Director Criminal Law Attorney - General Province of British Columbia, letter, November 28, 1973.

McDONALD, D.C., lawyer, three lectures delivered on Evidence Project Study Papers # 2, 3, 4, November 3, 1972.

MACDONALD, H.J., Justice Supreme Court of Alberta, letter, October 2, 1972.

McCRANK, R.D., lawyer, Regina, letter, July 19, 1974.

McFARLANE, M.M., Justice British Columbia Court of Appeal, letter, March 29, 1973; October 2, 1973.

McGILLIVRAY, W.A., lawyer, Calgary, June 26, 1974.

McKELVEY, E.N., lawyer, New Brunswick, February 12, 1974.

McLELLAN, R.F., Judge County Court of Nova Scotia, letter, February 11, 1974; April 23, 1974; October 7, 1974; April 21, 1975.

McQUEEN, R.S., Judge Provincial Court of British Columbia, letter, January 13, 1975.

MANITOBA Law Reform Commission, brief, November 28, 1972.

MATAS, R.J., Justice Manitoba Court of Queen's Bench, letter, September 18, 1972.

MARYWOOD, F., Detective Sergeant Metropolitan Toronto Police, brief (submitted by Adamson, Chief of Police), October 13, 1972.

MEWETT, A.W., Professor of Law, University of Toronto, letter, September 1, 1972.

MILLAR, P.S., Judge Provincial Court of British Columbia, letter (summarizing the views of British Columbia Provincial Court Judges attending a seminar), March 15, 1973; December 14, 1973.

MOLLORY, W.A., Judge County Court Manitoba, letter, March 10, 1975.

MONK, E.C., lawyer, Montreal, letter, November 2, 1972.

MONTREAL Lakeshore University Women's Club, letter, October 30, 1972.

NADON, M.J., Commissioner Royal Canadian Mounted Police, letter, October 28, 1975.

NATIONAL Council of Women of Canada, letter, March 21, 1973; October 10, 1973.

NEW BRUNSWICK Department of Justice, Law Reform Division, brief, November 1, 1972.

NORTHWEST Territories Status of Women Action Committee, letter, March 4, 1974.

ONTARIO Association of Professional Social Workers, brief, October, 1975.

ONTARIO Crown Attorney's Association: Committee on Law Reform, briefs, March 1973; April, 1974.

ORDRE Des Notaires de la Province de Québec - Mémoire sur le Secret Professionnel, 25 août, 1975.

OSBORG, B., Priest, letter, August 30, 1975.

OUTHOUSE, S.B., lawyer, Halifax, brief, September 19, 1975.

PARSONS, M.H., Consolidated Personnel Services Can. Ltd., letter, October 23, 1972.

PHELAN, L.J., lawyer, Winnipeg, letter, May 25, 1973.

PIRAGOFF, A.E.F., Senior Crown Prosecutor Judicial Centre of Regina, letter, July 16, 1975.

PRIMROSE, N., Justice Supreme Court of Alberta, letter, October 4, 1972; February 12, 1975; August 15, 1975; August 25, 1975.

PROCUREURS de la Couronne de la Province de Québec - Mémoire suite à rencontre du 15 septembre 1975.

RIOUX, G., Procureur de la Couronne permanent - District de Gaspé - Province de Québec - Mémoire du 1 mars 1973.

SCHIFF, S., Professor of Law University of Toronto, prepared briefs on all of the Evidence Project's Study Papers.

SCHULTZ, W.A., Judge British Columbia County Court, brief (on behalf of Judges of the County Court of Vancouver), October 26, 1972; letter, November 2, 1972.

SHENNAN, A.E., Chief of Police Niagara Regional Police Force, St. Catherines, brief, October 30, 1972.

SOPINKA, J., lawyer, brief, September 29, 1975.

STEIN, C., Avocat Letourneau, Stein, Marseille, Delisle et la Reine- Québec lettre du 22 août 1974.

STEVENSON, W.A., lawyer, Edmonton, letter, October 4, 1972; May 20, 1973.

TURNER, K., lawyer, Winnipeg, letter, November 23, 1972.

TYRWHITT, Drake M.L., Judge British Columbia County Court, letter, November 6, 1972; September 20, 1973.

UNIVERSITY Women's Club of North York, letter, November 8, 1972.

UNIVERSITY Women's Club Vancouver, letter, October 20, 1972.

VERCHERE, B., lawyer, Montreal, letter, February 17, 1974.

WALSH, H., lawyer, Winnipeg, brief, September 19, 1975.

WILLIAMS, N.J., and BRETT, P., Professors of Law, Osgoode Hall Law School, Toronto, brief, October 1, 1973.

WILSON, J.O., Chief Justice of the Supreme Court of British Columbia, letter, November 27, 1972; January 30, 1973.

WINNIPEG Police Department, brief, (undated)

YUKON Status of Women Council, letter, March 9, 1974.

COMMENTS

Title I

General Principles

Part I Purpose and Construction

Section 1 Purpose

Section 2 Construction

(The following general comments relate to the concept of a Code of Evidence and to judicial discretion in applying rules of evidence.)

Canadian Bar Association, Criminal Justice Subsection, Manitoba and British Columbia Branches.

The study papers proceed on the premise that "evidence more than any other branch of the law is an area in which codification seems justified". The British Columbia Sub-section agreed that the rules of evidence must be readily known, but did not agree that the proposed system of codification should be instituted. The Commission itself has indicated that it does not envisage a code of evidence detailing every step in the trial, but it does suggest a code sufficiently comprehensive in nature to serve

as a helpful guide. The British Columbia Sub-section is concerned with the question of draftsmanship of such a code and submits that the Law Reform Commission should consider the problem of draftsmanship further in this study.

It is apparent that in the proposed legislation, wide discretion is to be left to the judiciary in interpreting rules of evidence. The British Columbia Sub-section found fault with this proposal on the basis that the first aim of the Law Reform Commission is that the rules of evidence "must be readily known, understandable and capable of precise application". The Sub-section questions how any rules can be set in such a manner as to fulfill that trio of standards if the trial judge has such a wide discretion.

In the preface to the study papers, it is suggested that "the codification must not freeze the law of evidence, but permit the courts reasonable discretion coupled with a mandate to interpret the sections in the light of Common-law principles and the basic objectives of the Code." The British Columbia Sub-section saw no such mandate in the proposed form of legislation and further suggested that it would be difficult to provide any such mandate which could be effectively implemented in practice. Legislation must be clear, concise and certain in its effect if it is to be of assistance to counsel, the

court or, more important, to the litigant. The Sub-section questions whether counsel can properly instruct his client if such a wide discretion lies with the trial judge.

"The Supreme Court of Canada in Regina v. Wray (1970) 4 C.C.C. 1, 11 C.R.N.S. 235:

> "If a trial judge did have a broad general discretion to exclude otherwise relevant and admissible evidence there would be difficulty in achieving any sort of uniformity in the application of the law."

Manitoba Law Reform Commission

All of those who communicated with us queried -- but without denigrating -- the concept of codification. The preface to the Study Papers asserts that which no reasonable person would disagree:

The rules of evidence must be readily known, understandable and capable of precise application. (accessibles, compréhensibles et susceptibles d'une application sûre.) ...If the rules be not precise and capable of reasonable certainty in their application (l'imprécision des règles et la difficulté d'en prévoir l'application raisonnablement certaine) counsel experience difficulty in planning for trial, and appeals on evidentiary matters are likely to waste the resources of the courts.

With all of the foregoing we agree without quibble.

What, however, seems to be the effect of that which is actually produced to embody those premises? It appears to amount to a Charter for Judicial Intervention. In his discussion with us, Prof. Roland Penner, Q.C. said:

One of the things that struck me on first reading and again on second reading of some parts was, in fact, the quite apparent contradiction between an express goal to codify the law of evidence and then in point after point when specifics are spelled out the giving of a very great discretion to the judge. It seems to me that this reflects a basic misunderstanding of what a code of evidence is. If there is need for certainty in the law of evidence as to what may be proved and how, and I think there is, then I think there is argument for a code. It is something which then replaces the basic premises of the common law - involving a fair amount of judicial discretion. The way has been paved judicially for that in Canada, in any event, by the decision of the Supreme Court in Canada in Wray[1] criminally and in Draper v. Jacklyn[2] civilly in which whatever discretion was thought to exist to keep out legally admissible evidence on the grounds of unfairness,

[1] (1971) S.C.R. 272

[2] (1970) 9 D.L.P. (3d) 264

or prejudice is whittled to the tight little formula that is only evidence which is tenuous on the one hand and highly prejudicial on the other which comes within the operation of the discretion. Mr. Justice Martland's position in Wray, expressed in the legal positivism of the Supreme Court, in which he says very specifically that they are against this idea of a wide discretion because, as he argues it, (and there is much to be said for the position) you have one judge in one court exercising the discretion in one way and another judge in another court exercising it in another.

If you accept that premise that there should be much more certainty in the law of evidence than presently exists, then there is need for a code. But if they are going to have a code then for God's sake let's have a code where the rules are set out with as much clarity as possible. (And I agree incidentally with Mr. Bowman's, one of his preliminary statements, that there is a very simplistic view of how the law of evidence can be put down in some simple neat little tenets so your code is not going to be that simple, but a code will perhaps be much more certain than the existing principles of extending the common law on some unknown basis.) The final introductory remark I'll make about that is that you have a peculiar ambivalence in the Supreme Court. On the one hand in Wray they express it

as a matter of policy to steer away from any extension of discretion in the sense of being able, on grounds of fairness or abuse of the process of criminal justice, to keep out legally admissible evidence; and on the other hand in the case of Ares v. Venner[3] saying that the common law is this great body that can be extended at any time by the Courts to meet any need. And since the Supreme Court doesn't seem able to make up its mind, except in particular instances, perhaps it is time for a code. So I would agree with the principle of the code. I simply think that they are arguing code on one hand and arguing common law on the other. I think that they have to make up their minds.

In terms of overall effect, Mr. David E. Bowman commented before us:

It does seem to me that in many instances they (i.e. the Law of Evidence Project) have indeed invited the court to play a part totally alien to the role of the judge as the Anglo-Saxon system has always understood it. In some instances he's invited to conduct himself . . . almost as though he has a wandering royal commission brief. I don't think that's too desirable.

[3](1970) S.C.R. 608

Mr. George Lockwood, one of the members of the Civil Justice Section of the C.B.A. said:

I heard the tail-end of what Mr. Penner was saying, and whilst I speak as a lawyer engaged mainly in civil rather than criminal matters, I think I'm in substantial agreement with him. I think that there is a desire for codification . . . . But I'm not so sure its that simple. My general impression of this paper was that it had been framed by people who were accustomed to civil juries and, of course, we're not. There are some people in this province who think that probably, as it is, the judges in civil trials have enough, if not too much, discretion.

Our comment is that the basic trust in judicial discretion upon which the Study Papers seem actually to be predicated will generate less precision, understanding and knowledge of the rules of evidence than is to be sought in reform. The kind of discretion accorded and the manner in which it is expressed would produce appeal-proof rulings in the tribunal of first instance. Litigants then really become "imprisoned within that tribunal and have less opportunity to seek redress in the first appellate tribunal, much less out of the province. The basic assumption of adversary proceedings is that the litigation "belongs" to the litigants and not to the court. To re-cast the process

so that the judge may intervene more, and really direct the course of cases by more incontrovertible rulings is, we suppose, to impress the process with a kind of efficiency which emphasizes the commercial, industrial, economic and even mechanical senses of the word efficiency -- but probably underemphasizes the concepts of humanity and justice. Even so, unless judges be so well briefed in the intricacies and legitimate strategies of every case which they must adjudicate, it is doubtful that the right to intervene so fully will result in such a significant augmentation of efficiency. If the intention be to dilute or abolish adversary proceedings more frank explanation of the objective and specifics would be expected.

Omer Côté

Je suis parfaitement d'accord avec ceux qui croient que le code ne doit pas emprisonner le droit de la preuve dans un cadre rigide, et que le pouvoir discrétionnaire accordé au Président du tribunal dans l'interprétation des dispositions juridiques devrait être étendu.

Turner

Codification sounds fine. In practice, however, the "trial judge's discretion" which has operated for centuries

is of the utmost importance. I fail to see how that can be codified, unless the term "codification" is being used in a manner foreign to my understanding of it. Stephen in his Digest many years ago pointed out the inherent impossibility of codification. And coupled with the "trial judge's discretion" is the "advocate's discretion". Taken together, all this comprises an art predicated upon some "ground-rules" - it cannot be confined within the frame of a code. The most that can be hoped for is some improvement in statory form of some ground-rules called law.

Winnipeg Police Department

Police have long recognized, from day-to-day court appearances, gathering of evidence and the preparation of court briefs, the need for reform of our present day laws of evidence. They realize that the law of evidence is, in the main, lawyers' law, and has become complex, difficult to determine, and in the police view often thwarts the truth-finding function of the court. Therefore, we must concur in amending procedural law for a more just and effective operation of the substantive law, particularly with a need for quick authoritiative and understandable reference capable of precise application.

Law enforcement agencies are continually striving

to upgrade personnel to the complexity of modern society, it's machines, records, computers, education, developments in psychology, etc. A large burden lies on these people in the gathering of evidence which will subsequently reflect their efficiency in the final disposition of a criminal case. Therefore, any new procedural law in respect to witness or exhibit evidence that is in unsophisticated language, concise and with fewer outside the section references, will be of assistance in bringing before the courts and more complete evidence. Rightly or wrongly, in the present day, police prepare most court briefs in criminal matters. If they are uninformed, or do not understand fully the rules of evidence, then this lack of knowledge will be detrimental to the presentation of the necessary facts to the court.

Shennan

It is well known that throughout the history of the Canadian Administration of Justice and the Court system that the main function of the Courts, while extremely complex at this particular time, would be streamlined so to speak by codification of many of the procedures, especially the rules of evidence. Speaking from a police officer's point of view this would clarify many many areas for the working police officer; bearing in mind that in the criminal Courts in particular the police officers function rates very high.

The police community certainly welcomes any change that would up-date our present rules of evidence.

The basic reasons for our Court system, particularly in the realm of criminal law, is a truth finding function and it is obvious that to get at the truth under our present system is very difficult, bearing in mind the extreme complexity of our present rules of evidence. While most of the police community agree to the changing notions of fairness to the accused we, as police officers, also must bear in mind fairness to the victims and as such most of the proposed sections as laid out in the evidence project of the Law Reform Commission of Canada undoubtedly will be more meaningful, and present a far more reasonable approach to fairness not only to the accused but to the victim.

Procureurs de la Couronne du Québec - rencontre du 15 septembre 1973

Certes la codification n'élimine pas les problèmes, elle ne fait que clarifier. En codifiant, on garde la porte ouverte à une discrétion élémentaire pour interpréter la loi. Certains ont prétendu que les nouvelles règles de preuve donnaient une discrétion plus large au juge. L'avantage de la codification, c'est qu'elle a prévu l'étendue, les limites

de cette discrétion. La codification est un moyen terme: on établit les principes, on les codifie, mais on laisse de la place pour l'interprétation judiciaire.

Marywood

The present law of evidence is, in the main, the problem of lawyers. However, we the police, find ourselves in the position of collecting evidence and putting it in a reasonably understandable form for presentation by the Crown Attorney. While we have the advice of the Crown Attorney as to the admissibility of evidence we may have collected, there is a certain immediacy involved with a police officer on the street. A set of simple and easily understood rules would be of immeasurable assistance to us in our investigative endeavours.

The general rules that have been put forward seem to be no more concrete than those we have at present in the form of case law. I think we will now find ourselves (or rather the courts will find themselves) in the position of deciding the meaning of our new rules of evidence and the bounds within which our Justices must function just as we do at present with our non-codified rules.

New Brunswick, Law Reform Division

Another general observation is that reform of the law of evidence, by codifying it, does not really simplify it. To a great extent it is a substitution of new rules for old rules and one gets the feeling that although the overall ambition may be to make the trial less of a legalistic ritual, this is extremely difficult to accomplish. Our general reaction was that the project appears to be relying rather extensively on exceedingly good judicial appointments. I think many lawyers would react rather severely to giving a trial judge so much discretion over the conduct of a trial. There is the fear that with such wide discretion, justice will depend not so much on the process as upon the individual judge. While this is true to a certain extent today, it may well be more of a problem in the future, if a wide discretion is conferred upon the trial judge by the proposed Evidence Code.

Bowman

It is difficult to be successfully against reform and particularly against reform in an area so apparently clouded by confusion as that of the law of evidence. It is rather like being against motherhood and for sin. Further, when the proponents of change modestly acknowledge that their proposed codification will not in most respects change

existing law, it seems almost superfluous and, indeed, gratuitously nit-picking to snipe at and dissect many of their positions. Nonetheless, the Study Papers on competence and compellability, questioning witnesses, credibility and character, go far to make opposition to change more than respectable but indeed necessary and the lack of knowledge of present law evidenced in the material, together with the jejeune reasoning, if it may be so called, makes one positively anxious to embrace sin and attack motherhood.

One might further comment at the outset that despite the admission in the first sentence of these remarks, that the law of evidence is clouded by confusion, it must be pointed out that the authors of the Study Papers have managed to make the law of evidence in the areas covered much simpler than it actually is, inasmuch as they have either (a) misunderstood, (b) misstated, or (c) oversimplified the existing law.

The actual confusion in the law of evidence arises not from its essential difficulty, since the principles are neither so many nor so complex that they are incapable of understanding with a reasonable degree of application. The confusion arises rather from the unfortunate tendency of some judges to either misapply principles and use them in the wrong place, or time, or way, or to stretch them unreasonably,

or to say too much and to attempt to turn a difficult and narrow decision on a particular issue into an expression of further principle. This difficulty is compounded by the even greater tendency of so-called legal scholars to perform upon the body of the law reports the same sort of necrophiliac post-mortems that the Shakespearean scholars have committed upon his works over many, many years, that is, they read in meanings which were never intended, twist terms to meet preconceptions and create mystery where mystery exists not.

The project papers in question commit many of these errors. Indeed, the entire tone is to some extent tainted by the remark, on Page 2 of the preface, that "if the rules are not understandable simple and concise persons interested in and affected by court procedures become dissatisfied with the judicial process." This simple and fatuous remark ignores two basic and necessary facts:

1. The loser in any court proceeding it going to be dissatisfied to a greater or lesser degree. Only the most remarkable of judges and most tactful of counsel can ever so soothe the loser's feelings that he departs feeling that justice has been done. This

does not often occur.

2. No body of rules designed to permit justice between citizen and citizen or citizen and state can be anything but reasonably complex, bearing in mind the infinite variety and almost incomprehensible subtlety of human relationships. This means that a considerable period of study must be given to such rules before anyone, no matter how they are drafted or under what system they are administered, is capable of attempting to interpret and apply them. To then enunciate clearly, simply and in basic language in a few minutes or even an hour, what the rules are and why they apply in a specific way in a particular case is a task almost incapable of achievement. Your surgeon can tell you that your appendix must be removed and that he is going to remove it. He is not expected to tell you the entire process by which he has determined that it must be removed nor to describe, cut by cut, and stitch by stitch, the process by which it will be removed.

This type of remark smacks of a longing for "people's courts" where "justice" will be done with despatch and simplicity, without formality and fancy verbiage. This has been achieved in a number of countries behind the Iron Curtain. Rules of procedure and evidence did not just spring full-blown from the brow of some academic Minerva. They have

developed to control and channel court hearings; to turn mob shouts into disciplined accounts of fact limited to what experience has shown is important and capable of being tested; to protect each individual from unfairness. Substantive law is merely the skeleton. Evidence and procedure clothe it with flesh. To change substantive law unfairly might excite protest. More harm can be done by altering rules to permit judicial anarchy. If one could dispense with appeals there would be no need for a careful record or for careful application of rules, inasmuch as this is necessary, in part at least, to be able to show that rights were respected and opportunities afforded properly to every party. If there are to be appeals these things are necessary. Again, if there are no appeals of course we have the most arbitrary and irresponsible type of so-called justice. Similarly, one can do away with legal formality and the immense training and background of the judiciary if one is prepared to accept the substitution of the several prejudices of the neighboring farmer or druggist or mail-carrier or university professor who happens to be assigned as the court. Judges are not only trained to attempt, with some small degree of success, to control their prejudices, but are trained to operate within rules including the laws of evidence and to express themselves within those rules so that should they go wrong there is a greater opportunity of

correction.

These comments are made simply as an introduction to a brief and largely unreferenced analysis of the Study Papers, which are themselves unreferenced and shallow.

The preface, at Page 3, betrays an inadvertent acknowledgment of the major difficulty involved in any codification of something like the law of evidence which must necessarily be general in its terms and capable of significant variation in its application. The preface refers to the necessity for a code "comprehensive enough to serve as a helpful guide ---" and goes on to acknowledge that it "must not --- freeze the law of evidence but permit the courts reasonable discretion--". That is precisely what the law of evidence has done and is still doing, as it has developed over hundreds of years and is still developing. I personally have no objection to codifying the law of evidence but I envisage two related problems. One, that the codification might be carried out with so much detail and so many clauses and sub-clauses as to convey to the courts that their theoretical discretion is actually almost non-existent; or the alternative that the necessary discretion remaining will be so wide (as it almost must be), that in twenty or thirty years after such codification the whole subject will again be

almost as much at large as it is today and as much dependent upon the perusal of cases and interpretation of judicial decisions. In other words, it is my view that codification is not necessarily a bad thing but that its possible usefulness is extremely limited and that to look to it for simple solutions and easy public understanding is unrealistic.

As will be readily apparent, I find little merit, considerable harm and inconceivable stupidity in the reports. It seems clear that their authors have no experience of what actually happens in court and that their scales of values and priorities are foreign to the fundamental traditions and indeed life-blood of our jurisprudence. Whether this be attributable to their status as academics; to having been trained, in some cases at least, under the French system which is totally alien to ours and cannot possibly be grafted on in bits and pieces; or to a basic incompetence, is something I cannot judge. I would hope, however, that the Manitoba Law Reform Commission and many other bodies and individuals will make it clear to them that it is time to go back to the drawing-board and, hopefully, with an enlarged and more knowledgeable staff.

Stevenson

The paper envisages placing a vast amount of discretion in the Judge as to the admissibility and, more importantly, the use of the evidence that is offered to him. It seems to me there are two very important facts that must not be overlooked. Firstly, you assume a very high degree of competence in the court. By far the great majority of cases will, of course, be tried by judge alone. I do not think you can assume that all the triers of fact will be omnicompetent and unaffected by those factors which, in many cases, are the bases for exclusionary rules, prejudice, bias, and lack of appreciation of the legal significance of the evidence. Secondly, anyone who has had trial experience will, I think, warn you that very few are the judges who can completely reject from their consideration evidence which they have ruled to be inadmissible. The exclusionary rules are, therefore, an important check on the trier of fact.

Hurlburt

I note that there are references to the result as a "code". I am not sure that I understand the word in the same sense that it is used, but I would take it to indicate that the legislation would contain all the law on the field of evidence, either abolishing all existing law or leaving it available only to cover a hiatus. I would regard a complete

code as a very ambitious undertaking, and if it is done, I suppose that someone would be drafting fundamental sections outlining the types of evidence which may be adduced and so on.

Canadian Bar Association, Criminal Justice Subsection, British Columbia Branch

He posed the question of whether there really is an urgent problem in the law in respect to these matters. Since there is a general complaint throughout Canada that the clear and quick administration of the law is sadly hampered by poor draftsmanship, and since codification would call for draftsmanship, is codification, he queried, the answer to the present problems? He felt we should consider whether the National Law Reform Commission is embarking on reform for reform's sake, or whether there is really a necessity for the changes which are being suggested.

Parsons

Reasons for Codification: If codification of evidence aims at defining principles which have proven useful, satisfactory and consistent to the substantial aspect of the Law, than I agree that there is reason to consider codification. But somehow, I am not convinced that this is the main aim of the project group; I suspect the main aim

has been to propose codification primarily in the hope that such codification will eliminate a major portion of "procedural bickering" before the courts - and the attendant delays to court proceedings.

Personally, I believe that hope is well intended - but ill-founded. My impression, as a layman, has been that codification rarely reduced procedural bickering; rather, it appears to but change the form and fashion of bickering. However, if the project group can offer some practical demonstration of "procedural harmony through codification", I may share their optimism.

Justices of Supreme Court of Ontario

It is the view of the committee that it would be a mistake for Canada to move out of the common law stream of the rules of evidence. The committee further believes that it is a mistake to attempt to codify the existing law while, at the same time, changing the existing law. The committee further feels that they have no objection to a codification of the law of evidence, if properly done, but are not convinced that it is necessary, at this time, to codify our existing law of evidence.

The committee is unanimous in its belief that there

is no urgent need for a complete revision of the law of evidence at the present time. However, it should be pointed out that we do feel that there is need for a change in some of the existing rules of evidence. The committee is of the opinion that, from the study paper, it would appear that there is an attempt to retreat from our adversary system and to either discard it and go to the European system or a Code of Evidence system, or a melding of the two systems. We feel that both of these projects are unsound.

McLellan

In general, I agree with the proposal for codification and particularly the increased discretion which is given to the trial judge. I do not have jury trials and have found from practical experience that when the admissibility of any evidence is questioned, it invariably saves time to admit the evidence subject to the objection and a later ruling as to admissibility. In the majority of instances it is unnecessary to make a ruling on the objection, as its relevance has disappeared at the conclusion of the trial. Of course, I recognize that such a procedure cannot be adopted where there is a jury; however, the general thrust of the draft code is to favor admissibility and leave the matter of weight to the trier of fact which, as suggested above, is in accordance with my own practice.

Cowan

I have read the study papers with interest. My own view is that codification of the Law of Evidence is badly needed. I am also of the opinion that many drastic changes in the Law of Evidence are badly needed. The Law of Evidence at the present time is outdated and inadequate to deal with the speedy and efficient disposition of matters coming before the courts. As a trial judge, my experience over the past six years is that, in most cases, the judge will listen to all relevant evidence in an attempt to reach a just decision. In certain cases, however, the judge is bound by strict rules and it is these cases which give rise to the greatest difficulty.

In cases where a jury is involved, the judge usually is more strict in the application of the Law of Evidence, particularly if the matter is a criminal one. Also, if the amount involved is very large and the particular rule of evidence is crucial, the judge is more inclined to be strict since the parties are less likely to agree to admission of evidence and are more likely to appeal.

Judges and Justices of the Courts of Manitoba (transcript)

Well, no I didn't have in mind that; I simply -- for instance, I would have to say that I think the -- I

certainly agree there is a need for reform; I certainly agree that there are good reasons for codification; and I certainly agree with many of the proposed legislation. I'm sure it would be encouraging to the project to know that there are judges who think that reform is necessary, and that there is agreement with the general principles, and so on.

Like we -- perhaps we could even put this on the transcript; because I think we all agree that there is a need for reform. I think we all agree that it's highly desirable that evidence be put in the form of a uniform Code vis-a-vis civil and criminal proceedings, not only for the sake of uniformity across the country, but for the sake of public understanding -- you know.

Judges: Committee of County and District Judges' Association of Ontario

The Committee acknowledges that in some respects the law of evidence may require change.

The Committee submits, at the present time, that it would be error to wholly transfer from common law rules of evidence to codification. In many respects the law of Evidence Project proposes extreme changes in the existing rules of evidence. Many of the proposals in the study papers are a negation of the adversary system, and tend to

gravitate to an adoption of the inquisitorial system which prevails in some European Countries.

Any changes to be made should be by amendments or additions to present statutes.

The Committee submits it would be error to codify the law of evidence, in a new or an amended Canada Evidence Act, without assurance that in each of the Provinces a new or amended Evidence Act will be enacted, so that there will be standardization by uniform legislation applicable to civil cases. There is no distinction between what is admissible evidence in a civil case or in a criminal case, except where the matter is regulated by statute or by principles applicable to criminal law. It is submitted it would be unsatisfactory to have different rules of evidence under a new or an amended Canada Evidence Act, which would be applicable in civil cases to the Federal Court or to matters which the Parliament of Canada has jurisdiction, and to have different rules of evidence in civil cases in the Provinces.

The Committee submits, in the interests of fair play and impartiality, that the recognized limitations of a Trial Judge in interfering with the conduct of a case by counsel, as expressed in authorities, are sound and give the

public confidence in the fairness, integrity and impartiality of the Courts. There are many proposals in the suggested codification which are a negation of this submission.

Millar

I must regretfully express as the unanimous disapproval of our group to the proposal, which is inherent to the material, that the law of evidence be codified.

The above comments do not touch the more fundamental issue of the desirability of attempting to codify what is essentially an organic and developing limb of the body of law. To codify, in a phrase, would be to ossify. The circumstances to which the rules of evidence must be applied in each individual case are so subtle in their diversities that maximum flexibility is a vital requirement if the rules are to work with the desired effect. In our view any attempted codification would result either in a code so simplified as to be valueless, or so rigid as to be a positive evil in the administration of justice.

Our unanimous view is that codification would be unnecessary and inhibiting, and that the Manner of Questioning Witnesses may be swiftly elicited by reference to any standard text on the subject.

Wilson

I respectfully suggest that the opinions expressed in the study papers may be too much influenced by American experience on these matters. Any judge who has listened to a trial in an American court will remember the highly technical approach made to the admission of evidence, the very frequent objections and arguments. In an English court none of this happens, disputes as to the admissibility of evidence are very rare and soon resolved. This is largely true in the courts of this Province. In my experience objections taken to evidence are very often found, at a later stage of the trial, to have been unnecessary. We should not let the troubles they have in the United States influence us in making a decision as to the need of a Code.

You will also remember that the Code will only be Federal, so that the lawyer will be confronted with the neccessity of learning two laws of evidence, Federal and Provincial.

Tyrwhitt - Drake

By and large, I am of the view that the law of evidence, like most adjectival law, is not susceptible of codification. Reform, in my opinion, should concentrate on such things as exclusionary rules: and comparative studies would be useful.

Schultz

It is clear, by the Preface to the Study Papers, that it has been decided that the problems in the Law of Evidence will be solved by the enactment of a Code of Evidence, which will specify the rules of evidence that are "... readily known, understandable and capable of precise application."

Notwithstanding this simplistic solution to the problems of evidence, you assert "... the codification must not freeze the law of evidence but permit the courts reasonable discretion coupled with a mandate to interpret the sections in the light of common law principles and the basic objectives of the Code."

I am not convinced (1) that the prior assumption of a Code of Evidence as a solution is correct, or (2) that the exercise of "judicial discretion" will result in rules of evidence which are "... readily known, understandable and capable of precise application."

The case law emanating, for example, from the Criminal Code of Canada or the Canada Evidence Act does not support the simple solution concept envisaged by codification. The "precision - judicial discretion" approach to evidence

which is advanced appears to combine two different criteria. The result of the free flow of "judicial discretion" can be a "judicial jungle".

There are particular or special areas in the law of evidence where change might be effected by legislation as an appropriate remedy. However, the four initial Study Papers indicate that to seek to embody all the rules of evidence, both criminal and civil, into a Code of Evidence is to invite disaster.

Davey

Basically the four proposals for changes in the law of evidence will introduce chaos and lead to disaster, by leaving to trial judges a too wide discretion to exclude on various grounds evidence that would otherwise be admissible.

Speaking generally a codification of the law of evidence should be as certain as a statute can make it, and in only a few instances should admissibility depend upon the discretion of a judge, e.g., relaxing the rule against leading questions; a power to call witnesses in criminal and civil cases; there is also room for argument on which I have not yet formed a final opinion that a judge should have power to exclude confessions unfairly obtained, though otherwise made voluntarily.

Experience with voir dire procedure on the admissibility of confessions shows that the great increase in the number of voir dire hearings necessary to enable a judge to exercise his discretion under the proposed changes and the innumerable arguments on admissibility will unduly protract trials, and thereby impose a much greater case load on overworked courts and much heavier expense on litigants. The effort should be to simplify and shorten trials. Lawyers should be entitled to know what evidence will be admissible before they go to the expense of investigating and calling it, and witnesses should be entitled to know that their evidence will be received after waiting to be called.

Leaving so much to judicial discretion is bound to lead to uncertainties in the application of the rules and variations from judge to judge and court to court, and because the discretion is judicial appellate courts will be reluctant to interfere unless some mistake in principle has been made or the exercise of the discretion was clearly wrong. Thus one of the advantages the preface claims for codification will be lost.

Wilson

With singular unanimity this Court rejects the

idea that a code of evidence law is necessary or even desirable.

The Court does not find that the present laws of evidence "are unduly complex, difficult to determine and often thwart the truth-finding function of the Court", as stated in your preface. On the contrary, our experience has been that disputes about evidence in our Courts are of a diminishing number and significance. This is not to say that present laws of evidence represent perfection - like all other branches of the law, the law of evidence requires study and timely alteration. This can be accomplished when required by amendments to the Canada Evidence Act.

Judges of Supreme Court of British Columbia

"A codification of the type proposed will lead to more, not less, difficulty in conducting a trial. The 'code' relating to drinking-driving offences is an illustration of how difficulties can and do arise in the interpretation of codes. Those who think that a code may be devised to cover every conceivable situation that may arise during a trial delude themselves into a belief that they can anticipate every possible variation."

"The papers so far sent to us consist of a preface and four study papers. In the preface a conclusion is swiftly

reached in favour of codification and reached, in my opinion, on inadequate facts and reasoning. The preface states: 'It has long been recognized, however, by those who are engaged in day-to-day practice before the courts that our present laws of evidence are in need of reform'. If by reform they mean codification, I would question that statement. In my opinion, those who are engaged in day-to-day practice before the courts would favour amendment of certain rules but would not favour codification. It is those who are not engaged in day-to-day practice before the courts who recommend codification. The preface goes on and states that the present rules 'are unduly complex, difficult to determine, and often thwart the truth-finding function of the court for reasons unrelated to the protection of any significant interests'. Complex they may be but are they unduly complex rules. 'Difficult to determine'? Perhaps, but perhaps not more difficult than the complex subject matter requires; and perhaps more difficult for those who do not use them in their daily lives than for those who do. I have found that it is not the trial lawyers and trial judges who complain about this difficulty, but the solicitors and the like who do not use the rules and consequently do not know them.

'Often thwart the truth-finding function, etc.'? Do they? Often? Which rules do that? The preface goes on:

'Changing conditions have rendered many of the rules historical oddities. There are many examples:' But for examples given are of changing conditions. No examples are given of the rules which they say are 'historical oddities'. There are some, but I would not say "many". But in any event these matters should be spelled out and considered before jumping to the conclusion that codification is wise.

'If the rules are not understandable, simple and concise, persons interested in and affected by court procedures become dissatisfied with the judicial process.' True, but that is very similar to what laymen always say about the law. We find among lawyers who do not use and know the rules somewhat the same attitude towards them as laymen have towards the law generally and the same desire to dissolve their ignorance by a 'simple and concise' code.

"I do not find in the preface any reference to the tremendous amount of time that will be spent in trial (and appellate) courts arguing about the meaning of the words used in the code after the mass of earlier decisions has been thrown out. Statements like that in the preface that '..... ... the codification must not freeze the law of evidence but permit the courts reasonable discretion coupled with a mandate to interpret the sections in the light of common law principles

and the basic objectives of the code' will not stop such arguments from developing.

On page 4 the preface says, '.... we hope to be able to use insights which result from intensive research and the practical experience of judges, practising lawyers and all persons affected by the rules'. I think it would be well if all these factors were first used to determine whether or not codification is wise.

There is no doubt that some of the rules of evidence require change. I do not say "reform" because I think the use of that word may clothe change with a value it may not merit. Some of the reasons advanced in the preface for codification, even if shown to be sound, would support amendment of certain rules but not codification of the rules as a whole."

I am opposed to codification. Our present laws of evidence have worked well (with some exceptions) and have been acceptable to the bench, bar and public. There is no need to model our laws of evidence on the laws of other countries, including the United States. It is just as important to preserve Canadian concepts of justice as in other areas of life.

The common law is capable of expansion to meet the changing needs of society in most areas. Where necessary changes can be effected by amendments to the Evidence Acts.

Judge of the Supreme Court of British Columbia

Unlike the author of the "preface to study papers" I have not found that the present laws of evidence "are unduly complex, difficult to determine, and often thwart the truth-finding function of the court." I venture to assert that that has not been the experience of judges or counsel who practice as barristers.

I regard the whole effort as a make-work project by for academics who are seemingly unaware of the fact that the present laws of evidence are functioning satisfactorily, at least in British Columbia courts. In my opinion the Law Reform Commission and its staff could better devote its time and effort to matters of substantive law needing correction.

Judge of the Supreme Court of British Columbia

There are a number of assumptions or premises from which the writers of the study are proceeding with which I do not agree:-

(a) That there is a need for a quick, authoritative, and understandable reference to the present law (p.1). If

Phipson is found too time consuming or difficult, then perhaps those who feel the need could be provided with a copy of the Phipson Manual, at far less expense than what is contemplated.

(b) I agree the law of evidence is difficult, relatively speaking, when compared with other subjects taught in law schools; and is perhaps rather difficult to teach in theory only, without having the opportunity of appreciating it in practice. I suspect this is at the root of the academic wishing to attempt to set the law forth in a so-called "Code" so as, hopefully, to make it more readily taught academically. But a "Code", if it were at all extensive (as it must be for the purposes expressed) would itself be "complex" (p.1).

(c) I do not agree with the broad statement that the laws of evidence "often thwart the truth-finding function" (p.1).

(d) I do not see how a Code will "expedite" civil trials (p.2).

(e) The "Reasons for Codification" (p.2) consist of generalities which appear to me to be written by someone who does not know his laws of evidence in practice. I do not accept that the situation is as it is painted here.

Judges: Provincial Judges Association of the Province of British Columbia

1. PURPOSE OF A CODE OF EVIDENCE: The stated purpose of the Law Reform Commission is to draft a Code of Evidence that will be simple, clear, precise, complete, and reasonably certain, to the end that the orderly programs of trials will not be hampered. At the same time, the Commission does not envisage the Code as including every facet of the admissibility of evidence. "It should be comprehensive enough to serve as a helpful guide, and it must not freeze the law of evidence, but permit the courts reasonable discretion coupled with a mandate to interpret the sections in the light of common law principles" (Page 3).

COMMENT: This seems ambivalent and suggests some unsureness of purpose, and may cause more problems than it solves. A Code, such as the Criminal Code, is not a mere guide, but is a pronouncement of the law. That is not to say that sections of the Code are not subject to interpretation by the courts, as are all written statutes. But they are as complete and comprehensive as a draftman's skill and ingenuity can make them. On the other hand, we think that the characterization of the proposed Code of Evidence as a "helpful guide" which would not "freeze the law of evidence" indicates that the Commission is alert to the fact that the law of evidence, as applied from case to case, is organic and developing to meet new

problems as they arise. For example, fast developing technological changes quickly give rise to new problems touching upon the admissibility of documentary evidence. A rule of evidence formulated, say, in 1974, dealing with electronic devices, might not be applicable in 1975. We have some reservations as to the usefulness of an attempt to codify the law of evidence. But we think that if it is to be done, then it must be more than a "helpful guide", of which many now exist. To exclude some facets of the law of evidence may well cause more problems than it solves. We think that, if there is to be an Evidence Code the Law Reform Commission should actually draft a complete model Code, rather than deal with it in general terms.

2. JURISDICTION: At Page 4 it is said that "the Commission will submit its recommendations including a draft Evidence Code to the Minister of Justice." Presumably, therefore, the proposed Code of Evidence will deal only with matters coming within Federal jurisdiction, such as criminal law, bankruptcy, banking, etc. in the hope that it will be enacted into a Federal statute. This, of course, leaves untouched, all Provincial matters. Unless there is some proposal whereby there will be uniform Provincial Codes as well as a Federal Code, there is bound to be a great deal of confusion.

COMMENT: Are the Provincial law reform bodies working toward the same end? If not, how can this jurisdictional problem be reconciled? Also, there are some reforms suggested by the Commission which may not gain quick acceptance. (e.g. Abolition of marital privilege). We suggest to the Commission that while it might be a worthy endeavour to attempt to draft a complete Code of Evidence, we think that we should be told just how such a Code (which is to be submitted to the Federal Minister of Justice) is to be made applicable to the Provinces. We think further, that, it might be a more useful approach to stress and give priority to such pressing matters as, for instance, a revision and codification of the Hearsay Rule, and Exclusionary Rules, and the rules relating to proof by documentary evidence.

The Commission should perhaps draft a Code dealing with Hearsay, for example, and this should be done in depth. Then some process should be evolved to ensure or persuade Provincial Legislatures to adopt such rules for incorporation into Provincial Evidence Acts. We are not clear as to whether the Law Reform Commission envisions a Code to be drafted into a Statute such as the Canada Evidence Act, or a Code which would be drawn by the Commission which would not necessarily have the force of law, but would merely be a "helpful guide" such as any one of numerous text books upon the subject.

On Page 1, it is said that "the Law Reform Commission decided to give priority to a critical study of the law of evidence with a view to its codification". After distillation of the views of the people of Canada, and various legal bodies throughout the land, the draft Code will be submitted to the Minister of Justice. What then? Will the Minister of Justice submit a Bill to Parliament? If so, what jurisdictional areas will it cover? It can presumably only be applicable to Acts of Parliament, not Acts of the Legislatures. No doubt the Commission has all this in mind, but it is to be hoped that it would make some statement on this fundamental problem. To attempt to get a complete Code of Evidence through Parliament seems like a massive project, and could take many years and meanwhile, perhaps the Code could be put into effect by one of the Provinces as an experimental pilot project for five years, or so, and see whether it will work.

Phelan

It is apparent from reading the article that the gentlemen in charge of this "Project" are proceeding on some rather surprising assumptions. The assumptions should, I think, be the source of concern not only to all members of the profession, but also to the Law Reform Commission of Canada, whose future as an acceptable entity must of

necessity depend on little other than its continuing credibility.

In the first place, the "Project" is apparently proceeding on the assumption that codification of the laws of evidence is necessary. In the latter part of the 19th century, the criminal law and the law relating to bills of exchange and sale of goods were codified. They were codified because the need for codification was obvious. The "Project" however, has made to attempt whatever to justify the assumption that codification of the law of evidence is necessary.

The article does, however, offer a clue to its readers as to why its authors think it so. They say that they have engaged a "social psychologist" whose "assistance has been invaluable in helping us understand some of the realities of the rules of evidence." Perhaps these fellows would also find the experience of sitting in a courtroom invaluable in helping them understand the subject.

Some of the finest jurisprudence of the common law is to be found in the leading cases of the law of evidence. Unlike other areas of the law, the rationales underlying most of the rules of evidence hold just as true today as they did a hundred years ago, when they were carefully thought out by

clear-thinking judges. The leading texts disclose precious few areas of the type of chaotic uncertainty that led to codification in other areas of the law.

Codification would send all this jurisprudence down the drain. This is clear from the Vagliano decision (1891) A.C. 107.

The second startling assumption is the general approach to the rules (given codification). The "Project" apparently proceeds on the footing that rules of evidence should not be binding on judges. Judges should, they say, always be able to exercise a discretion whether or not to apply a rule of evidence. This assertion should also unsettle a few stomachs. Again, it is bald assertion made without any pretense of an explanation or reason why an entire area of well-established law should be turned upside down.

The Law Reform Commission would do well in recognizing as a fact of life that some (certainly not all) academics are so anxious to spend grant money that they lose sight of a fundamental rule of logic, namely, that it lies upon a seeker of change to justify why a change is warranted.

Addy

As to the idea of codifying the law of evidence, altogether apart from the numerous difficulties involved in doing so and the inevitable proliferation of litigation resulting from interpretation of rules of such general application as the law of evidence, with resulting delays in the administration of justice for many years to come, the Commission must certainly be fully aware that, unless a uniform code is agreed upon by the Federal Government and all of the Provinces, the creation of a federal code, with a view to re-stating and perhaps modifying to some extent the common law rules of evidence, far from simplifying matters will only have the effect of adding another set of rules to those already existing and of creating utter confusion among the members of the public as well as the members of the legal profession. However, if a uniform code of evidence could be devised which would be acceptable by all jurisdictions and applicable throughout the country as a whole, and which would contain the required provisions for the trying of civil cases under all provincial and federal jurisdictions as well as for trials of offences under the criminal code and penal offences under provincial statutes, then the uniformity ultimately achieved would seem to justify the intervening period of confusion and uncertainty. Codification under any other condition would, in my view, merely serve to create confusion and impede both the adminis-

tration of justice and the understanding of the laws of evidence by all concerned.

Tyrwhitt - Drake

A swift perusal, however, serves to reinforce my opinion that it may be a mistake to attempt to confine adjectival law in the static form of a detailed code. If reform is to be accomplished by legislation, then the civil law, I suggest, provides an excellent series of models, confining itself as it does to the expression of general principles.

Stevenson

Judicial Discretion - I am one of those who expressed concern about the amount of judicial discretion proposed in the early papers. The answer is given in an article by McElroy. I have two comments. One is that it answers the question of wilful misuse and does not answer the question of incompetence. Moreover, it seems to me that the whole proposition is an unsafe justification for extending discretion. It seems to me that, to use McElroy's statement in this context is the equivalent of saying that because some expert may be able to pick my door locks, I shouldn't secure my property. The fairly difficult problem is the unsure judge, who lets something in "for what it's

worth", and then can't discriminate.

A Provincial Court Judge

Our present laws of evidence have been developed through many years experience, and should not be changed without good reason, and then only if they can be replaced by provisions which can reasonably be expected to produce better results. In suggesting changes it should be firmly kept in mind that ours is an adversary system, a system which we are not prepared to abandon. Any procedures used in other systems of justice should be very carefully considered to be certain that they are compatible with and adaptable to the adversary system and in no way repugnant to that system before they are recommended.

We are faced with the question of how far does the changing picture of crime in our modern society require a lessening of the insistence on the inviolable maintenance of the individual's rights and privileges in order to secure greater protection of society as a whole from criminal activities. In resolving this question it must be borne in mind that the citizen's rights must necessarily involve attention being given to each person's commensurate responsibility for the safety and protection of his neighbours in society. The ultimate decision will involve a balancing of

the interests of society and the rights of the individual.

It should also be remembered that the purpose of the laws of evidence is to facilitate the determination by the Court of accurate truth, whole truth and relevant truth concerning the issues before it. Any proposed change in the existing laws of evidence should be carefully considered in the light of this purpose.

Judges: Ontario Provincial Judges' Association

In our view, any changes or modifications that may be made in the law of evidence should be related to the purpose or object that the law is intended to serve. In criminal cases, we believe that the primary object of the rules of evidence is to seek out and ascertain the truth of the facts surrounding each case consistently with due regard for and preservation of basic rights of the individual. In our experience, the best method of accomplishing this object is still through the adversary system of trial with continued application of the two main principles of the criminal law; the presumption of innocence and the requirement of proof of guilt beyond a reasonable doubt. It is our opinion, however, that some changes, modifications or amendments of existing rules are necessary or desirable at the present time by way of adjustment to the existing condition of the

social order and so as to achieve and maintain a due and proper balance between the rights of the individual and the interest of society to elicit the truth and protect the public from the incidence of crime.

As long as the adversary system is maintained it is essential, at least to the appearance of justice, that the trial judge be neither proponent nor inquisitor. In both civil and criminal cases the issues are drawn and presumably explored before trial. Obviously the pre-trial discovery in summary conviction cases and those tried by magistrate under absolute jurisdiction or on election by the accused is presently limited by the extent of whatever rapport exists between individual defence and prosecution counsel.

However, if the judge's role is to be, and to appear to be, impartial when presiding at an adversary trial, he should not be expected to take the initiative in developing the apparent issues before him either by way of examination or cross-examination of witnesses or by directing the order of their appearance. Exceptions to this practice suggest themselves when it appears desirable to clarify the testimony of a witness or to ascertain whether an evasive witness is adverse or merely reluctant. With respect to the adverse witness, it is more desirable to relax the rules permitting

his cross-examination by counsel than to expect the judge to conduct the cross-examination from the bench.

In our experience, it is rarely that a trial judge should wish to call a witness who has not been called by the prosecution or the defence, or to re-call one who has. However, the right to do so should be clearly recognized. If the purpose of the trial is to discover the truth of the matters in issue then of necessity, if it appears during the trial that some person not called or not present can furnish relevant information not otherwise before the court, such person should be called by the judge if neither prosecution nor defence wish to produce him as his own witness, even if this involves adjourning the trial to a later date.

Canadian Bar Association, Study Group, Edmonton

John Weir felt that the general approach of the evidence project is wrong inasmuch as it is tackling the task from the wrong end and instead of looking at the law of evidence and seeing where it is working injustices or is inadequate or antiquated and correcting those areas the project appears to be taking far too general an approach and advocating too many changes, a great many of which are not justified.

David McDonald was of the general view that while

the overall approach was not necessarily wrong in itself the implementation of it by overly generous borrowings from American approaches to reform of the law of evidence was not appropriate in many cases for Canada.

The majority agreed that in general the proposals give too much discretion to the trial judge and that this is wrong unless there is a corresponding change in appellate powers of review as there are obvious difficulties of taking an appeal where there is some evidence on which the trial judge could have exercised his discretion. The majority also felt that in spite of the protestations in the preface the question of discretion is still playing a prominent part, for example, the liberal use of the word "may".

Section 3 Unprovided Matters

Gray

Is it the intention of the Commission to consider the possible desirability of having Parliament enact a federal Code of Evidence?

Such a code should provide leadership in effecting uniformity of provincial laws of evidence. At the same time it would provide a basis for amending S.37 of the Canada Evidence Act so as to avoid the necessity for applying provincial laws of evidence in proceedings over which the Parliament of Canada has legislative authority.

S. 37 reads as follows:

> "37. In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena, or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings."

Let me give an example of the anomalous effect of S.37 as presently worded. A wishes to sue B in the Federal Court of Canada for infringement of a Canadian patent.

Having regard to Rules 2(p), 200(4), 200(6) and 400 of the General Rules and Orders of the Federal Court of Canada, A may institute his action, by filing a Statement of Claim, in the principal office of the Federal Court of Canada in Ottawa or in any of the several local offices of the Court located throughout Canada, irrespective of where the defendant resides or where the alleged act of infringement has taken place. In the absence of any over-riding consideration, A might be expected to file his Statement of Claim in a province whose laws of evidence are best suited to his purposes. For example, if A's proofs involved reliance on evidence that was inadmissible in one province, but not another, A would be imprudent if he did not institute his action in the latter province. I note, for example, that until a few years ago the Manitoba Law relating to the admissibility of business records had for a long time been more liberal than the law elsewhere in Canada.

The added expense and inconvenience of filing the Statement of Claim in a Federal Court office remote from the "home" office of the Plaintiff's solicitor, where he would normally file, would be negligible. Subsequent filings and steps in the action could be effected in the "home" office in the normal way.

Such is the effect of S.37 of The Canada Evidence

Act in respect of proceedings in the Federal Court of Canada. I do not think it is desirable that our laws should encourage what might be considered to be a modified form of what in the U.S.A. is called "forum shopping".

It might be contended that S.53(2) of the Federal Court Act is sufficient to render forum shopping unnecessary. This sub-section reads:

> "53 (2) Evidence that would not otherwise be admissible, shall be admissible, in the discretion of the Court and subject to any rule that may relate to the matter, if it would be admissible in a similar matter in a superior court of a province in accordance with the law in force in any province, notwithstanding that it is not admissible by virtue of section 36 (now S.37) of the Canada Evidence Act."

But there is no certainty as to how the Court would exercise its discretion. Indeed, the discretion bestowed on the Court under S.53(2) is much too wide, in my submission. Not only does the sub-section render the law uncertain, it imposes on the parties' lawyers an unreasonable obligation to become familiar with the laws of evidence in each province, no matter where the cause of action arose or where the action is commenced.

In short, I think that serious consideration should

be given to expanding the Canada Evidence Act to provide a complete code of evidence made applicable in all proceedings over which the parliament of Canada has legislative authority, and to abolishing S.53(2) of The Federal Court Act.

Part II General Rules

Section 4 No comments

Section 5 Exclusion On Grounds of Prejudice, Confusion, Waste of Time. (See comments following sections 1 and 2)

Title II

Decision - Marking Powers Respecting Evidence

Sections 6 to 11 No comments

Title III

Burdens of Proof and Presumptions

Part I Burdens of Proof

Section 12 (1) Burden of Persuasion

Section 12 (2) Civil Proceedings

Schiff

I agree with most of the analysis that is set out on page 2 of the text. However, I am not as optimistic as the Project that "a jury or a judge would (not) actually

attempt to compare mechanically the probabilities independent of any belief in the reality of the facts...". The trier's comparison of probabilities is exactly the danger caused by a jury instruction phrased and explained in terms of probabilities of the existence of disputed past events, on the one hand, rather than in terms of the trier's belief in their existence and the allowable degree of doubt the trier may still entertain, on the other. As the last sentence on page 2 of the text emphasizes, any statutory amendment must "direct the attention of the triers of fact to the degree of belief" which the triers must entertain "before the proponent is entitled to a finding favourable to him". However, any reforming statute must not, as the same sentence asserts, render the trier's belief dependent on the action solely of the proponent: as at present, evidence and argument introduced by the opponent should also have their proper influence upon the trier's belief.

Contrary to the assertion at the top of page 3, I find a clear difference between a person believing in the existence of a fact and his merely believing that the fact's existence is more probable than not. And I am unpersuaded by the argument that every factual statement is really a statement of probability. To my mind, that argument misses the point. As the condition to determining for the purposes of the civil trial that a disputed fact exists as the proponent

alleges, the trier must actually believe that it exists even though the trier may still harbour such doubt that he is barely persuaded of its existence. The traditional verbal formulae, including the formula used in section 2(1) of the Possible Formulation, are all directed--or should be directed--to expressing (albeit inappropriately) the degree of doubt that the trier may entertain which still permits belief for the purposes of a fact determination in a civil proceeding. Indeed, the traditional formulae have been used to express a scale of doubt-belief: after the trier's mind has passed the metaphorical 50% mark on the scale he may say honestly that he believes. I cannot think of a formula better than "more probable than not" to express the point just beyond this 50% mark which does not at the same time invoke the weighing of evidence. I am therefore content that the "more probable than not" formula be used for that purpose. But, I dispute the assertion in the sentence ten lines from the top of page 3 that this formula is "simply a way of describing a held degree of certainty that the fact exists". In my view, this formula standing alone in section 2(1) would permit the trier of fact to avoid deciding whether the alleged fact exists. Therefore, in place of the present wording of section 2(1), I suggest the follow:

(1) In civil proceedings, the trier of fact shall

determine the existence of a fact in issue as alleged by the party liable to the burden of persuasion on that fact if and when the trier believes that the existence of the fact is more probable than its non-existence and believes that the fact exists.

The outline of the problem in the middle and bottom paragraphs on page 3 is unobjectionable (except that the word "they"--referring to the antecedent "the Canadian cases"--in the second last sentence in the middle paragraph should more properly be "some"). However, since the Project insists upon codifying a standard of persuasion in civil cases, I recommend that the Project should not (as does the text at the bottom of page 3) reject the job of drafting another verbal formula and by the rejection leave "more probable than not" to handle the whole load. Unlike the Project, I do not have faith that the uninstructed "trier of fact will consider as a matter of common intelligence, the nature and consequences, both social and economic, of the facts to be proved." Indeed, I find it incongruous that while the Project rejects an extra jury instruction here, the Project on pages 6 and 7, and in proposed section 3(1), insists upon elaborated jury instructions in criminal trials. In Smith v. Smith and Smedman, (1952) 2 S.C.R. 312, (1952) 3 D.L.R. 449, Mr. Justice Cartwright said that the trier of fact in a civil trial should be instructed

about the matters mentioned in Briginshaw v. Briginshaw (1938), 60 C.L.R. 336 (Aust. H.C.): "the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding...". I agree and, in my view, the problem for the Project is to determine how that should be assured. If the legislation should contain any provision defining a standard of persuasion in civil cases, then I recommend a provision setting out in general terms the factors for consideration by the trier of fact outlined in Briginshaw. With some diffidence I offer the following as a new subsection of section 2:

( ) The trier of fact, in determining the existence of a fact in issue pursuant to subsection (1), shall consider the nature of the particular fact and the consequences of determining its existence.

Williams and Brett

At the outset we would make one drafting suggestion. There are several references in various sections to the question of probability and the phrase "more probable" is used in several different places. We think it would be more helpful and useful if the phrase "more likely" were used wherever the phrase "more probable" at present occurs. In

saying this we have in mind the well-known and well-accepted distinction between matters of mathematical probability and matters of the degree of a subjective belief. The latter cannot be assessed in mathematical terms; and since the use of such words as "probable" is increasingly coming to be understood as importing a reference to matters of mathematical probability, we believe it would be desirable to emphasize that such matters are not being discussed. Such an emphasis could be given by use of the phrase "more likely".

Bowker

Study Paper #8 - Burdens of Proof and Presumptions

I think it good to try to tidy up and simplify the rules on these topics. I agree that it is hard to set out differing standards of proof in civil cases and that section 2 states the proper general rule. I am however a little concerned about the particular problem which the paper recognizes--that of proof of a crime in a civil case, e.g., of arson in a defense to an action on a fire insurance policy. I have no affirmative proposal that improves on the discussion on page 51, middle paragraph. However if the trial is by jury I can imagine difficulties in giving a proper direction.

Section 12(3) Criminal Proceedings

Schiff:

The text beginning at the top of page 4 and continuing to the end of subparagraph (3) at the top of page 6 is unobjectionable. However the first sentence of subsection (1) of section 3 of the Possible Formulation is not verbally parallel with section 2, its counterpart for civil proceedings. For the reader's ease of comprehension, I recommend that sections 2 and 3 should be verbally parallel respecting the party who has the burden of persuasion on relevant issues and the degree of the trier's persuasion required before he may determine the particular issue in the party's favour. In light of my recommendations for section 2, I suggest here that the two ideas inherent in the first sentence of section 3(1)--allocation of the burden and the required degree of the trier's persuasion--should be separated into two paragraphs. The provision would then read as follows:

3.-(1) In a criminal proceeding,

(a) the burden of persuasion on the facts in issue constituting the elements of the offence is on the prosecution; and

(b) the trier of fact shall determine the

existence of the facts in issue constituting any element of the offence if and when the trier believes beyond a reasonable doubt that the facts exist.

Contrary to the Project's assertion at the bottom of page 6 and the top of page 7, I see no reason to include any statutory provision concerning an "assumption of innocence". Explanatory text in the Comment should probably mention the few occasions when Canadian judges have required an instruction about "the presumption of innocence" and should outline Dean Wigmore's explanation of what the term really signified, that is, that the burden of persuasion of the accused person's guilt is solely on the prosecution. (By the way, does not Wigmore's explanation deny the assertion at the top of page 7 that "a person's innocence is 'assumed' from the outset of the case"? As I see it, neither the accused person's innocence nor his guilt is assumed.) Indeed, as the third sentence in section 3(1) of the Possible Formulation reads, the sentence really duplicates in different words the meaning of the first two sentences of the provision. Moreover although the sentence is supposed to serve as a jury instruction, the language is inappropriate for that purpose. I recommend omitting from proposed legislation that sentence or any substitute designed to require reference to an "assumption of innocence".

Although I have never heard of the requirement before, I see some reason, as the Project asserts in the first full paragraph of page 7, for requiring a jury instruction that the accused person's arrest, confinement and charge give rise to no inference of his guilt. However, as the last sentence in section 3(1) of the Possible Formulation is worded, it does not direct a trial judge so to inform the jury. At all events, if some provision is needed which is not in the form of a direction to the judge, I suggest the following as subsection (4) of a redrafted section 3:

(4) In determining the existence or non-existence of facts in issue, the trier of fact shall draw no inferences from the accused person's arrest or detention nor from his having been charged with the offence being tried.

Williams and Brett

We would also advert briefly to the matter of the standard of persuasion in criminal cases. This is correctly stated as "beyond a reasonable doubt". We think however that the draft might well include a provision clearly forbidding the judge from making any attempt to define or explain the phrase. Not only is any such attempt likely to confuse the jury, but it will almost inevitably have the effect of watering down the strength of the words themselves.

Section 12(4) Defence, Excuse or Justification

British Columbia Law Reform Commission

Section 3(3) and the commentary at Page 10 raises a new task for a trial judge. In effect it says that the Crown does not have to negative a defence or exception, until that defence or exception is raised in the evidence. At present, if there is any evidence of a defence or exception the Crown must prove its non-existence beyond a reasonable doubt. The working paper proposes that the judge shall rule if there is sufficient evidence brought forward to raise a reasonable doubt as to the existence of a defence or exception. If he rules that there is sufficient evidence to do that, then it is the jury's (trier of facts') function to decide whether the Crown has satisfied them of the non-existence of that defence or exception beyond a reasonable doubt. This raises the importance of the trial judge's function since he must clearly now weigh the evidence, to see if it is sufficient to raise a reasonable doubt. Previously he had only to rule whether there was some evidence, regardless of what he thought about the effect of that evidence. The chance has the advantage of adding practicality to the trial function, by excluding from a jury's consideration evidence so weak that an experienced trial judge finds it without merit to raise a reasonable doubt. Undoubtedly some trial judges will fall into error at

some time and give rise to appeals on their judgment. That is not a criticism of the change, however. Appeals will be always with us. One of the B.C. Commissioners suggested that there may be some virtue in making a provision that the trial judge be permitted to rule upon whether or not there is sufficient evidence, before the Crown is called upon to put in any evidence by way of rebuttal. If that were to be done, then the length of trial may be shortened by avoiding Crown Counsel putting in rebuttal evidence to negate some evidence of defence, excuse or justification which may have arisen during the defence case when that evidence is unsubstantial. As the matter stands at present, Crown Counsel out of an excessive caution may spend time in rebuttal when the trial judge was already of the opinion that no rebuttal was required. The Commission as a whole recommends consideration of this point.

Schiff

Both the text on page 6 and the second sentence of subsection 1 of section 3 state that a "defence" is properly in issue if there is "evidence sufficient to raise a reasonable doubt". But, strong judicial opinion has held that a "defence" is in issue only if there is present before the trier of fact sufficient evidence to permit reasonable men to draw an inference that the facts supporting the

defence exist (that is, the quantum sufficient to avoid a non-suit). E.g., Hill v. Baxter, (1958) 1 Q.B. 277 (Devlin, J.) (automatism negativing intent); Bratty V. Att.-Gen. N. Ireland, (1963) A.C. 386 (H.L.) (Lord Morris and Lord Denning) (same as Hill); Bratty v. Att.-Gen. N. Ireland, supra, (Lord Denning, obiter) (drunkenness negativing intent); Regina v. Szymusiuk, (1972) 3 O.R. 602 (Ont. C.A.) (automatism negativing intent.) Clearly that definition of the necessary quantum makes the accused person's job harder and the Crown's easier than the definition proposed by the Project. Ultimately the choice for statutory purposes between the two definitions may well be based on a preference for different values in the criminal law process. But, beyond that, I have trouble quantifying evidence in a package called "evidence sufficient to raise a reasonable doubt". And my trouble is not lessened by the assertion in the last sentence of the first full paragraph on page 6 that "the standard in the proposed section...relates the quantum of evidence needed to the prosecution's standard of proof".

I agree with the Project's concern expressed in the second full paragraph on page 6 that the word "defence" is "perhaps an unfortunate name" for those facts which negative an element of the offence. But the fact that "the word is descriptive and is in common use" is not good enough reason

to continue the danger of the trier's incorrect assumption that the accused must establish "the defence". Indeed, the Project may have increased the danger by recommending a provision to cover something called "affirmative defences" which the accused, in order to succeed, must establish. Thus, if the Project can think of some new label for ordinary "defences", it should be substituted in the proposed legislation:

Since section 3(2) defines the circumstances in which a "justification", or an "excuse" or (I shall argue in paragraph 16 below) a "defence" is in issue, there is no reason to define those circumstances in section 3(1) (second sentence). Therefore, I recommend the following to replace the first two sentences of the existing draft of section 3(1)--as well as my redraft of the first sentence set out in paragraph 10 above:

3.(1) In a criminal proceeding,

(a) the burden of persuasion on the facts in issue constituting the elements of the offence and the non-existence of the facts in issue constituting a defence, excuse or justification is on the prosecution;

(b) the trier of fact shall determine the existence of the facts in issue constituting an element of the

offence and the non-existence of the facts in issue constituting any defence, excuse or justification if and when the trier of fact believes beyond a reasonable doubt that the facts constituting the element of the offence exist and that the facts constituting the defence, excuse or justification do not exist.

Subsection 3(2) Excuses or Justifications (page 7)

I understand the distinction between the "excuses" or "justifications" discussed here and the "defences" discussed on page 6. But, since under section 3(2) of the Possible Formulation (which the Project says is "the present law") the quantum of evidence sufficient and necessary to raise any excuse or justification is the same as that quantum sufficient and necessary to raise a "defence" under the second sentence of section 3(1), there is no reason to limit the scope of section 3(2) to excuses or justifications. The Project should add "defence" to section 3(2) and eliminate reference in section 3(1) to the sufficient and necessary quantum of evidence to raise a defence.

However, I do not agree that the quantum of evidence necessary and sufficient to raise a justification or excuse is that quantum permitting a reasonable doubt. Case authorities clearly demand sufficient evidence to permit the trier

rationally to infer the facts constituting the justification or excuse (that is, the quantum necessary to avoid a non-suit). Mancini v. D.P.P., (1942) A.C. 1, (1941) 3 All E.R. 272 (provocation); Latour v. The King, (1951) S.C.R. 19, (1951) 1 D.L.R. 834 (provocation); Bullard v. The Queen, (1957) A.C. 635, (1961) 3 All E.R. 470, (P.C.) (provocation); Regina v. Lobell, (1957) 1 Q.B. 547, (1957) 1 All E.R. 734 (C.C.A.) (self-defence); Regina v. Gill, (1963) 1 W.L.R. 84, (1963) 2 All E.R. 688 (C.C.A.) (duress); Regina v. Wheeler, (1967) 1 W.L.R. 1531, (1967) 3 All E.R. 829 (C.A., Cr. Div.) (all three justifications).

As I have already said, I have trouble contemplating a package of evidence no larger than one permitting a reasonable doubt that some fact exists. In contrast, I am quite used to a package rationally permitting an inference that the fact does not exist. If the Project decides to retain the reasonable-doubt-quantum formula, in light of my recommended redrafting of section 3(1) set out in paragraph 13 above I recommend rewording section 3(2) of the Possible Formulation to read:

(2) For the purpose of subsection (1), facts constituting any defence, excuse of justification are in issue if and when sufficient evidence has been introduced

to permit a reasonable doubt that the facts do not exist.

However, if the Project decides that the non-suit-quantum formula favoured in the case law is preferable, I suggest this rewording:

(2) For the purpose of subsection (1), facts constituting any defence, excuse or justification are in issue if and when sufficient evidence has been introduced to permit a rational inference that the facts exist.

Section 12(5) When Burden On Accused

Schiff

The term "presumptive language" in the fourth line of the first paragraph is not crystal clear in meaning, Nor indeed are the immediately following words "shifts the burden...", at least since the text does not refer to the particular condition precedent to the burden leaving the Crown and being placed on the accused, I recommend rewording the particular sentence as follows:

The language of a number of Criminal Code provisions clearly places on the accused person the burden of persuasion concerning elements of certain offences.

In addition, of course, some provisions of the Criminal Code also contain language that some judges have held places on the accused person only a burden of introducing evidence on a particular issue. Does the Project propose that these latter provisions shall be covered by sections 3(1) and 3(2) of the Possible Formulation?

At this moment I do not quarrel with the Project's argument that the accused person should never be obliged to persuade the trier of fact of the non-existence of any element of the offence charged. However, even assuming that this principle were adopted as a framework for criminal legislation, I do not take it that the Project denies that there is sometimes good reason for obliging the accused person to introduce evidence in order to raise certain issues. Again, is that idea covered by sections 3(1) and 3(2) of the Possible Formulation?

Section 3(3) of the Possible Formulation purports to define two things. First, the provision defines which party has the burden of persuasion on "affirmative defences", and second, it defines the degree to which the trier of fact must be persuaded as the condition to the trier's determination of the facts constituting the "affirmative defence". Thus, respecting affirmative defences only, section 3(3) of

the Possible Formulation is the criminal law counterpart of section 2. And section 3(3) embodies an exception to the previous provisions of my suggested redraft of section 2. Moreover, it sets out the verbal formula which I have rejected for the trier's required degree of persuasion in civil proceedings. In all, I recommend that section 3(3) of the Possible Formulation should be redrafted to read (again in light of my previous suggestions):

(3) Notwithstanding subsections (1) and (2), when any statute designates any defence, excuse or justification as an "affirmative defence", the burden of persuasion is upon the accused person concerning the facts constituting the defence, excuse or justification so designated and the trier of fact shall determine the existence of those facts if and when the trier believes that the existence of the facts is more probable than their non-existence and that the facts exist.

I do not quarrel here with your arguments on pages 14 and 15 that legislation should never allocate to the accused person the burden of persuasion on any element of an offence. However, the argument is confused by the assertion that such allocation has often occurred by the statutory creation of presumptions as defined at the top of page 13. As I have just shown, most of the provisions of the Criminal Code and

other statutes referred to on pages 13 and 14 as examples do not create presumptions within that definition. Moreover, as I read some of the provisions listed on page 13 the issue on which the burden is allocated to the accused is not an element of the offence but rather an "affirmative defence". As far as the impaired driving provision is concerned, the Project's point if well taken because section 237(1) does create a presumption in the Thayer-Wigmore sense (although not in the sense of the Project's definition): the use of the "deemed" clause creates an offence for something quite different than impaired driving.

As you know, the 4th meaning of "presumption" defined on the bottom of page 15 and the top of page 16, as well as the 3rd meaning defined on page 13, includes the meaning approved by Thayer and Wigmore. Moreover, this sentence defining the 4th meaning also defines (at least partially) the condition approved by Thayer and Wigmore for avoiding or dispelling the presumed fact. See also Model Code, rule 704, and Uniform Rules, rule 14(b), which adopt the Thayer-Wigmore theory. According to this theory, the evidence necessary to avoid or dispel the presumed fact is that quantum rationally permitting the trier's inference to the contrary. In my view that definition of quantum makes more sense than "evidence sufficient to raise a

reasonable doubt", chosen by the Project. I therefore recommend rewording the sentence at the bottom of page 15, top of page 16, to read:

The word presumption is sometimes used to label the following situation: when certain basic facts (a certain basic fact?) are (is?) established, the trier of fact must determine the existence of the particular presumed fact unless and until there is present sufficient evidence of the non-existence of the presumed fact rationally to permit the trier's finding of its non-existence.

Section 5(2) of the Possible Formulation encompasses more than presumptions even as the Project has defined them in section 5(1); it also includes situations where, apart from any presumption, a burden of proof has been allocated to the accused person. Moreover, clause (i) is not necessary because paragraph (a) would, of its own force, demand a ruling against the accused if there is insufficient evidence to raise the issue. To maintain the logic of section 5(2) as a provision governing presumptions as defined in section 5(1) and in light of what I have just said in previous paragraphs, I recommend rewording section 5(2) as follows and placing the revised provision <u>after</u> what I will recommend below for a revised section 5(3):

( ) Where the establishment of the basic fact of a presumption under this section would otherwise render the accused person in a criminal proceeding liable to the burden of persuasion on the presumed fact, after sufficient evidence has been introduced to justify the rational inference that the presumed fact does not exist the burden of producing evidence and the burden of persuasion on the presumed fact are on the prosecution and the trier of fact shall determine the existence of the presumed fact if and when the trier believes beyond a reasonable doubt on the whole evidence that the presumed fact exists.

Since the Project clearly wants a provision that goes further than my redraft of section 5(2), in order to accomplish that I recommend that both section 5(2) of the Possible Formulation and my redraft might be abandoned. In their stead, the following provision might then be added to section 3 and I have redrafted it. I have omitted the substance of section 5(2)(b) because I find it redundant.

( ) Subject only to subsection (3), where any rule of law or statute imposes upon an accused person in a criminal proceeding the burden of introducing evidence or the burden of persuasion on a fact, after sufficient evidence has been introduced to justify the rational inference that

the fact exists the burden of producing evidence and the burden of persuasion on the fact are on the prosecution and the trier of fact shall determine the non-existence of the fact if and when the trier believes beyond a reasonable doubt that the fact does not exist.

British Columbia Law Reform Commission

This is dealt with in the commentary at Page 10, third paragraph, although it is not referred to in the heading until Page 11. That part of the commentary contained in the first paragraph on Page 11 refers to something which is in need of further clarification, in the sentence reading as follows:

"A burden of persuasion on the accused will only exist if the excuse, justification, exemption or qualification is specifically designated an affirmative defence."

Somewhere in the proposed legislation, or case law to be developed on it, there needs to be a definition of what is an "affirmative defence". It appears to relate to a type of excuse or licence without the existence of which a certain act constitutes an offence. For instance it is an offence for a person to be in possession of certain narcotics unless he is a licenced physician. The existence of the licence, the

burden of proving which rests upon the accused, is the affirmative defence. It should be possible to define the meaning of the term "affirmative defence" within the legislation, so that the matter is not left in doubt.

Section 5(2) (a) - Burden of Proof

The British Columbia Commissioners are concerned with the statement in the National Report that in some recent cases trial judges, although not persuaded beyond reasonable doubt of the guilt of an accused person, have felt themselves compelled to convict where there is a statutory presumption of proof upon the accused, because the presumption has been interpreted to mean a burden of persuasion rather than a burden of producing evidence. The British Columbia Commissioners propose that Section 5(2) be changed in the proposed draft, by inserting as 5(2)(a)(i) a section to the effect that where in a criminal proceeding any burden of proof falls upon an accused person, that burden of proof shall be deemed to mean the burden of producing evidence, and not the burden of persuasion. The presently proposed sub sections (1) and (2) should be renumbered as (2) and (3). In addition the British Columbia Commission suggests that the present onus sections in the Criminal Code and other legislations should be reviewed, with a view to rewording them to avoid any doubt that may arise on the specific

wording of such sections, so that an accused person is never required to shoulder the burden of persuasion in a case, although he may, as a matter of policy in some acts, be required to shoulder the burden of producing evidence.

The British Columbia Commission is thus in sympathy with the proposal at pages 14 and 15 of the N.L.R.C. commentary that the sections of the Criminal Code and other legislation which create a mandatory presumption, should be redrawn. However it is my recommendation, with which the British Columbia Commission is in sympathy, that the same argument does not apply to those inconclusive presumptions contained in legislation or law, which enable, but do not compel, the trier of fact to reach a presumed conclusion from certain evidence. While I agree with the logic of the N.L.R.C. statement here, I suggest that in some fact patterns the long experience of the law, which is not shared by the casual jury, assists the jury's lack of experience by suggesting a conclusion that may but need not be reached. For instance the possession of recently stolen goods in the long experience of the law is strong enough to found the presumption that the possessor knew they were stolen. The casual juror unversed in the ways of thieves would not put two and two together as does the inference which the law suggests. In summary, the trial judge should be left free to suggest to the jury or to himself that

evidence of "recent possession" is strongly persuasive of the knowledge of guilt, provided that he is not compelled to accept that presumption.

Frenette, O., lettre du 7 septembre 1973

Selon nous, la loi n'a fait que codifier des règles, régissent des situations qui font logiquement naître une présomption contre une personne, qui devrait alors être contraint de donner une explication de ces faits.

Par example, celui qui est trouvé en possession d'un bien récemment volé, ou en possession de drogues prohibés ou en possession de monnaie contrefaite, ne devrait-il pas être contraint d'expliquer cette possession. Nous le croyons car ce n'est que la constatation d'une situation de faits.

Dans une telle circonstance, si l'accusé ne présente aucune explication, il est raisonnable de conclure qu'il est coupable de l'infraction reprochée.

Il ne s'agit pas là d'une clause imposée pour des motifs sociaux, mais uniquement d'une application concrète d'une déduction logique et raisonnable d'une situation de faits incriminant l'accusé.

Dans une telle circonstance, d'après une jurisprudence uniforme, si l'accusé présente une explication valable, il sera acquitté selon le principe du doute raisonnable.

Ceux qui préconisent l'abolition des présomptions n'ont évidemment aucune expérience pratique en matières criminelles car la condamnation des personnes innocentes aujourd'hui est tellement peu probable qu'elle devient un mythe existant dans l'imagination de certaines personnes qui doutent de l'impartialité de tout l'appareil judiciaire.

Ce qui devrait préoccuper plus votre commission serait de changer la loi de la preuve et le code pénal afin que des personnes soient trouvés coupables dans des causes ou la preuve de culpabilité existe et ou le juge est moralement convaincu de sa culpabilité mais se croit obligé de l'acquitter vu la possibilité d'innocence basée sur l'application ou principe du doute raisonnable.

Si les présomptions sont enlevées, les seules personnes qui en bénéficieront, seront les criminels, lesquels utiliseront cet autre moyen pour échapper à la justice.

Williams and Brett

Our next specific point arises on section 6. We must say frankly that in our view this, as at present drafted, is almost completely incomprehensible and is likely to give rise to most troublesome problems in practice, if ever it is enacted. The difficulty which the section seeks to overcome springs from the fact that there are at present a number of statutes which cast on the accused burden of "proving" or "establishing" some matter. It is current doctrine that such provisions are interpreted as referring to the burden of persuasion. The Project has taken the view--rightly, we think--that this doctrine should be overthrown, and that the statutes in question should be taken to refer to the burden of producing evidence. Section 6, however, refers to statutes which cast a "burden of persuasion" or "burden of producing evidence" rather than to statutes which simply cast a "burden" and as a consequence of this wholly unnecessary reference it produces complete confusion.

We think that the Project's policy could far better be accomplished by first recasting section 3(3) in positive rather than negative terms and then by saying specifically (in section 6) that statutes which cast a "burden of proof" on the accused, or which use other language

apparently doing the same thing, are to be interpreted as referring solely to the burden of producing evidence. In that way the Project's policy will be explicitly stated, and there should be no room for difficulties of interpretation.

Apart from the foregoing specific comments, we have some general observations on matters which are not dealt with (so far as we can see) in the present draft, nor are they clearly adverted to in the commentary. We preface these general comments by saying that we fully agree with the proposal that the rule in Hodge's Case should be abolished. We disagree, however, with the portions of the draft which recognize the possibility of what is termed an affirmative defence if a statute provides therefor. We think it is a retrograde step to give explicit recognition to the notion of such a defence, with a burden of persuasion on the accused, especially at a time when this question is being investigated elsewhere (as is noted in the commentary). Moreover, if the Project on Evidence is to make any provision on this matter, we think that true principle would require that the possibility of any affirmative defences should be foreclosed; this would accord with the recent recommendation by the English Criminal Law Revision Committee, in its 11th Report dealing with evidence.

Bowker

My last comment has to do with proof in criminal cases. I understand the idea of an "affirmative defense" but wonder if it will always be easy to tell when a statute imposes the need to make an affirmative defense. Maybe I am overestimating the difficulty.

I gather that the authors of the study paper, if they had their way, would abolish affirmative defenses on the ground that they truly infringe the presumption of innocence. I have spent a lot of time trying to analyse the Appleby case and to determine whether I agree with it. I now tend to the view, which I think is in line with the opinion in the study paper, that it does permit the conviction of a man when there is a reasonable doubt on one of the elements of the offense.

Substantive Criminal Law Project

The suggestion concerning the limitation of reverse onus clauses to shifting only the burden of producing evidence may create some embarassment for us concerning the evidence of due diligence as a halfway house between strict liability and liability on the basis of mens rea. Of course, in such cases due diligence could be said to be an affirmative defence.

Canadian Bar Association, Study Group, Edmonton

Further to our letter of December 10th., 1973, a group of us have met to consider further the meaning and application of the Project's proposals relating to affirmative defences.

While we appreciate the Project's desire to eliminate all reverse onus situations since at first glance they derogate from the presumption of innocence, we fail to see what real change is accomplished by the affirmative defence proposal. In fact, we are afraid that instead of strengthening the presumption of innocence, the affirmative defence proposal may actually weaken it by putting a greater onus on the accused by introducing the words "and believe that it exists" in Section 3(3) on Page 46.

If, for example, one rewords Section 173 of The Criminal Code in accordance with the affirmative defence proposal, it comes out as follows:

> "173.(1) Everyone who loiters or prowls at night upon the property of another person near a dwelling house situated on that property is guilty of an offence punishable on summary conviction.
>
> (2) Where an accused charged with an offence under sub-section (1) produces evidence that he had a lawful excuse for his presence at night upon the property of another person near a dwelling house

situated on that property, the production of such evidence is an affirmative defence to the charge."

If the required degree of belief is as set out in Section 3(4) on Page 46, we fail to see how that is different from the present wording of that Section, namely that the accused must persuade the trier of fact that he had a lawful excuse.

Obviously, any cock and bull story is not going to be sufficient. If, on the other hand, it is only the reasonableness of the explanation that is in issue, as in the recent possession of stolen property cases, that, in our opinion, would strengthen the presumption of innocence. It all seems to depend on the requisite degree of belief. We feel that the Project's affirmative defence proposal doesn't really change most of the reverse onus situations and in fact, puts a greater onus on the accused than the onus put on him in recent possession of stolen property cases.

We appreciate the Project's concern with the decision in Regina v. Appleby, 1972 S.C.R. 303 as evidenced by the remarks on Pages 62 and 63. However, in our experience it is most unusual for a trial judge to state (as did Provincial Judge Ellis in R. v. Appleby) that the accused's

testimony as to why he entered the driver's seat could be true ("it did raise a reasonable doubt in my mind") and then go on to say 'but I don't believe him' (i.e., he has not discharged the persuasional presumption on a balance of probabilities).

Our experience is that in practice, the distinction between the evidentiary presumption and the persuasional presumption is usually foreclosed by a simple finding by the trier of fact that he disbelieves the accused. This seems to always be taken by Courts of Appeal to mean that the accused's explanation could not reasonably be true. Perhaps a reasonable solution to what appears to be almost an insoluble problem would be to state categorically that:

> The Prosecutor always has the general burden of persuading the jury of the prisoner's guilt beyond a reasonable doubt and this burden includes proof beyond a reasonable doubt of any facts upon which a presumption or reverse onus is based.

Thus, in R. v. Appleby, 1972 S.C.R. 303, if the trial judge had said:

> "I am satisfied that Appleby's explanation of why he entered the driver's seat could reasonably be true"

it would follow that the Crown had not proved its case beyond

a reasonable doubt and Appleby would be entitled to an acquittal even though the trial judge might not be prepared to say that, on a balance of probabilities, Appleby's testimony of why he entered the driver's seat was more likely than the inference contended for by the Crown.

Tollefson

I also disagree with your suggestion that a presumption should never be created or interpreted so as to shift to the accused the burden of persuasion on one of the elements of the offence. I really do not see why there is anything so outrageous about such a provision. After all, you have no objection to the legislature placing the burden of proof on the accused with respect to an affirmative defence. What difference does it make which way it is done? I really doubt that either the Department of Justice or the man in the street would find much merit in the suggestion that section 234 of the Criminal Code should be amended to make it an offence for a person to occupy the driver's seat of a motor vehicle while he is impaired. The essence of the offence is not the occupation of the seat, but the fact that he has the care or control of the motor vehicle, and I do not see anything illogical or harsh about a law which states that a person who occupies the driver's seat is presumed to have the care and control of the vehicle. But this is a

fight in the clouds, as you indicated in the paper it should perhaps be left to the project on General Principles.

Section 13 Burden of Producing Evidence

Part II Presumptions

Section 14(1) Presumptions

Section 14(2) Effects in Civil Cases

Schiff

I recommend that section 5(3) of the Possible Formulation should follow section 5(1) as the next subsection. But, while I agree that the burden of persuasion should fall on the party against whom the presumption is directed, I recommend again the different verbal formula I have previously set out for the necessary degree of persuasion in a civil proceeding. Moreover, the provision does not take into consideration the presumption of legitimacy (and other possible analogous presumptions) where social policy may require a greater degree of the trier's persuasion. Is that matter supposed to be handled by section 2(1) of the Possible Formulation, as explained on pages 3-4 of the Comment? In all I recommend a redrafting of section 5(3) as follows (renumbered to accommodate its new position):

(2) Subject to the provisions of this or any other statute, when the basic fact of a presumption has been established the trier of fact shall determine that the presumed fact exists unless and until the trier of fact believes that the non-existence of the presumed fact is more probable than its existence and that the presumed fact does not exist.

I omit any further provision modelled on Model Code, rule 703, and Uniform Rules, rule 16, because I assume that the Project intends that section 2(1) of the Possible Formulation will handle the matter. I think, nevertheless, that the Project should consider further the possible desirability of such a provision.

I disagree with the assertion in the second sentence of the bottom paragraph on page 16 that "once any evidence is introduced rebutting the presumed fact the presumption is without effect". Whether the presumed fact is legally forestalled or dispelled by any particular quantum of contradictory evidence depends on a wise assessment of what quantum should be necessary. As you know, Thayer and Wigmore demanded a sufficient quantum of evidence at least to justify the rational inference of the contrary of the presumed fact.

Moreover, I recommend that the Project avoid using the traditional and confusing verbiage of presumption doctrine: In the second sentence of the bottom paragraph on page 16, instead of "rebutting the presumed fact", say "tending to establish the non-existence of the presumed fact". In addition, instead of saying "the presumption is without effect", say "the assumption of fact hitherto required by the law ceases to be required".

A consolidation of my recommended new presumption provisions is set out in the Appendix.

Williams and Brett

Our next specific point arises on section 5(2), which appears to have gone wrong in the course of being drafted. The draft incorporates the common error of supposing that prima facie evidence that the existence of a fact is more likely than its non-existence can only be overcome by evidence showing that the non-existence of the fact is more likely than its existence. But this is not so; to reason in that way takes no account of the case where the trier of fact is in complete doubt one way or the other. The true proposition is that as soon as the trier of fact is of opinion that the existence of a fact is as likely as its non-existence, then the party who

carries the burden of persuasion as to greater likelihood has not succeeded in discharging that burden.

Section 14(3)	Effect in Criminal Cases (See back, section 12(5)
Section 14(4)	Conflicting Presumptions

Title IV

Specific Rules Respecting Admissibility

Part 1 Exclusionary Rules

Exclusion Because of Manner Evidence Obtained

Section 15 Exclusion of Evidence Bringing Administration of Justice into Disrepute

McLellan

In accordance with your general invitation for comment upon the various papers produced by the Commission I respond to the study paper on evidence entitled "10. The Exclusion of Illegally Obtained Evidence".

I preface these brief remarks, however, by stating that what follows is based upon a theoretical consideration of the problem raised by this particular subject as my judicial experience (now into its tenth year) has in no instance brought me into contact with this question.

I am firmly of the view that the Canadian approach, exemplified by the decision of the Ontario Court of Appeal in R. v. Wray is the proper approach. I have always deprecated the American rule and its corollary "the fruit of the poisoned

tree" doctrine on the ground that this unduly hampers the activities of the law enforcement agencies in their investigation of crimes. I grant the argument, however, that where the evidence is obtained as a result of extremely oppressive action by such authorities (such as, the application of extreme physical force) I would seek some way of rejecting the evidence perhaps on the ground of unreliability and I think I would direct that an assault charge be laid against the responsible officials.

In general it seems to me that the authors of the Paper have been at pains to set up the American doctrine as an object of attack and have successfully demolished the doctrine by the arguments made against it.

I do not find the arguments in favour of a middle road (that is, between the American and the Canadian or English approach) convincing. Indeed, I am firmly of the view, that for Canada at least, the present Canadian position should not be changed. I think that any extension of a discretion to reject evidence because of "serious injustice to the accused" would only introduce an element of uncertainty in the absence of a clear statement of what is meant by the words "serious injustice". Does this mean a greater liability to conviction or is it intended to be

limited to oppressive measures taken by the investigators?

I think that my views in general can be summed up by stating that I consider that society's rules are under heavy attack from a minority of individuals who are unwilling to abide by those rules and that anything which weakens society's defences against such attacks ought to be avoided. It seems to me that the proposals of the Paper represent a weakening of society's defence.

Finally, and purely from an editorial standpoint, I find it difficult to understand the first full paragraph on page 28. In some ways it seems to me that the word, "not" has been omitted from the second line, although merely inserting it without further change in the sentence would not itself make sense. Surely it cannot be an objection that the prosecution is able to predict, with more or less certainty, what evidence would be allowed on the prosecution.

Crawford

I have just obtained a copy of Evidence #10, The exclusion of illegally obtained evidence. It is noted that comments should be mailed to your office prior to April 1/75., however I still feel that I would like my comment to be noted or filed.

As a Canadian I feel that our system of law enforcement is far superior to the U.S.A. and not as good as the system used in Britain. It is my opinion and the opinion of the common majority in this country that we would not like to live under a system of law enforcement as practised by our friends in the United States. In view of this anything that is done to weaken our system by setting Rules for the Exclusion of Illegally Obtained Evidence is certainly not in the best interests of the law abiding people in Canada. If it felt that evidence is obtained through criminality, then punish the policeman. However, not all statements given to the police are obtained illegally, they are inadmissible, but this does not necessarily mean that evidence obtained by the use of these statements is illegal. As a matter of fact you will find that the admissability of statements varies from one judge to the next. Possibly your committee should look at laying down Legal Rules for taking statements and then you may find you will have less illegally obtained evidence.

Addy

I acknowledge with thanks receipt of Study Paper #10 relating to the Exclusion of Illegally Obtained Evidence. I would like to comment on some of the statements and recommendations pursuant to the Commission's invitation to

do so on the cover of its report.

In the second recommendation on page 29 of the report, I understand neither the relevancy of nor the reason for the statement: "...furthermore, as a possible expansion to this judicial discretion, to give the judge the power simply to dismiss the charge against the accused." Surely the basic power to convict an accused or to dismiss the charge against him is unaffected by and unrelated to any discretionary power to admit or reject evidence. Where evidence is excluded pursuant to any discretionary power existing in the judge to do so, and where there nevertheless remains sufficient evidence to convict beyond a reasonable doubt, then the accused must be convicted and where, after excluding the illegally obtained evidence, there is not sufficient evidence to convict, he must be acquitted. This is so basic and fundamental that I fail to see how its application can constitute even remotely an "expansion to this judicial discretion" which in any way requires statutory authority. It does not constitute an expansion of the discretion to reject evidence and is not, in my view, in any way related to it. A discretionary power to admit or to not admit evidence is one matter and the duty to consider all the evidence which eventually has been admitted and to weigh it in order to decide on the guilt or innocence of the accused is a completely different matter

totally unrelated to the question of admissibility. These two matters are so unrelated in fact and in law that, in the case of a jury trial, one is solely within the province of the judge and the other solely within the province of the jury.

I also note that in your two recommendations at page 29 you fail to state whether the extent of the relevancy or probative value of the evidence is still to be considered a factor, and you do not mention what your recommendation would be in the case of evidence which might qualify as being obtained in a flagrantly illegal fashion, not having merely "tenuous relevance as evidence" but on the contrary having substantial probative value carrying great weight and being almost conclusive of guilt. I am drawing this to your attention in view of the fact that in the paragraph immediately preceding your two proposals you definitely seem to consider the relevance of the evidence as a factor to be taken into account in deciding whether the evidence illegally obtained should or should not be admitted. I am referring more specifically to the words "...besides having tenuous relevance as evidence." in the second last sentence of that paragraph.

It appears to me that the main reason why the

Commission is of the view that there is a real need for a statutory enactment is the fact that it disagrees with the decision in the Wray case, which it feels has changed the common law as it previously existed.

The majority judgment in the Wray case contains the following statement which the Commission itself has noted in its report: "It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling which can be said to operate unfairly." (The underlining is mine.) Since the Wray case specifically dealt with this matter, surely any recommendation as to a restatement of the law should cover the point.

By the application of the rule expressio unius exclusio alterius, in subsequent judicial interpretations of a re-statement of law, any re-statement which is incomplete is very likely to radically change the law in a fashion not all contemplated by the codifier or to leave it in a greater state of confusion than existed previously to the enactment.

As to the Wray case itself, I wish to take this opportunity of stating that I fully agree with the majority decision and completely disagree with the need for changing

the law on this point. As you must have heard many times the arguments for and against the decision, there is little likelihood of any useful purpose being served by my giving my reasons. Suffice it to say, however, that in the conduct of a criminal trial, there are two major objectives which should not be deviated from in the least or clouded in any way, namely, the determination of the truth and the protection of the accused. When one adds a further consideration of protecting the reputation of the administration of justice, as a major consideration for admitting a rejecting evidence, one will be doing so, in most cases, at the expense of arriving at the truth. Where Courts are scrupulously fair to the accused and are effective in arriving at the truth, they will enjoy the full confidence and respect of the public. Where they sacrefice, in any way, either their role of arriving at the truth or of assuring that the accused has a fair trial, even when motivated by the totally praiseworthy desire of protecting the reputation of the system of justice, they are sacrificing their main role for an entirely secondary one and will in fact be achieving the opposite result: they will ultimately bring the administration of justice into dispute.

When the police and other persons charged with the administration of justice act illegally in the gathering of

evidence, then, both the criminal law and the civil law provide ample remedies for righting any such wrong or punishing any such transgression and should the Commission feel that the law is inadequate in this area, then serious consideration should be given to strengthening it. The reputation of justice will best be protected by rigorously enforcing such laws and by vigorously prosecuting any persons who knowingly and in bad faith transgress any law in the gathering evidence, rather than by having the Courts reject such evidence when it is clearly probative and is clearly essential in arriving at the truth and where the accused is afforded every reasonable opportunity of contradicting or explaining the evidence.

You have undoubtedly been exposed to this argument on several occasions, but neither the fact that it is common place nor that it lacks novelty should detract from its basic soundness; on the contrary, triteness is often akin to truth.

I trust that the above comments might prove of some value.

Frenette, O. lettre du 20 janvier 1975

Pour ces motifs, nous croyons que le droit américain, sur ce point, est non-réaliste, rétrograde et empêche d'atteindre des buts du droit pénal.

Selon ce droit, au nom de la protection des libertés fondamentales du citoyen, on exclut la preuve de crimes sur de simples informalités ou technicités.

On semble s'attacher aux questions de forme quelque soit le résultat quand au fond, avec le résultat que l'administration de justice, aux Etats-Unis, n'atteint pas le but visé, et inspire peu de confiance.

Les médias d'information rapportent des cas de criminels connus lesquels contournent les effets de la loi par tout les moyens et continuent à affliger la société américaine, avec le résultat que les autorités policières ont les mains liés, et le taux de criminalité augmente en flèche.

Comme le rapport le démontre (aux pages 12 et 13) nos législateurs ont été influencés par la règle américaine et l'ont partiellement adopté dans le contrôle des communications privées.

Il nous semble qu'il s'agit d'un dangereux précédent qui ne fait que protéger les criminels.

Nous sommes d'avis que la règle suivie au Canada en cette matière doit être continuée sauf dans des cas extrêmes ou la preuve obtenue, par la violence physique ou mentale, serait inadmissible.

Cette soupape permettrait d'exclure la preuve illégalement obtenue par des pratiques abusives des forces policières.

Par ailleurs, la preuve obtenue illégalement sur des questions de forme serait admissible.

Jodouin, A., lettre du 29 janvier 1975

Un point cependant m'a semblé poser certains problèmes: celui de la discrétion exercée par la juge de première instance à l'égard des critères de jugement qu'on lui propose pour l'évaluation de l'admissibilité des preuves illégales. A ce sujet, il me vient à la mémoire 2 exemples d'exercice discrétionnaire qui laissent à désirer.

D'abord, le pouvoir de la Cour d'appel de ne pas accueillir un appel malgré des irrégularités de preuve ou de procédure lorsque, de l'avis de la Cour, il n'y a pas eu déni de justice. L'impression que j'ai de cet exercice discrétionnaire est que la Cour d'appel (notamment celle du Québec)

cherche à résoudre la question: l'accusé est-il coupable? A l'aide de la preuve contestée elle-même, ou sans tenir compte du moyen de procédure irrégulier. Par exemple, lorsque le défaut qu'on reproche est la privation d'un droit de contre-interrogatoire d'un témoin important, contre-interrogatoire-portant sur la crédibilité, il est rare que la Cour déclare: "Nous ne savons pas si, après un contre-interrogatoire régulier, le jury aurait cru le témoin". La réserve fondée sur le "déni de justice" me semble peu efficace puisque le contenu de cette expression échappe à l'analyse.

Autre exemple: en matière de renvoi d'un jeune délinquant au tribunal des adultes, le juge, avant d'ordonner le renvoi, doit se satisfaire que cette procédure est dans l'intérêt de l'enfant et de la société. Pendant un certain temps, les tribunaux ont lié cette procédure exceptionnelle au seul critère de la gravité de l'infraction, de sorte qu'en matière de meurtre, il y avait un renvoi quasi automatique (v.g. Truscott).

Les critères d'admissibilité proposés par la Commission me semblent sains, cependant j'éprouve quelques craintes quant à leur utilisation par le juge. Il n'y a peut-être pas de remède à la situation où un juge déclare

dans son jugement avoir exercé sa discrétion dans un certain sens alors qu'en réalité il ne l'a pas fait: "Je sais qu'il est dangereux de se fier au témoignage non-corroboré d'un complice etc.". Néanmoins, si cette discrétion était assortie de quelqu'exigence procédurale, l'esprit de votre recommandation serait sans doute mieux savegardé.

Je pense notamment aux techniques suivantes: celle de mettre à la charge de la poursuite la preuve de certains faits qui permettront au juge de se décider. Ainsi, ce serait à la Couronne de prouver que l'illégalité de la preuve est un incident isolé et ne fait pas partie d'un projet continu. Bien sûr, une preuve négative est difficile à faire, mais moins difficile quand même qu'une preuve dont les éléments sont en la possession de la partie adverse! Autre technique, présomption d'inadmissibilité en l'absence d'un "show cause" sérieux de la part de la poursuite.

Branson

I have just finished reading the above-noted Study Paper of the Commission and, in accord with the invitation for comments, would like to say that I am in general agreement with the reasoning set out in the Paper and the conclusions reached therein. However, I feel that it would be a great mistake if the discretion which it is contemplated be given to

Judges to exclude illegally obtained evidence were cast in broad or general terms. The disparity of result which would be caused by such a procedure would, in my opinion, result in the cure being worse than the disease.

It is my opinion that in the area of criminal law, perhaps more than in any other, the principle of certainty and uniformity of result should be a major object. To have the result of a criminal trial depend upon local community feelings would be bad enough, but to have that result dependent upon the views of one Judge as against those of another is dangerous. Furthermore, if the criteria which the Judge must give in arriving at his decision to exclude or include illegally obtained evidence are set out in the legislation it will be a guide to him (and I think that they appreciate such a guide): furthermore, it would provide a more equitable basis upon which the right exercise of this decision can be judged in appellate tribunals. Indeed, it would probably, in my opinion, be better that the matter was not expressed in terms of a judicial discretion but, rather, as a rule of law requiring the application of the trial Judge's mind to set criteria.

Also, while I have spoken about it in terms of the decision being made by the trial Judge I feel that serious

consideration should be given to having this process taken away from the trial process and dealt with at an earlier stage.

I feel that consideration should be given to exclusionary hearings being held at a time and place separate and apart from the trial. It may be that this could, to some extent, blend with a discovery process, or with that which may now be necessary in light of Section 178.17 of the Protection of Privacy Act.

The advantage of such a course would be a saving of the time of the jury or the trial Judge at the time of the trial and lead to a greater continuity in the laying out of the case.

I do not think that such a course should be restricted to jury trials as it is just as important that a Judge sitting alone not hear "inadmissible" evidence. I am not one of those who adhere to the platitude that a trial Judge is able to disabuse his mind of inadmissible evidence when he comes to make his final decision.

I am aware that it can be argued that the trial Judge is the best person to decide what should go in because he has the total case before him. However, upon a mature

reflection of this proposition one must reach the conclusion that it is not actually the case. In actuality the amount of the case about which the tribunal is aware at the time of the ruling on the introduction of a particular piece of evidence depends upon the accident of the timing of the attempt to introduce this evidence. On the other hand, by having the exclusionary hearing prior to the trial there can be no harm done by putting a summary of facts in front of the Judge at this hearing so that he can determine the admissibility of each piece of evidence in light of the total case; indeed, it would even be possible to defer judgment on the admissibility of a piece of evidence until it is determined whether another item of evidence is admissible or not. Probably one could even go farther and allow the decision reached about a piece of evidence early in the exclusionary hearing to be changed in light of what occurs later at that same hearing. Such a course of action would be extremely difficult to work out within the trial situation.

Then, if you know, before the trial, what evidence is admissible and what is not the prosecution and defence can plan their case accordingly. It may well be that as a result of a ruling at the exclusionary hearing the Crown may want to pack it in as the whole case may have been dependent upon the admission of that particular evidence. On

the other hand as a result of the exclusion of certain evidence it could result in quite a few witnesses who would otherwise be subpoena'd and expected to wait around the Courtroom or at least be available, being dispensed with for the trial.

Of course, provision would have to be made for the introduction at the trial of evidence newly discovered since the date of the exclusionary hearing whether that be the evidence which was the subject of the exclusionary hearing or other evidence which may have affected a ruling made thereat.

Once again, may I thank the Commission for affording me the opportunity to comment upon its Working Papers. I do hope that the members of the Bar will be given the fullest opportunity to do so throughout Canada and it is for this reason that I am particularly pleased that Mr. Morris Manning of the Ontario Bar has been seconded to act as a liaison between the Law Reform Commission of Canada and the members of the Canadian Bar Association for the purposes of making sure that there is a maximum input from my colleagues to the Commission.

Honsberger

I have read with interest the discussion on exclusion of illegally obtained evidence. This is a very controversial debatable question with no easy solution. However, in four

and one half years on the bench, with emphasis on criminal cases, I have yet to meet the situation discussed.

I do not see any material enhancement in the public image of law enforcement officers through the use of the exclusion area rule in the United States; in fact, the opposite may be said to be true. This may be as a result of the general decline in the public, or private, appreciation of morality and authoratative figures.

If the anti-social element opts out of the social rules, that we generally accept, should they when apprehended be heard to demand the protection of those rules. It seems that the "game" is being played by different rules on each side. I agree that those who violate our rules must be tried by those same rules, but it seems somewhat to be tying our hands behind our back to exclude positive physical evidence of guilt which may have been ascertained by the prior violation of some civil liberty or other infraction.

I believe there to be a degree of culpability in the illegality of obtaining evidence e.g. the hidden policeman to catch the speeder, as opposed to illegal search of a vehicle that turns up guns and other paraphanalia for a planned robbery. I accept criteria similar to those in

Scotland as a basis for determining the admissibility to such evidence.

If a voir dire is held, similar to those on admissibility of statements, with some such criteria as above, or similar to the provisions of S. 178 16 (2) of the Protection of Privacy Act, the protection of the individual can be protected and the needs of society adequately met. This must be in balance, however, it appears to me, as if the balance is being weighed too heavily in favour of the individual in the present times, to the disadvantage of society generally.

Bowker

I have read the study paper on the above subject. I think it is an earnest and thoughtful effort to deal with a difficult problem. I have always felt that there is room for an "escape" provision whereby the judge should have a discretion to admit evidence obtained in a very highhanded or brutal way, but my difficulty is in formulating the basis for the discretion. According to Kuruma the discretion exists "if the strict rule of admissibility would operate unfairly against the accused". The only example given is that of evidence obtained by a trick; and I suppose that even if one takes this example, there are minor tricks and real dirty tricks.

In King v. Reginam, (1968) 2 All E.R. 610 the Privy Council returned to this problem. As in Kuruma it was held that there is a discretion to exclude evidence when admissibility would be unfair, but as the judgment itself says at page 617, "unfairness to the accused is not susceptible of close definition".

In Wray, as the study paper points out, the Ontario Court of Appeal had two criteria--injustice to the accused and discredit to the administration of justice. Incidentally I wonder about the passage on page 29, lines 7-8, which add the condition that the evidence have merely "tenuous relevance as evidence". I do not think that I have ever seen the judgment of the Court of Appeal in Wray, but I should not have thought the evidence of the finding of the rifle had only tenuous relevance. I realize that Martland J. in reversing the Court of Appeal, said that the discretion exists only where the evidence has little relevance, as in Noor Mohamed. I should have thought that the critics of Wray disagree on this point, and I notice that your tentative proposals on page 29 do not include this element.

I agree completely with your first recommendation. Anyone who follows the endless flood of cases in the federal Court of Appeals and the Supreme Court of the United States

can only be bewildered by the complexity of the rule and cynical of the end result. When the Fourth Amendment speaks of unreasonable "searches and seizures", and an exclusionary rule is imposed against them, then in the nature of things there is bound to be uncertainty because reasonableness is an imprecise guideline. My concern is that the exclusionary rule has, far too often, put a "cloak of immunity" around the guilty person. This is the phrase that Wilkie J. used in United States in Robinson in his dissent which prevailed in the Supreme Court (U.S. v. Robinson (1973), 94 S.C. 467). I realize of course that this decision created an outcry. In my opinion however it would have been a gross miscarriage for Robinson to go free. Some of the recent cases on airport searches go to absurd lengths in suppressing evidence. In the view of some American judges, though I am sure not the majority, the "right to travel" becomes a right to travel loaded down with firearms, or at least illegal drugs.

Looking at recommendation #2 I do not think one can complain about the circumstances giving rise to the discretion, namely, that "the violation is the result of a deliberate voluntary act committed in bad faith". This keeps the application of the recommendation narrow, as it must be. My difficulty is with the two limbs of the recommendation. I find it hard to discern a criterion for "serious injustice to the

accused". Would it not be better simply to use the second limb which is the bringing into disrepute of the administration of justice? I realize too that it is a vague term, but if we are to give the court a discretion I do not know how it can be conferred in other than vague terms. The thought behind my suggestion that the only criterion should be the second of the two is that we do want to put some check on brutal conduct, and I think, or at least hope, that the test of discredit to the administration of justice will be easier to apply than that of unfairness to the accused. You will recall that Mr. Justice Frankfurter thought of these problems in connection with due process of law, and his test was that the evidence should be suppressed if the conduct of the police "shocks the conscience". There is of course just as much difficulty with this as with the other criteria, as appears from cases like Rochin, Breithaupt and Schmerber.

My last comment is this: We should not give power to the judge to dismiss the charge. This does turn the whole of the administration of justice into a game. It is true that suppression of evidence often results in an acquittal, but this is not quite the same as dismissing the charge because of highly improper conduct in obtaining evidence. We should not turn the trial of the accused into the trial of the policeman.

Canadian Bar Association, Study Group, Edmonton

Since credibility is not a test for admissibility of evidence, we believe that recommendation No. 1 on page 29 of the Paper should be amended so that the sentence ends as follows, "If the evidence in question" is relevant.

It was noted earlier in the Paper that a distinction was made between "real" evidence and "testimonial" evidence. In order to ensure that illegally obtained testimonial evidence is not admitted under any circumstances whatsoever, Mr. Ketchum and Mr. Davidson favour the insertion of the word "real" before the word evidence so that we would revise objective No.1 to read as follows:

> 1. To recognize as a basic principle that an irregularity in obtaining real evidence is not in itself a reason for exclusion if the evidence in question is relevant.

This would give effect to Cartrights C.J.'s dissent in R. v. Wray that an involuntary confession even if verified by subsequently discovered real evidence could not be referred to in any way. It would also make this objective consistent with the Commission's proposal in Paper No. 5 that no statements by the accused to the police, except those made before the independent official, are admissible at trial. Elizabeth

McFadyen and John Lee dissented from this position, preferring the majority judgment in R. v. Wray.

With respect to objective No. 2 on page 29 of Paper 10, we note that in the fifth line the word "or" should be inserted after the words "bad faith" and before the words, "its admission", otherwise the sentence is not only imprecise but grammatically incorrect.

While we were all in favour of the judicial discretion proposed in objective No. 2, we think the objective should be more precise as to whether all or any one of the several criteria mentioned must be satisfied before the trial Judge should exercise his discretion. We note that the criteria in objective No. 2 are largely those set out on page 16 as being the criteria used in Scottish law, but we can see problems arising where trial Judges might feel that they would have to be satisfied on all seven criteria so set out before they would be prepared to exercise their discretion.

Finally, we feel that since certainty to detection and punishment is generally the best deterrence to illegal acts it is our view that the Commission should do more research with a view to putting forward specific proposals

for dealing with persons who have obtained evidence illegally (hereinafter called "violators"). We note the Commission's reference to Israel's handling of this problem. We feel that the registering of an immediate conviction against a violator by the Court trying the case in which a violation comes to light would be unfair as denying the violator's right to a trial of the issue, however, we are all of the view that:

1. We would like more research on how Israel and other countries deal with such violators so that justice is seen to be done to them for violating the law regardless of whether the accused chooses to commence such proceedings.

2. We would like proposals for a summary procedure, (contemporaneous with or immediately following the criminal proceeding in which the violation comes to light) for sanctions of a criminal or civil nature against the violator.

3. We would like the employer of the violator to be vicariously responsible to the aggrieved person under an absolute liability rule. We would agree that that employer should then be subrogated to the aggrieved person's rights against the violator. It is our experience that certainty of recovery of damages (if a judgment is obtained against the violator) is usually a spur to prompt action and that it is prompt action against such violators that deters violations.

Section 16 Confessions

Walsh

Section 41: The intent of Section 41 (1) is to exclude a statement by an accused person, unless proof is offered that the statement was voluntary. A great body of law has been developed in Canada as to the meaning of the term "voluntary". Why not, then, use such a well-defined term in the Section, and have it read as follows:

"A statement made by the accused to a person in authority is inadmissible if offered by the prosecution in a criminal proceeding, or in cross-examination of the accused, unless the judge is satisfied beyond a reasonable doubt that the statement is volunatry, and was not made under circumstances (including the presence of threats or promises) that were likely to render the statement unreliable.....".

McFarlane

I think the time has come when the practice of holding a voir dire in which the trial judge is required to make a finding of fact as to voluntariness should be abolished. I suggest that any statement made by an accused person should be admitted in evidence if tendered by the Crown together with the circumstances under which the

statement was made or obtained. It would then be entirely for the jury to decide what effect, if any, should be given to the statement and, in addition, to decide whether its contents are to be regarded as exculpatory or inculpatory.

This would involve the repeal by statute of the effect of the judgment of the Supreme Court of Canada in Piché (1971) S.C.R. 23. In that case a dictum of Lord Sumner made in 1914 appears to have been interpreted as though it were a Canadian statute.

Fundamentally, if we believe in jury trials we should trust juries. Much waste of time would be avoided if my recommendation should be adopted.

A Provincial Court Judge

Since there is no compulsion on the accused to make a statement, nor do I believe that there ever should be, prior to his trial, I do not see any reason to assure that he is represented by counsel before making a statement.

It is my view that no accused person should be convicted upon the evidence contained in his own statement, admission or confession unless there is corroboration of material facts of the offence and of the involvement of the accused.

The voir dire which is now held to determine whether the statement is admissible is based on whether the statement was voluntary in which case it is deemed to be probably true. This is a most artificial and unrealistic procedure. Having in mind the purpose of the rules of evidence, I would suggest that the prosecution be allowed to introduce any formal statement given by the accused during the investigation providing he be then required to introduce every statement made by the accused during the investigation and the circumstances surrounding the taking of each statement so that the judge may be in the best position to know what weight, if any, to give to the statements.

I would also suggest that the accused be allowed to require the Crown to introduce any statement made by him during the investigation providing that the Crown is then required to introduce all statements made by the accused during the investigation and the circumstances surrounding the taking of each statement.

Judges' Ontario Provincial Court Judges Association

Although a great deal of time at trial is given to hearing evidence as to the voluntary nature of a statement, insufficient concern seems to be given to the equally important question of whether or not the statement proffered

is really the accused's statement. It is our experience that considerable conversation takes place - never recorded and only vaguely, if at all, remembered - between interrogating officer and the accused before the officer starts to record his questions and the accused's answers. Generally the questions are selected to extract the maximum inculpatory response. It is rare indeed that one finds any attempt by the interrogator to record a full statement. If several statements are taken from an accused, frequently only the most inculpatory one is offered by the prosecution. Verbal statements - including those recorded in the interrogator's note-book at or shortly after the time of questioning - are even more suspect since their brevity clearly indicates editing for inculpatory effect.

Until all interrogation is fully recorded, it would seem only just to require all written statements of an accused person to be submitted by the prosecution, or if he does not choose to put in any statement, all should be made available to the accused before trial to use as he sees fit.

PERKINS' AMENDMENT

1. (1) All statements made by an accused person at any time to any person in authority concerning the offence with which

the accused is charged may only be introduced in evidence at the trial of the accused by the prosecution as parts of one statement upon the following conditions:

(a) That the prosecution has given to the accused seven clear days notice of its intention to introduce such statement together with a copy of the statement intended to be introduced.

(b) That the prosecution establishes beyond reasonable doubt in the opinion of the judge, justice or other presiding officer at the trial of the accused that such statement and every part thereof is the voluntary statement of the accused, freely made without threat, promise of favour or intimidation.

(2) The prosecution shall file with the court as evidence all parts of any such statement made by the accused upon demand by the accused, which demand may be made at any time prior to the closing of the case by the accused.

Exclusion of Certain Circumstantial Evidence

Character and Disposition

General Comments on Projects Draft Sections

Canadian Bar Association, Criminal Justice Subsection, Manitoba and British Columbia Branches

Sections 1 and 2 - General Rules Respecting Character

The British Columbia Sub-section is not disposed to adopt the proposals set forth since they appear to add little to the present law and could create uncertainty in an area of reasonable settled law. The question of "traits" is a matter that requires separate provision in light of cases such as Regina v. Lupien (1970) S.C.R. 263. An allied matter is the question of psychiatric evidence of "truth serum" result which admittedly does not bear exactly on character, but is undoubtedly a matter of medical science that the law will have to face.

The Manitoba Sub-section disagrees with the proposal in Section 1 on the grounds that it is superfluous.

The Manitoba Sub-section agreed with the proposal in Section 2 on the grounds that it is a safeguard on the next

following proposal.

The Manitoba Sub-section agreed with the proposal as set forth in Section 3, save and except Section 3 (1) (c). This is based on the view that evidence of previous conviction should only be admissible if it is not too remote, is relevant, and if the witness has not been pardoned.

British Columbia Law Reform Commission

Section 201 - Character a Main Issue in the Trial

This section perhaps needs further words to distinguish it from Section 200 where character evidence is circumstantial evidence of a person's behaviour. Here it is a main issue in the trial. I propose to insert after the words "is in issue", some phrase such "other as under Section 200" or "as a main issue in the trial".

The justification for a different rule where character is a main issue would run something like this:

That where character is to be used as a circumstance from which to judge whether the accused/defendant, or victim, did a certain act, the trier of fact, to avoid being trapped in a multiplicity of issues, should be armed with the most cogent and tested evidence of character

available, i.e. that of general reputation.

Where the trier of fact is required to pass upon the character of a party as a main fact in issue, then he is entitled to receive any evidence relevant to that issue and to test its accuracy by his own judgment, thus receiving evidence of reputation, personal opinion and specific instances, including prior convictions.

An interesting sidelight is the use of specific instances to prove the character of a vicious animal.

A question is raised whether under the proposed code a single specific instance may be proved. (The wording is "specific instances"). Assuming that the intention is that character should not be proved by a single act, a better wording might be chosen to show that it is only from repeated instances that character is to be judged. I propose the following:

"...or evidence of a sufficient number of instances of the person's conduct that the Court may find the person's character therefrom".

It is thus left to the Court, on the facts of each case, to decide whether sufficient instances are proved from

which character may be inferred.

Manitoba Law Reform Commission

Character - A luncheon meeting of members of the Civil Justice Section was called to discuss this Study Paper. Their views were expressed to us by Mr. Charles Phelan who said:

We confined our discussion to this paper on Character and this turns the law right upside down. It is not a codification of the existing law at all. We felt that the jurisprudence of evidence kept character out of evidence. Kept it inadmissible for the very simple reason that it was irrelevant and to introduce it would muddy the issue: Now all of a sudden according to this paper character evidence would be admissible unless 1, 2, 3, 4, 5 naming the very same things that they say in relation to credibility. And that would, in the view of the group that I had lunch with, would make the whole judicial process a bit of a joke. To adopt some of the things that have been said earlier, I think that it would put far too much power in the hands of the judge. One of the things that we all were puzzled with was section 2(b), where evidence would be excluded if, in the opinion of the judge or other person presiding at the trial or other proceedings, its probative value is

substantially less than the likelihood of confusing the issues to be decided. What about the trial judge having to be the one to decide whether or not he was confused by the issues to be decided? In a nutshell this pretty well represents our views: we found very little in here that appealed to any of us and we felt that the law relating to character as it presently exists and as it's laid down in well thought-out cases, is the law as it should remain.

Another thing is, on the point of codification as such, I believe there is the case of Vagliano Bros. v. The Bank of England (1801) A.C. 107 at 145.) which says that when you're dealing with a code you can't go into what the previous cases say, what the cases decided before the code. You have to examine the wording of the code and if its words give a meaning which can be perceived, whether good or otherwise, you can just take those books, and throw them out, and you can throw all the cases out that go with them, because they're going to be of little assistance to any of us. Those are the thoughts we had.

We should be inclined to favour a much more restricted provision as to the admissibility of character evidence which, as the Project's own Comment acknowledges, is only occasionally relevant. We should prefer a more specific

provision, rather than the general declaration of admissibility followed by an almost equally general power of judicial discretion of exclusion. We agree with Mr. Bowman's comments about the curious reversal of the use of such evidence as between cases of sexual offences and others.

Mr. Bowman commented: A victim in an assault or a murder -- you could go on and try to produce all the evidence in the world that he was a peaceful lamb and couldn't possibly have done anything to promote this; but the lady who has taken on the entire block, you'd have to leave her alone. The Comment says also "since the complainant may suffer unfair embarrassment and great harm, rape victims are often reluctant to press charges and also women of bad character are provided with little protection against rape." I don't think that is a justification. For instance, I well remember a case where the girl was shown to be a prostitute, but the jury believed that on this particular occasion she hadn't consented and they convicted despite evidence of her highly unchaste character. That's not a unique instance by any means.

Our view as to admission of evidence as to character is that it ought to have demonstrable relevance to the issues being litigated or be excluded as irrelevant. That

an accused on trial for forgery may have been a thoughtless ingrate toward his parents, is of no relevance to the issue of forgery. We should prefer the touchstone of relevance to the unpredictability of discretion.

Mewett

I have read with interest the Commission's first set of study papers on Evidence, much of which we have already considered at the Ontario Law Reform Commission. I get the impression that you, like me, find the problem of character evidence the least satisfactory.

I shall limit my comments to criminal cases. Perhaps the whole trouble stems from the continued use of the concept "character". Apart from the fact that it is not very good English usage, it connotes a moral quality of goodness or badness. I am not sure what the Commission means by a "trait of character" but presumably it means goodness or badness in a particular respect, a concept that I think is an impossibility, rather like being in other respects sane, but having specific delusions.

The clue to the solution may be in abolishing all character evidence and concentrating on trying to use the concept of disposition. It is certainly more concrete and signi-

fies a state of subjective inclination towards a particular course of conduct, or action, or motive or intent. It has, above all, no moral connotation. Wherever, therefore, a particular course of conduct, or action, or motive, or intent is in doubt on a particular occasion, proof of disposition ought to be a piece of relevant evidence in helping to resolve the doubt. The principle that has to be isolated is that because a person has acted in a certain way before, he therefore has the habit of acting that way, he therefore is more likely to have acted that way on this occasion.

This has nothing to do with character and I'd like to suggest:

1. Evidence that is relevant solely to the good or bad character of any person is inadmissible. (this, of course, is apart from problems of sentencing or damages and so on). Character is only confusing, and to allow an accused to put his good character in issue is an unjustifiable anachronism from the days when an accused could not testify and was thought to be something like a "criminal class". Furthermore, character has nothing to do with credibility or conduct of a victim.

2. Where an issue has been raised as to whether

a person did or did not engage in certain conduct or activity or did or did not have a certain motive or intent, evidence is admissible to show that that person has disposition to engage in that conduct or activity or to have that motive or intent, for the purposes of proving whether he did or did not engage in that conduct or activity or have that motive or intent on the particular occasion in question.

What I have attempted to do is first of all to require a nexus to be established between the person and the alleged offence, thus avoiding the Harris v. D.P.P. problem of conviction by accumulation of suspicious circumstances. Once the issue has been raised, then I think disposition becomes very relevant. Thus, in the "similar fact" type of situation, the prosecution cannot prove its case solely by proof of disposition, but given that it has presented a reasonable and relevant case, then evidence of disposition is relevant to any issue that might then be raised - e.g. as the Commission says, as to identity, intent, and so on. Similarly where there is an allegation of self-defence, it is not possible for the accused merely to show that the victim is subject to violent tempers, but, given that he produces some evidence of his being attacked by the victim, the victim's disposition becomes relevant.

3. In all cases it shall be the duty of the judge or other officer presiding to determine whether the evidence proffered is capable of leading to the inference that the person in question has much disposition.

If this is not already the law, then I think it should be. For example, I do not think that merely because a witness has been convicted, say, as recently as six months ago of even an offence involving dishonesty (whatever that may be) is capable of leading to the inference that the witness has the disposition to lie while testifying. On the other hand, if there is some series of such offences, or some connection with the present subject matter, the same result might not follow. I am not sure, but I rather think it is preferable to permit the courts to build up a body of case-law on the type of evidence that might go towards disposition, but I suppose one could add a provision that limits it to opinion evidence (by which I assume the Commission means expert opinion evidence. If this is so, it should so state), evidence of reputation or evidence of previous conviction (though this latter provision would overrule cases like Thompson, Sims, Smith and so on, and I'm not sure that this was deliberate - the comment is not of much help).

I hope these random comments will be at some help.

I am not, myself, too sure of my actual proposal.

Character in Civil Cases

Sopinka

This should not be restricted to civil cases with respect to care or skill. In a fraud or assault action unless there is a scheme or system alleged, or the evidence is relevant to some other issue, evidence relating to disposition should not be admitted. The law at the present time excludes it.

Outhouse

Section 55 (c) should be deleted. While it is true that in most cases evidence of a trait of a person's character with respect to care or skill would be of slight probative value this is not sufficient reason to adopt an absolute exclusionary rule. Where the evidence is of slight probative value or its value is out-weighed by the possibility of prejudice, consumption of time or confusion, then the evidence can be excluded by the judge under section 5.

Schiff

In civil trials, character evidence is excluded on the grounds set out in your comment (page 7) and there are not

the pushes of policy in criminal cases to overcome that conclusion: e.g. good character of the accused might raise a reasonable doubt, but if accused an attempt to show good character, then adversary interests and protection of public demand Crown rebuttal. See, e.g., Model Code, Rule 306 (1)(a); Rule 47 (b)(i);

I agree that in the general run-of-the-mill cases character should not be admitted, but in cases where the specific issues render the particular evidence of character of higher prohative value, or where policies in favour of protecting a litigant against quasi-criminal findings press for character evidence as they do in criminal cases, then the evidence should be admitted.

The first suggestion in your textual comment (mid-page 8) would, under your present draft of s.2, render <u>all</u> relevant character evidence admissible in a civil trial unless the judge excluded any particular evidence under his power in s.2. that would impose on the judge in a civil trial a more onerous burden than in a criminal trial - a reversal of the existing position re: evidence of character in civil and criminal trials.

Your second suggestion page 8 is superior at least

because it would limit the occasions when character evidence might be introduced (and limit the potential burden upon trial judges under s.2), and I cannot now think of a better qualifying then "moral turpitude" to describe the kinds of civil actions I refer to above (paragraph 2).

Macdonald

There is nothing in the proposed legislation expressly referring to the use of "character evidence" as evidence of the disposition to do an act, as justifying an inference that the act was done, in civil cases. The language of the exceptions found in Sub. (1) and Sub. (2) is entirely limited to situations in criminal law. The Project explains that "by the present law, character evidence cannot be used as circumstantial evidence in a civil case to prove the conduct of the parties". The Project does recognize that in some civil cases, such as those where a party is charged with criminal, immoral or fraudulent conduct, some provision ought to be made to recognize that such evidence may be relevant, and the Project invites comments on the problem in civil cases. The Project asks whether the legislation should give the trial judge a discretion to admit such evidence in civil cases, or whether the legislation should prescribe that the same rules with respect to character evidence in criminal cases be applicable to civil actions involving an allegation of moral

turpitude? I suggest that the premise with which the Project begins, that character evidence cannot be used as circumstantial evidence in a civil case to prove the conduct of the parties, is not universally correct.

It is evident, therefore, that in some civil cases the courts have in effect and in reality allowed evidence to be admitted, the purpose of which must, on true analysis, be only to show that a party possessed a trait of character relevant to show the disposition of that person to act in a particular manner, and therefore to support an inference that he did on the particular occasion in question act in that manner. The cases have given no guidance as to when evidence will be admitted and when it will not be admitted for this purpose; surely the problem has been one of probative value and therefore one of relevance, based on the circumstances of the particular case. In my view, this position should be recognized by a separate section expressly recognizing that in civil cases, such evidence is admissible where, in the opinion of the trial judge, it is relevant to a fact in issue.

Section 17(1) Evidence of Accused's Character

British Columbia Law Reform Commission

Section 200 (1) - Character Evidence Generally

Section 200 (1) recognizes the existing law that evidence of a person's character may not be used as proof of the issue whether or not he committed the act charged or complained of. This represents no change from the existing law and no change is desirable.

Two exceptions are provided in favour of accused persons, and parties to Civil law suits where moral turpitude is alleged. The key to the exception is - where the defendant first offers character evidence in his own support. The new Code proposes that the defendant may only give evidence of "relevant traits" and not of his character generally. That is a restriction from the present law under which an accused may give evidence of his good character generally for the purpose of persuading a jury that he is not likely to have committed the offence. However I do not propose that exception be taken to this restriction. Indeed, relevance should be the test of admissibility for any evidence and the restricting words "relevant traits" would seem to allow enough latitude to permit any accused, or any party to a civil trial, to introduce sufficient character evidence in support of his

denial of the act alleged. The opening up of the field of character to the prosecution or other party following the offering of character evidence by the accused, or defendant, is in accord with the present law. It is justified by the present reasoning that the accused has lead evidence of his good character only, concealing the available evidence of bad character and thus endeavouring to mislead the trier of fact. Permitting the Crown/Plaintiff to lead evidence of an accused/defendant's bad character only because he has attacked the complainant's character by cross-examination is a departure from R. v. Butterwasser (1947) 2 A.E.R. 415 (C.A.). This is a constructive change because once the accused/defendant has tried by circumstantial evidence to throw the blame for an occurrence on to the victim, the calling of similar circumstantial evidence of his character should not be made to depend upon whether or not he testifies himself.

(The B.C. Commission wishes to resolve full consideration of this topic until it has been decided whether each accused will be compelled to testify.)

A Justice of the Supreme Court of British Columbia

Section 3: The proposed section uses the word "relevant" in an imprecise way. It says the accused may offer evidence of a "relevant trait of the character

of the accused". It doesn't say to what the trait must be relevant. The comment at page 4 days "The section does change the existing law by limiting the prosecution's character evidence to evidence of a trait which is relevant to the crime charged, though not necessarily the trait with respect to which the defendant has chosen to lead character evidence." If the section would lead to that result, I am against it. If the accused leads evidence as to his character, the prosecution should be permitted to lead evidence relevant to traits of character covered by the accused's evidence, whether relevant to the charge or not. I would not quarrel with the proposal to limit the Crown to traits of character relevant to the crime charged and traits of character in respect of which the accused has led evidence. I rather suspect, however, that it was the intention to limit the accused and the Crown to traits which were relevant to the crime charged, but not to limit the Crown to traits in respect of which the accused has led evidence.

Section 17(2) Evidence of Victim's Character

Criminal Procedure Project

Permitting the Crown to Call Evidence of the Accused's Character

(a) I think we agree with Mr. John Spencer's view that the Crown should not be allowed to call evidence of the

victim's good character ab initio, because it could be taken to be an inference of the accused's bad character and as such, if done directly, is prohibited. Further, there is no need to permit it to be done first; it can always be done by reply.

(b) As well, we wonder if it is sound to permit the Crown to offer evidence of the accused's bad character merely because the accused has attacked the character of the victim. Certainly that is the proposal in Section 2(1)(a)(ii). In present practice when the defence does that, is it not enough for the Crown to be allowed to rehabilitate the victim's character? Further even if something more is needed, what will be considered to be evidence offered by an accused relevant to "a trait of the character of the victim"? What if something of that nature comes out in cross-examination of Crown witnesses? Is that an "offer" of such evidence? Does it matter if it seems inadvertent or slips out as the result of the inexperience of incompetence of defense counsel? We think these are real questions that should be considered.

Macdonald

Sub. (b) provides that character evidence may be given as to the victim of an offence, without waiting for

the defence to attack the character of the victim. Where the Project discusses this matter, at p. 7, no reason is given for this recommendation. On the other hand, the Project recognizes a danger in the proposal, in that the trier of fact may be unduly influenced by the attractiveness of the victim. The Project felt, however, that this danger should be taken into account by the trial judge in the exercise of his discretion under Section 2.

Sub. (b) excludes sexual offences. In other words, where sexual offences are concerned, neither the Crown nor the accused may adduce evidence as to the character of the victim. At present, such evidence may be adduced by the Crown only if the accused has first introduced evidence portraying the victim as of low reputation. The Project staff evidently feels that the present rule results in rape victims being often reluctant to press charges, and leaving women of bad character with little protection against rape. Thus the Project recommends "that in cases involving sex offences, the defence not be permitted to adduce evidence of the bad character of the victim either on cross-examination or in its case in chief." (p. 6) It should be noted that immediately after making that recommendation, the Project states as follows:

"The problem of proof of sex offences, including the

desirability of informing the trial judge respecting the female complainant's social history and mental make-up as determined by psychiatric examination, and the problem of corroboration, will be the subject of a special study by the Project but any comments on this problem are welcome."

If this entire question requires "special study", then it is difficult to understand how the Project's recommendation can be made at this time, in isolation from any recommendations it may have to make in the future after such a "special study" has been conducted.

Bowman

Character: The proposed sections under this heading would in part at least, again, reduce trials to the process of head-counting, i.e., the heads of friends or enemies of a witness or an accused.

On pages 5 and 6 of the comment, the suggestion is made that whereas the evidence of character of the victim should be permitted in other cases, it should be excluded in sexual offenses. It offers the observation that the complainant may suffer "unfair

embarrassment and great harm". I find it difficult to equate such embarrassment and harm with that occasioned to an accused person convicted of rape on the unsupported evidence of a woman whose background he has not been able to bring out. The law has recognized what the project authors do not; that this kind of charge is easily made, difficult to refute and emotive in character, insofar as a jury is concerned. The law has created safeguards without which even greater numbers of unfounded charges would be prosecuted to conviction. In my experience over perhaps thirty or more rape defenses, I doubt if I was satisfied that more than four or five, and those almost all involving several men and one woman, were actually rape. I doubt however if the others would have been acquitted, as they were, if I had not been able to explore at length the background, conduct and character of the complainant and to demonstrate to the jury the unreliability of her story.

The comment then goes on to say that some of the problems, including "corroboration", will be the subject of a special study but comments are welcome. The audacity of the authors is over-whelming.

Having purported to exclude the evidence of character in those cases where it is most useful, the authors would then admit it in cases where it is not. At the moment it is

possible to bring out some background relevant to a defense of self-defence or provocation. If the authors have their way this will continue to be permitted but, as well, the Crown will be able to convict a great many more accused, not because of what they did on a particular occasion, but because of what they had done in the past. The sublime inconsistency of their position does not seem to trouble the authors of the report.

British Columbia Law Reform Commission

Section 200 (1)(b) - Evidence of the Victim's Character

This sub-section deals with the situation where the victim's character is sought to be proved as evidence that he, rather than the accused/defendant, was responsible for the crime or civil wrong. I have not found any case where this type of evidence has been lead by the Crown/plaintiff. It seems logically to follow that if the Crown cannot lead character evidence against the defendant's character to show that he is predisposed towards the commission of the offence, and therefore likely to have done it, it cannot by the same token prove the victim predisposed against the commission of offence (i.e. that he was a gentle man not likely to have provoked an attack), because to do so infers against the character of the accused.

It is the law that the accused/defendant may lead evidence attacking the character of the victim as for example in the following circumstances.

1. Evidence that the deceased was a bully disposed to violence, in support of the defence that the fatal blow was struck in self defence under the reasonable apprehension of serious harm to the accused.

2. On a charge of rape, that the complainant had a general character as a prostitute for the purpose of showing that she consented to intercourse.

Where the accused/defendant leads such evidence it is open to the Crown/plaintiff to rebut the evidence. The proposed sub-paragraph (b) however gives the inference that the Crown/plaintiff may lead such evidence of the victim's character in the first instance. I propose that the sub-Section be clarified by distinctly showing that it is not permitted.

We should also consider and provide for the case where an accused/defendant wishes to lead evidence of a relevant trait of character of a third party, i.e. another potential suspect, to show that he, rather than the accused/defendant was likely to have been responsible for the act

charged or complained of.

Dealing with the exception against character evidence for the accused/defendant in sexual cases the National Report proposes that evidence of the complainant's character be inadmissible as circumstantial evidence of her consent. It is true that frequently in rape trials the complainant suffers more harm than the accused since the questions put to her, rather than her answers, tend to be remembered and since the burden of proof favours the accused over the complainant. However, I submit that any evidence, logically probative of the key issue of any trial should be admissible unless excluded by strong dictates of public policy. The issue of consent is so crucial to sexual offences that character evidence of the complainant tending to eshow her consent ought to remain admissible. Safeguards might be erected such as requiring that the accused/defendant be prepared to prove the adverse <u>reputation</u> of the complainant should she deny it. (i.e. Fishing expeditions would be precluded). However as at present the complainant's answers on specific instances of prior unchastity should be taken as final without the right to adduce contradictory evidence for the accused/defendant.

(Note, however, that the contradictory evidence

might be adduced for the purpose of challenging the complainant's credibility. i.e. Has she lied in the presence of the jury?)

The objectionable part of sub-Section (b) is that it provides for the admission of evidence as to the character of the victim at the instance of the Crown/plaintiff ab initio. It ought to be restricted to cases where evidence favourable to the character of the accused/defendant or adverse to the character of the victim is first lead by the defence. In other words the rules should be exactly the same as in the case of evidence of the character of the accused/defendant. In any case, where the Crown adduces evidence of the victim's character in chief it is difficult to see how it can satisfy the rule in Hodge's Case.

Clark

I wish to write to you in support of Study Paper No. 4 relating to the recommendations pertaining to character evidence in rape cases. We wholeheartedly support the recommendation that all such evidence should be inadmissible.

While we appreciate the need to ensure that all relevant evidence in such cases is brought before the judge and jury, we find no reason to suppose that any character

evidence relating to the past sexual history of the victim is or can be relevant. The use which is supposed to be made of such evidence, namely, to cast doubt on the credibility of the witness with respect to the question of consent, is based on a totally indefensible inference, from 'she consented in the past' to 'she more probably consented in the current instance.' That such an inference could be thought to be justified is beyond our powers of logic and imagination. If there were to be any grounds for such a conclusion, it would surely have to be based as much on evidence as to how many times the victim had in the past refused consent as on the number of times that she had not. Further, since it is well known that juries do not use such evidence even for the purposes for which it is designed, using it instead as the basis for concluding that since she has consented in the past no great harm has been done and she deserves what she gets despite the guilt of the offender, we believe the use of such evidence to be highly dangerous and prejudicial, creating as it does a status offence for the victim rather than establishing anything with respect to the offender.

For these reasons we would urge you to accept the original recommendation of the Commission in this respect, despite the arguments advanced against it.

Davey

Section 3(1)(b). In my opinion the victim of an alleged sexual offence should be open to cross-examination as to his or her bad character as at present. I have seen not only cases where a victim was embarrassed by unfair cross-examination but also cases of unfounded sexual charges laid for various reasons, which would be difficult to defend if cross-examination of the victim was restricted as suggested.

A Justice of the Supreme Court of British Columbia

Section 3(1)(b) Character of the Victim

I do not agree with the proposal to prevent the accused in a sexual case from cross-examining the complainant as to previous acts of immorality with the accused or other persons. This may be embarrassing to the complainant but the whole affair is no doubt quite uncomfortable for the accused. These matters do go to credibility on the issue of consent. I think it would be wrong to exclude them. Dealing with the proposal to admit evidence of the character of the victim of an offence, the author says, "the project concluded, however, that it was best to leave the decision to exclude this evidence to the discretion of the trial judge who would weigh the probative value against the possibility of undue prejudice in the particular case." This, I presume, refers back to section 2 and is indicative of the sort of problems the trial judge will

have to decide without any law to assist him.

Schiff

I do not agree that relevant and important evidence re: the complainants character in a sex assault case should be excluded as you argue, and as s. 3(1)(b) would do: the risk of trumped-up sex charges is too great - where the alleged victim had previously screwed with the accused, your provision prevents evidence of those past events, which are surely of great probative value, even on cross-X.

- and where the alleged victim was notoriously a loose woman, you even more emphatically reject the evidence

- and you do all of this to protect the complainant, but ignore the dangers to the accused.

British Columbia Civil Liberties Association

We are concerned primarily with the proposal in section 3(1)(b) that an accused by prohibited from introducing evidence concerning the disposition of the victim of a sexual offence. An accused should be given wide powers to defend himself, and a fair hearing requires that he be prohibited from presenting relevant evidence only in exceptional circumstances. On the other hand, the present rules have the effect of discriminating against women by discouraging them from testifying as to sexual offences. Thus, civil

liberties arguments can be made both for and against the proposal. We believe that the interests of women outweigh those of the accused in these circumstances and approve of the proposal.

Criminal Procedure Project

Character of Victims in Sexual Cases

Members of the Project did not feel a case was made out for receiving evidence of the character of victims generally, but not of the character of victims in sexual cases. In many instances previous acts by the complainant are very relevant on the issue of consent and it was felt to be quite inadequate to simply leave the matter of proof of previous sexual activity to a psychiatric examination and report to the judge. Members acknowledged that sometimes cross-examination on this subject may go too far and that, as well, sometimes the previous activity of the complainant may not warrant any questioning. But these are problems which, it was felt, should more properly be determined by the exercise of discretion by the trial judge. For example, under present law judges seem to regard questions about previous sexual activity with persons other than the accused, no matter how recent the activity, or how frequent, or whatever the circumstances, to be proper and will not interfere with them - subject to advising the complainant that she does not have to answer and

preventing the defence from contradicting her. Well it would seem a sufficient safeguard against that kind of abuse to merely make the questions themselves subject to the judge's discretion so that if there really is no relevance or if the questions have no foundation they cannot be asked.

Section 18 Similar Facts Rule

British Columbia Law Reform Commission

Section 200 (2) - Similar Acts

This sub-Section preserves the right to call evidence of other crimes or civil wrongs or act committed providing they are relevant to some fact in issue. The most common example is similar acts. The section merely reflects the law as it currently stands and is in my view perfectly acceptable. It does nothing to over-rule the vast body of existing case law dealing with the grounds of admissibility of similar fact, evidence, etc.

A Justice of the Supreme Court of British Columbia

Section 3(2) Similar Fact Evidence

At page 9 the author says "Proposed section 3(2) is therefore technically unnecessary and has been inserted solely to codify the existing law and avoid any misunderstanding and confusion." Does this mean that section 3(2)

is a codification of the law as to the admissibility of similar acts? If so, it doesn't come anywhere near codifying that law. Perhaps the comment refers only to the effect of the rules as to admissibility of character evidence on the admissibility of similar acts, and the other aspects of that problem will be taken care of elsewhere. My mind, at least, is left with "misunderstanding and confusion". Further, I would like some precise definition of the words in subsection (2), e.g. what is the meaning of "motive"? Is motive, where used in subsection (2) to be given the limited meaning that it has been given in the cases relating to the use of motive to infer therefrom the doing of a human act?

Mcdonald

Sub. (2) is intended to declare the second part of Lord Herschell's classic dictum, describing the circumstances in which similar fact evidence is admissible in criminal cases, despite the general rule of inadmissibility. Lord Herschell said:

> "On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury; and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

My only comments concern the drafting of Sub. (2). It seems to me that, if this is a Code, then the language of Sub. (2) should expressly make such evidence admissible, rather than stating in negative terms that nothing is Section 2 prohibits its admission. Next, I question the wording of the specific examples given in Sub. (2), of facts to which similar fact evidence may be relevant: The comma after the word "act" should be a semi-colon, as in the French version; if the comma were changed to a semi-colon, then the wording of the words following should be changed to correspond with the French version, "this proof may be used to establish, amongst other facts, motive...etc." The comma which follows the word "mistake" should be deleted, for obviously what is intended is that such evidence may prove the absence of accident, as well as the absence of mistake; the French version, which has no comma, is correct in this respect. Moreover, the Subsection should surely be worded in such a way as to make it clear that similar fact evidence may be admissible not only to prove the facts referred to therein, but also, where material, to disprove such facts; for example, similar fact evidence may be relevant so as to exonerate an accused by showing that there was a mistake in identification, such as occurred in the Adam Beck case (Notable British Trials).

I am vaguely disturbed by a feeling that Sub. (2)

of Section 3 does not sufficiently convey the hostility which the common law has displayed towards evidence of similar facts in criminal cases. If it is merely the intention of the Study Project to codify the existing law, what bothers me is that the wording of Sub. (2) might, to a trial judge, indicate that all he has to do, to find that similar fact evidence is admissible against an accused, is to hold it to be relevant to any of the listed facts. Perhaps the French version avoids this danger, or lessens it. I point out that Clause 3(2) of the English Draft Bill attempts to meet the problem by using the following language:

> "In any proceedings evidence of other conduct of the accused tending to show in him a disposition to commit the kind of offence with which he is charged shall be admissible for the said purpose if the disposition which that conduct tends to show is, in the circumstances of the case, of particular relevance to a matter in issue in the proceedings, as in appropriate circumstances would be, for example--"
>
> There follow three examples.

A final point with regard to Sub. (2), relating to similar fact evidence, is that it leaves open the possibility that such evidence is relevant to prove a fact in issue, not necessarily only because it shows the disposition of the accused to act in a particular manner, and thus that he did act in

that manner, but also, as no doubt is sometimes the case, to show that there was a criminal act, or that the accused did the act, or the intent with which the accused did the act, or that he had guilty knowledge or there was no mistake or accident, otherwise than by showing that he had a disposition to do that kind of act. For example, such evidence may be relevant to show the impossibility of the coincidence upon which the accused's defence essentially rests, as was the situation in Makin's Case and Smith's Case (the brides in the bath case) (1915) 11 Cr. App. Rep. 229. The English Draft Bill specifically recognizes, in Clause 3(7), that

> "nothing in the foregoing provisions of this Section shall prejudice --
>
> (a) The admissibility in evidence in any proceedings of any other conduct of the accused in so far as that conduct is relevant to any matter in issue in the proceedings for a reason other than a tendency to show in the accused a disposition..."

As I have said, it appears that the Canadian Project feels that this form of reasoning as to the relevance of the evidence is sufficiently covered by the general language of Sub. (2).

Criminal Procedure Project

Similar Fact Evidence

Members of the Project felt that perhaps the "rule"

about similar fact evidence could be the subject of a full study and that maybe more was needed than simply to codify the existing law. Are there not serious problems in the present law of evidence about when similar fact evidence can be adduced by the prosecution, in fact about what is capable of being similar fact evidence? Finally is there not such a relationship between similar fact evidence and character evidence that the rules about them - particularly the limitation of the trial judge's discretion - should be expressly related? Of course in present law the reception of similar fact evidence is subject to the exercise of discretion by the trial judge, but if the common law is to be replaced by a code provision then should not the right to exercise such discretionary power be contained right in the code section? There is no such provision in Section 3(2) and moreover that section is not related in any way to the discretion exercisable in Section 2.

Section 19 Habit; Routine Practice

Section 20 Manner of Giving Character Evidence

A Justice of Supreme Court of British Columbia

Subsection (3) I am opposed to character evidence being put in by way of an individual witness's opinion. I am not too happy with reputation but not only is reputation

an "aggregate judgment" as stated by the author, but if it is a community reputation, the theory (perhaps unsound) is that it would be unlikely to persist if it were not true. A single individual's opinion is too subject to control by the character and interests of the individual. "Reputation among those who know him or would know about him" would be all right provided there were some words added to show that the number of persons covered was not too small or too carefully selected.

Canadian Bar Association, Criminal Justice Subsection, Vancouver

Section 3(1) This would change the present practice and permit the introduction of opinion evidence. It would in effect pile hearsay on hearsay. He pointed out in passing that a person who "would know" about a person but cannot be classified as one who knows him, is in fact a person who doesn't know him; and that being so, what use would his evidence be? Mr. Hall felt that the proposed legislation would open up a great new area of uncertainty and he was against the proposal.

British Columbia Law Reform Commission

Section 200 (3) - Method of Proof of Character

An innovation is suggested here in sub-paragraph

(a) that character may be proved by opinion. At present it may only be proved by evidence of general reputation. (Under B.C. Evidence Act Section 18 or Canada Evidence Act Section 12, by proof of a previous conviction. The purpose of both sections seems to be to attack the witness' credibility, an issue which is not dealt with in the proposals here under discussion, but in a later paper).

I submit that a witness who testifies to his opinion of a person's character bases it upon specific instances to his own knowledge. For each such instance there will be a witness with a counter-instance and the trial will dissolve in a multiplicity of evidence of a circumstantial nature. This is avoided if evidence of character is limited to general reputation. Even evidence of prior conviction (other than going to credibility) should be excluded because although they are easy of proof and few enough in instance to enable the witness to prepare for them nonetheless for every assault committed by a person (led to show his propensity for violence in yet another assault case) there may be a hundred instances where he has led an old lady across a busy street or patted a dog on the head.

Other than going to credibility I propose that proof of a relevant trait of character should be limited either to a

witness' own evidence of his own character, saying what he is disposed to do or refrain from doing, and general reputation of his character in the community. This however should not preclude cross-examination of the witness on specific instances where he says he is disposed to gentleness. Thus seven different assaults with or without conviction could be put to him in cross-examination but his denial would be taken as final (e.g. a collateral matter), on the issue of character to prove the act circumstantially. However, the denials would open the way for the Crown/Plaintiff to prove the act in rebuttal as going to the witness's credibility (i.e. a lie in the face of the Court).

We are then involved in the trial of seven different assaults as collateral issues and the wisdom of the present rule restricting character evidence to "reputation" only is immediately seen, saving time and avoiding confusion.

The quick and arbitrary solution of this dilemna is to restrict all character evidence (save when led as to credibility) to general reputation.

Section 102(1) - Opinion and Reputation Evidence re Credibility

I urge against the inclusion of opinion evidence

as to truthfulness upon the grounds stated above. General reputation as to truthfulness or otherwise is a better test, providing reputation, as in the case of the Paper on character evidence, is expanded to refer to reputation in the community in which he resides or in a group with which he habitually associates. At present (and I propose in future) opinion evidence should be limited to opinion of the witness' reputation for truthfulness. Private opinion as to truthfulness should not be permitted. It can lead to confusion between opinion as to truthfulness on a specific occasion and as to truthfulness generally.

Schiff

Assuming, as you argue (bottom 11, top 12) that the opinion witness (and presumably the reputation witness) may be cross-X on specific instances of the person's disputed conduct founding the witness's opinion or the alleged reputation may, subject to judge's discretion, contradict answers by other evidence, then the door is wide-opn to evidence of previous conduct directed to the persons character under the guise of credibility, and can only be controlled by the judges discretion given him here by s.2 (and by s.2 of the Credibility provisions).

Thus, I recommend abandoning all of (3), in favour

of the general provision of section 1.

At the least, I would agree with P. Fed. Rules. Rule 405 (second sentence): prohibit evidence of specific instances only on cross-X of the witness, as a mode of initially limiting such evidence but thereafter permit opponent to contradict witness's answer subject to judges discretion to limit time, etc. etc.

Roberts

Proof of Character by Opinion Evidence

While members of the Project were in agreement with the proposal to permit the character of any person to be proved by opinion evidence it was not clear what interpretation should be given to that provision, i.e. Section 3(3)(a). Ordinarily in the law of evidence where opinion evidence is received the basis for the opinion is included, indeed, in strictness of practice it is required to be established before the opinion can be offered. In regard to an opinion as to another's character, that basis could be the previous relationship between the witness and the accused or previous acts of conduct of the accused, etc. If it is the latter then the question is this: is it intended that in Section 3(3)(a) that kind of basis for the opinion would

be inadmissible? If it is so intended then two comments might be made. Firstly, it is not clear that Section 3(3)(a) excludes evidence of specific instances of previous conduct where offered in support of or as a basis for the "opinion". Arguably to receive the "opinion" is also to receive its foundation. Secondly, one has to wonder at the utility of any unsupported opinion. It is the basis for the opinion that gives it weight. To receive a naked opinion about someone's character trait is somewhat akin to the old English system of trial by compurgation; the side with the greatest number of character witnesses - all unchallenged - carries the day. There is, in our view, no real value in that.

Another point on this specific issue, to permit evidence of previous convictions as evidence of character, as Section 3(3)(c) does, is somewhat inconsistent with the position of not permitting evidence of previous acts of conduct. Of course the Evidence Project treats it as an exception because in their view: "there is much less danger of surprise, consumption of time and confusion of issues, and their prejudicial effect is outweighed by their probative value". Well, perhaps, all of those assumptions can be challenged, and, if so, there is then no validity in the exception. So far as surprise is concerned, there is no reason why one side should be taken any more by surprise where the previous

conduct was bad conduct that culminated in a conviction than where it was either bad conduct not charged or good conduct. In either case a system of pre-trial disclosure could remove any concern on that account. Regarding consumption of time to prove the previous conduct, in many instances specific conduct not culminating in convictions may be just as easy to prove as those instances where convictions were obtained; this is true also where the conduct is good conduct. A witness may have seen it (the previous conduct) occur or some document may be available to prove its occurrence. Certainly one can think of numerous instances where such proof would be no more difficult than proof of previous convictions and therefore to brand the proof of all previous conduct not culminating in previous convictions as involving, uniformly, an undue consumption of time is unjustified. Perhaps the better approach would be to leave that concern to the discretion of the trial judge rather than to impose a rigid rule.

Moving to the next reason, i.e. "confusion of issues, and that their prejudicial effect is outweighed by their probative value", there is really no basis for suggesting that there is a difference simply because there was a conviction for the past conduct. In fact if anything the existence of the conviction would seem to make the evidence

more prejudicial than where there was no conviction for such conduct. But that kind of inconclusive argument aside, surely the danger of confusion of issues is not assisted one way or the other by the presence or absence of a conviction for the past conduct nor is the probative value of such evidence. In each case it is a matter of relevance and that depends upon the kind or type of the previous conduct and upon its circumstances, not upon the presence or absence of a conviction.

In conclusion it is our view that a case has not been made out for exclusion of previous acts of conduct (either in support of an opinion or separate therefrom) as evidence of a trait of character to act in any particular way. We think that if it is reasonable to receive a person's opinion on this issue then it is unreasonable to receive it without the full basis for it. Further, if it is reasonable to receive previous convictions as evidence on this issue, then it would seem unreasonable to exclude other acts of conduct not amounting to convictions, and also acts of good conduct where relevant; the presence or absence of a conviction would seem to be irrelevant. In our view the controlling element should be the discretion of the trial judge based, in all cases where such proof is offered, on such factors as relevance, consumption of time, confusion of issues and prejudicial value. Such an approach seems not only reasonable but it would serve to

simplify an area of adjectival law that is unnecessarily complicated.

Section 21 Subsequent Remedial Measures

Sopinka

While most provinces now follow a rule of evidence similar to section 59, some do not. I fail to follow the rationale of this exclusionary rule. If there is an explanation for the repairs inconsistent with negligence, the explanation can be offered. The matter should be taken care of by the weight to be given to the evidence.

Section 22 to Section 26 No Comments

Hearsay

Section 27 (1) Hearsay Rule (General remarks)

Ontario Crown Attorney's Association

Hearsay evidence is an extremely difficult matter to deal with, involving as it does the admissibility of evidence not only in criminal cases but in civil cases as well (in which there is a lesser standard of proof). As well any comprehensive legislation or rules with regard to hearsay will probably have to include items which are peculiar to one but not the other of the two fields of procedure. It may be quite possible that some exceptions to the hearsay rule are acceptable in Civil Courts and yet the Criminal Courts could not live with them. It is also important to determine whether or not the present law creates serious problems, and whether or not treatment in a different way would only serve to create new areas of difficulty. Giving additional discretion to Judges will only create new areas for Judicial interpretation with all the attendant uncertainty. As matters now stand, the Judge's charge to a jury must be unintelligible, at least in part, to most, and probably all the jurors. Crown Attorneys know from their experience with the Grand Jury that although a Judge will only address them for perhaps 20 minutes, and although he may repeat to them three or four times the few simple

instructions by which they will conduct their hearings, by the time they reach the jury room they have forgotten some of his most simple directions. One must be mindful of this problem when going into new areas of evidence which would only increase the uncertainty in the minds of the jury.

Looking at things from the Crown's point of view, it can be argued that it is unlikely that any change in the law giving the Trial Judge discretion to allow hearsay evidence would in fact mean that the Judge would allow it in. To give additional discretion will no doubt lead to more uncertainty in the criminal law contrary to what the paper suggests. Page 5 of the paper states that "jurors today are usually people of experience and education", which may be true with regard to their particular profession or managing everyday affairs but when they come to trying a criminal case, for the most part they are rank novices and can't be expected to appreciate the finer points, which often seem to elude even Judges. Curiously, most professional people are excluded either by statute or automatically challenged by Defence Counsel who have on occasion admitted to attempting to pick the 12 dumbest people on the panel of the jurors, since only they would believe the outlandish defence put forward on behalf of the accused. The average juror does not have a high school education and the complexities of

law with its inferences and presumptions can be too much for him. It would be too easy for a jury to use the doctrine of reasonable doubt with reference to hearsay, (in other words giving too much weight to it), and the Crown could do nothing about this.

Page 7 of the paper states "indeed because of the great need to protect the innocent in criminal cases a strong case can be made for never applying the hearsay rule against the accused." One wonders whether some people are not leaning over backwards to protect the guilty also. Just because the possibility exists that evidence may be manufactured does not mean that we should change the law of evidence so as to encourage it. And just where is the strong case which the author of the paper claims can be made?

Suggestions with Regard to Methods of Dealing with the Hearsay Problem

In an attempt to clarify hearsay, the following four methods have been suggested:

1. Abolish the hearsay rule, making everything admissible but have the judge direct the jury as to weight.
2. Make all hearsay inadmissible.
3. Codify current hearsay rules.
4. Make new laws with regard to hearsay building

on the current law, either making changes required or relying on the best evidence rule with judicial discretion of the trial judge.

Looking at number one, there are some problems in allowing all hearsay evidence. It must be remembered that this evidence is not given under oath. You cannot observe the demeanour of the person who made the statement, and the evidence cannot be cross-examined on. If given on a collateral issue, one wonders whether it could be contradicted to show it was unreliable. That is, for example, by calling witnesses, (you can not after all, in most circumstances, attack the character of the person who made it).

There is, of course, always a danger that the defence would put its entire case in through hearsay evidence by cross-examination of Crown witnesses, by calling unimpeachable defence witnesses who could testify only to hearsay, and by calling their friends who say they believe it. There is, of course, the problem that if hearsay goes in through the Crown witnesses, then the jury may accept it as part of the Crown's case, and therefore true.

Letting all hearsay evidence in goes a long way towards negating the best evidence rule. Self-serving

statements galore could be admitted as, for example, calling a priest from the confessional stating that 'A' always confesses all his sins and he would have likely confessed to this if he did it, and he has not confessed to it.

We must also bear in mind the difficulty of the jury sifting through evidentiary problems of weight with regard to hearsay evidence.

What would happen in the area of "ghost witnesses"? For example, a police officer might say that, "Smith told me he saw the accused with the murder weapon, and the accused said it was his, "but of course Smith doesn't testify because he has been told by the accused that if he told in Court what he told police he'd be shot and he's disappeared. Is this to be admissible?

Dealing with problems in disallowing all hearsay evidence, this would throw out all incriminating statements made by the accused to others. Dying declarations by the sole eye witness would also be excluded, and they have been important statements in many trials.

It would also create problems in conspiracy trials and bail hearings, and how do we handle public documents and

business records without a great deal of inconvenience? And what if the Crown alleges recent concoction? Can the accused call witnesses to the fact that he told the police the same story at the first opportunity? Is it to be treated as hearsay or simply as the fact that it was said?

Red Gestae is now received as original evidence, proving the fact that it was said, but not necessarily is the truth of what was said.

And what about the situation where "A" is charged with a crime? Can 'B' give evidence that 'C' told 'A' in his presence that 'C' had done the crime in a manner to incriminate 'A'. Could this be admissible?

Cross sets out an example where the police raided a suspected bookie joint, and with all the evidence, there was evidence of many phone calls of people saying "this is number 862, put $5.00 on Red River in the third," and so on. Should this evidence be receivable? Bookie joints move around. Now we can use a wire tap to get this evidence, but if any wire tap legislation comes in then this situation could occur.

Evidence of character and reputation are also hearsay.

As far as codification of current hearsay rules is concerned, this is no problem at all, and one only needs to look in the more reliable books on evidence to see that they are set out therein. One wonders whether codification would serve any really useful purpose at all.

Perhaps the most appealing situation would be codify the current law and make some changes; for example, often in practice two sides of a conversation are admitted, especially where what's said isn't terribly controversial. While strictly speaking, one witness should be saying what he said and the other witness should be testifying as to what he said. Surely, such evidence could be allowed in where the evidence is not in dispute.

Where a person has given his evidence earlier in the presence of the accused, subject to cross-examination, and now is unable to be in Court because he is out of the country, is dead or is too ill to testify, then that evidence will be admitted at trial. There is no reason why the same evidence could not be admitted where the author can not be found despite reasonable search, especially if those provisions were required.

While it may be desirable to give the trial Judge

some discretion in this area, it is also important in any event to limit that discretion.

There definitely should be some provisions with regard to notice, and there is no reason why you couldn't put in admitted facts through hearsay evidence.

As far as onus is concerned, the onus should be on the proponent of the statement, and probably should be on a balance of probabilities rather than beyond a reasonable doubt.

McGillivray

I have read with interest the study paper prepared by a branch of the Law Reform Commission.

My reaction is that I am appalled by what is suggested.

In the committee's introduction, which to me seems to be a most able job of discussing the pros and cons, the five disadvantages of hearsay are set forth.

The first disadvantage is the inability of a witness to attend, resulting in a possible injustice.

My concern is that some memorandum by that witness may result in an even greater injustice, and what is worse, some evidence by a contemporary who purports to record oral discussions relating to the subject by the missing or deceased witness, is very likely to result in an injustice.

As to the expense of proving facts that are not seriously in dispute, surely there can be some penalty as to costs as a deterrent to unreasonable positions being taken. This seems to me to be a much better solution than the introduction of what may be biassed or garbled second-hand evidence.

As to the criticism that the hearsay rules add greatly to the technicality of the law of evidence, again, this does not seem to me to be much of a price to pay to rule out what may be self-serving statements which, because they are in writing, are given an authenticity which they do not deserve.

It is said that hearsay rules deprive a Court of material which would be of value. That gets us back to the fundamental of how much value is hearsay. For a witness to testify that he hears that Joe Smith is a drinker, surely should not be paid any more attention than any other bit of gossip, and from there we go to the deponent who says that Bob Brown told him that Joe Smith was a drinker, and we have

not the slightest notion of the basis on which Bob Brown has put this.

Moreover, the witness who is giving the hearsay may be a most effective witness, whereas the person whose evidence is being allegedly put before the Court may be a completely ghastly witness, and the evidence gets a brand-new character passed on in second-hand form.

Lastly, it is urged that the hearsay rule often confuses witnesses, and prevents them from telling their story in a natural way, but I have never found this to be any sort of real problem in practice. If we have a Judge jump down a witness' throat or his Counsel's throat because a witness does start getting into second-hand information, that can be upsetting, but that has nothing to do with the hearsay rule -- it is because a Judge is not being considerate of the layman giving evidence.

In short, I do feel that over the years a pretty good code to ensure that evidence is accurate has been evolved, and what is proposed seems to me to have more disadvantages than advantages.

My most serious criticism is that we are going to

let in a lot of highly unreliable evidence, and there is no way of testing it.

Certainly one can see some merit in a transcript of a deceased person's evidence, which evidence was taken under oath, being permitted in, even though that evidence may not have been the subject of cross-examination. At the same time, I am very apprehensive about a letter or a statement or a memorandum by that witness being permitted in.

It is all very well to say that a Court or Jury can judge the weight of such a statement, but the facts of life are that something that is in writing and is put before a Judge or Jury tends to become something of the fact, unless there is very weighty evidence against it, and indeed, that written document may become more effective than if the witness had been there himself, and subject to cross-examination.

To say that all matters go to weight excludes the very reason for the hearsay rule, and that is that matters can be so prejudicial that it is not safe for them to be put before the Court and to be weighed.

It also seems extraordinary to me that where we have a witness who is present and available, but who refuses to be

sworn, that a statement made by him can be put in evidence. How can one judge what weight is to be attached to that statement, unless knowing why the witness refuses to be sworn?

I personally practise very little criminal law, and I suppose the prosecution is frequently faced with a situation where someone has given the Police a statement and at Trial, is afraid to testify, because he is serving time in a penitentiary and is liable to be beaten up or killed, but to put his statement in may result in someone else perhaps being in the penitentiary who should not be there, or it may be a statement calculated to assist the gentleman in the penitentiary which may be available to the Defence, and the person whose statement it is does not run the risk of being charged with perjury.

Again, certainly one can see some merit in a statement going in to implicate or convict someone charged when it is believed that the prospective witness has been simply frightened into not testifying, but I cannot help but feel that we are going to get into more problems than those which we are curing.

Then, I come to the situation where the author of the statement is available, but even then it appears that

such a statement can be put in, unless the statement is made for the purpose of setting out the evidence. I do not understand what the object of this new exception to the hearsay rule is.

There may be some merit to records made in the ordinary course of business coming in as some sort of prima facie evidence of the fact, where such memoranda are made pursuant to a duty.

An unscrupulous owner of a business, however, could certainly create some fancy records. Perhaps it may be said that he hasn't got a duty, and therefore the records would not be admissible, and that only the records of an employee of his, who had no axe to grind, would be admissible.

One can live with this, and certainly there is some advantage in such evidence being admitted, in that it may be, practically speaking, impossible to find an employee who can prove that goods were actually delivered by the company to a defendant who is not paying for them. The records show this to be so, but no one can actually say they delivered those goods.

My reaction on the whole, however, is that we are

going to get a new code of law that is much more complicated than we now have, and are going to effect injustices in a number of cases, and I have the feeling that a number of changes are being made for the purpose of change only, and are not going to do away with injustices, but may create more than are done away with, and are most certainly not going to less complicate the law of hearsay.

Do I understand that we are going to have the law of hearsay evidence, as it exists, with all the criticisms which are made to it, and have the new legislation tacked onto that? Even if new proposed legislation simply said that all the hearsay rules are gone, I think in a short time, under what you propose, you will have a bigger and even more complicated body of law.

In Ares -v- Venner the Supreme Court of Canada said that a nurse's notes made in the course of her duties were per se admissible. The nurse was there, the Court held that it was not necessary that she be called, and the Court went on to suggest that the other side could call her if they wished to question her notes.

This has always seemed to me to be a rather extra-ordinary ruling. If the nurse had not been available,

perhaps the arguments advanced by the Supreme Court are persuasive, but when she was there, to suggest that the side seeking her notes did not have to call her, and that the other side could call her, seems to ignore the differences between examination and cross-examination.

Certainly the nurse's notes would have been admissible in evidence as evidence of what was present to the minds of the doctors, or could have been present, because the notes would be available to them, but I am bothered by that decision, and I hate to see your Commission take matters further.

Notwithstanding these criticisms, may I be presumptuous enough to say that while I am unhappy with your conclusions, I do think that the Commission has most fairly and competently introduced the subject.

Canadian Bar Association, Study Group, Edmonton

General Comments: Generally speaking, we think the effect of allowing in much of what is now normally considered hearsay has two very deleterious effects:

(1) If you allow it all in and point out that it is up to the trial Judge to weigh it, it is very difficult to appeal a trial Judge's decision because you simply don't

know what may have affected the mind of the trial Judge.

(2) It leads to extenuated trial proceedings often on matters that are entirely collateral and one has the spectacle of witnesses commenting on other witnesses' hearsay statements, etc.

Dean Fridman notes that while a rule of law shouldn't be preserved just because it has existed since Henry II's time, it is equally true that where a rule of law has withstood an extensive test of time that is usually some indication that it has good foundation and reason to it. Dean Fridman also strongly stresses the need for more in depth study in this area before any changes are made.

In response to the Project's request in Paragraph 3 on Page 14, we are in favor of letting the Courts make the necessary changes as they arise (see the dissenting Judgments in Myers v. D.P.P.) as opposed to codifying it which simply freezes the situation.

We noted the five disadvantages stated by the English law Reform Committee as quoted on Page 6 and we disagree that these necessarily are disadvantages. In fact, we think that the proposed solution would lead to greater

disadvantages.

We all agree that there may be inconvenience to the witness in not being able to narrate things in his natural way of narrating them because hearsay evidence would come in but we think that in practice it is not so difficult to stop the witness and ask him not to repeat the hearsay. Also, we note that the whole courtroom experience is strange to witnesses so it is not so surprising that they have to narrate their evidence in a slightly different way.

We note that many facts are admitted both in criminal and civil proceedings and that the cost of proving other facts is often overcome by provisions in the Narcotic Control Act regarding analysts' certificates, etc.

On the whole we feel that the status quo which leaves room for judicial change as new occasions and circumstances demand (Ares v. Venner) is preferable to the legislative change proposed. It was felt that the focus of the Project's attention might be better placed on an examination of individual existing exceptions to the hearsay rule to determine whether, in each instance, the exception should be abolished, preserved as is, or preserved but enlarged. Our group would be most interested in assisting in such a project.

Mr. Justice McDonald also notes that the Project Paper does not deal with the res gestae doctrine as did the English Act of 1968.

Nadon

A review of the future legislative program in the Solicitor General's Ministry has surfaced the desirability of implementing changes to those sections of the Federal Statutes, such as, the Food and Drug Act and the Criminal Code which permits courts to accept certificates of analysis from designated analysts. While provision for the use of these certificates already exists in many statutes and in selected sections of the Criminal Code, extensions of these provisions are considered desirable to further reduce the necessity for the analysts to attend court unless specifically requested to do so by the judge or the parties of the court proceedings.

It is understood that the Law Reform Commission will in the very near future propose an Evidence Code which will in part, make it necessary for the party who intends to adduce expert evidence to furnish all other parties the name, address and qualifications of the witness, the substance of the proposed testimony and a summary on the grounds of each opinion and inference. I would strongly urge that

this section of the Code be extended to permit expert evidence in the form of an affidavit, without necessarily calling the expert to testify, unless the expert is subpoenad to testify by the judge or any party.

The merits of this extention are evident from the U.K. Criminal Justice Act of 1967 which permits the use of written statements by scientists instead of giving oral testimony. The experience in the U.K. has shown a dramatic decline in the number of court appearances by expert witnesses.

During 1973/74 fiscal year R.C.M. Police Laboratory staff attended court some 3090 man days requiring a little less than one million miles in travel. The cost in salaries, overtime, travel and living expenses is estimated at just under one half million dollars. Invariably the evidence of the forensic scientist is admitted as soon as he is called as a witness and corresponds to the statements made in his Laboratory report. Such evidence is either not questioned or it is cross-examined in only a superficial manner. Also, it is not uncommon for the Laboratory specialist to arrive in court and discover that the accused intends to enter a plea of "guilty" or that the case must be remanded until another date. In extended trials there is a tendency for the forensic specialist to wait several days before being called to give

evidence. On the other hand the court procedures themselves are frequently hampered when the forensic specialist is unable to attend in court on a specified trial date, because he is under previous subpoena to attend at another hearing that date.

I am sure that you will agree that our proposed extention would be beneficial to the efficiency of the Justice system without placing in jeopardy the right of either party to cross examine. The onus would simply be on any party, after having had prior notice of the evidence, to state his desire to have the expert witness subpoened to the hearing.

I would certainly appreciate your favourable consideration and hope that our extention to the proposed Code is not too late for inclusion.

McCrank

I read with interest the Study Paper number 9 on Hearsay prepared by the Evidence Project of the Law Reform Commission of Canada. I agree generally that statements which can be regarded for one reason or another as trustworthy ought to be admissible and available to the Court which will be in a position to decide what weight to attach

to any such statement.

With respect however, it seems to me that the author of the Study Paper has misperceived both the historical origin and the purpose of the Hearsay rule when he states at page 5:-

"The origin of the hearsay rule resides in our adversary theory of litigation, which depends on the right of the adversary to cross-examine the witnesses produced by his opponent and thereby test their credibility."

It is quite correct that the admission of hearsay is repugnant to the adversary system since each party must not only be able to present such evidence as may be available to him but to test by all means at his disposal the evidence sought to be presented by his opponent. The adversary system is rightly designed to protect the rights and interests of both parties to a dispute.

In fact, the hearsay rule is simply an application of the principle that the evidence which a judge may hear and upon which he may make his finding of fact is only that evidence which is given under oath before him. The fact that some persons say that a particular event occurred is no proof that it did, in fact, occur. On the other hand, if that person

swears that he say the event occur then his sworn statement is evidence that it did, in fact, occur.

The origin of the hearsay rule and the theory that demands that it be retained therefor is not the right of an adversary to cross-examine the witnesses produced by his opponent but the fact that sworn statements have probative value to the tryer of fact whereas unsworn statements have not.

If therefore the hearsay rule is designed to insure the truth of the matter stated and presented before a judge or jury, then the utmost care must be exercised to insure that the principle be maintained when any amendment to the rule is proposed.

McLellan

This letter is written in response to the Commission's request for comments on its various papers and proposals. I readily acknowledge that what follows may be of little assistance to the Commission but I am determined to make what contribution I can to the work of the Commission, for what I consider to be a very good reason, namely, that I fear the work of the Commission has been entrusted to persons whose background has been almost exclusively in the

academic field, with little representation from members of the profession who are charged with the day to day responsibility of making the results work.

Secondly, I frankly admit that my comments will not be based upon a wide practical knowledge of the workings of the rules of evidence in the realm of hearsay. This is for the reason that I hold relatively few criminal trials (i.e., County Court Judges' Criminal Court trials) and furthermore, only very seldom do I have a trial before a jury. The consequence is that full fledged arguments about the admissibility of such matters as hearsay seldom occur in the courts over which I preside, the tendency being either to admit the evidence subject to a later ruling on its admissibility (and almost inevitably the necessity for such a ruling has disappeared by the time all the evidence is in) or to admit the evidence but to assure the objecting counsel that it is a matter of weight to be accorded to the evidence. Again, it has been my experience that by the end of the trial the whole picture has been exposed and even the matter of weight becomes of relative insignificance when all the evidence is in. For these reasons, I think you ought to take much more seriously the comments from those practitioners or judges who try criminal cases as, for instance, before juries where an immediate decision on admissibility must be made.

Having thus virtually disqualified myself from being able to make any useful contribution to the hearsay study paper, I proceed to say that in general I agree with the proposed draft legislation. It seems to me that it has rather neatly finessed the whole morass of evidentiary rules relating to hearsay and reduced the rules to a reasonable code. I agree with the tendency to let the evidence in and to depend upon the trier of fact to attach the appropriate weight to the evidence.

I see a danger in connection with the proposal to admit hearsay statements by a person, after the accused has been charged. It will, of course, always be claimed that the statements were made in ignorance of the fact of the indictment or the information and it may be difficult for the Crown to trace such knowledge to the maker of the statement or to produce sufficient facts to lead the judge or the jury to conclude that the statement was made in furtherance of the accused's interest after knowledge of the charge. On the other hand, I am quite prepared to let this fact fall into the group of facts which are otherwise required to be decided or weighed by the judge or the jury. For this reason then, I favour the legislation as drafted.

Section 27(2) Definition of Hearsay

Canadian Bar Association, Study Group, Edmonton

We note the Project's distinction between verbal and non-verbal conduct and between assertive and non-assertive conduct. We had some problem differentiating between acts which the actor-declarant intended by his conduct to be a communication and those which he did not intend to be a communication and we think Courts would also. Also, we note that the statement beginning "the proposed legislation is worded in such a way" and ending with "to be a communication" on Page 11 is surely wrong as to the shifting of the onus as in our view there is nothing in the possible formulation of proposed legislation set out that would cause such a shifting. In substance, we all felt that the number of times the problem of non-assertive conduct would arise in practice would be minimal.

Ontario Crown Attorney's Association

Section 1 Definitions

(1) Statement - A statement is verbal or non-verbal conduct intended by the declarant to communicate his belief in the existence of a fact.

The first question that comes to mind is whether

there should be a definition of who a declarant is. There is also a danger in dealing with non-verbal assertions. Surely, a description of a physical act actually seen is different from saying what someone else has said, providing that it can be demonstrated in the first place that the physical act is relevant. With the law as it now stands not all verbal assertions are admissible. In some circumstances one questions whether or not there is likely to be deception or concoction (Ratten v. R. (1972) Cr. App. Rep. 18 (P.C.). The Queen v. Wray also dealt with the probative vs. prejudicial value aspects. One wonders how the author of the paper can say at page 14, "while it is clear by our definition that verbal conduct which was not intended to be communicative, e.g. a man's scream in pain, is excluded from the operation of the hearsay rule". How can this be clear? Obviously, he communicates his belief that he is suffering pain.

At page 15 the author states, "the trial judge would be able to exclude evidence of such conduct if he believes its probative value is outweighed by the danger of undue prejudice". Surely, he means greatly outweighed since at present it is only the admission of evidence gravely prejudicial to the accused, the admissibility of which is tenuous and its probative force in relation to the main issue before the Court is trifling, which can be said to operate

unfairly toward the accused and will thus be excluded. (The Queen v. Wray (1974) (C.C.C.1).

(2) Hearsay - Hearsay is a statement, other than one made by the declarant while testifying at his trial or hearing, offered in evidence to prove the truth of the statement.

At page 15 the author of the paper lists statements which would not be hearsay, if for instance they are being offered only to prove the fact that the statement was made.

1) Statements that affect the legal rights of the parties. Does this mean admissions against interest? Surely the confessions affect the legal rights of the parties and are offered to prove the truth of the contents.

2) Statements that accompany and explain a transaction. Is this a reference to res gestae? And does it include other transactions collateral thereto?

3) Statements that are offered to show the knowledge to the hearer. It is important to note that Ares and Venner admitted the statement as truth of the matter.

4) Statements offered as circumstantial tending to prove the feelings or state of mind of the declarant. Surely this goes to show that something is true. See Regina v. Humphrey (1973) O.C.A. unreported, page 387 blue pages, 1973 O.R. and R. v. Bencardino and DeCarlo (1974) 24 C.R.N.S. 173.

At page 15 and 16 the author notes that, "also our proposed definitions of hearsay and the following exceptions make no distinction among first, second or third-hand hearsay," and then he goes on to say "we do not believe the law of evidence should generally concern itself with weight." In other words you allow double hearsay and so on. And surely the problems of hearsay become all the more problematical if double hearsay is allowed. Glanville Williams, whose article is referred to on page 16 of the paper, gives some very unlikely situations where double hearsay would be relevant and material. And if it is the only evidence available surely then there should be some onus on the person calling to show the relevancy, materiality, and the need for it, and the onus on that person should perhaps be on balance of probabilities, and in the interest of justice, and so on with those provisions before it can be used, if in fact it is even to be allowed.

Glanville Williams says that the French allow double hearsay and it works, so therefore, it should work for us. But the French have an inquisitorial system and the accused must give evidence. Also, the President of the Court advises their jury that such evidence has little or no weight, thus in some ways usurping the function of the jury. If there is to be no weight, or very little weight, then why bother at all putting it in and risk confusing the jury.

The English Criminal Law Revision Committee on evidence gave four reasons why hearsay should not be abolished completely and they are set out in Glanville Williams, "The Proposal for Hearsay Evidence" (1973) Criminal Law Review, page 76.

1) The rule against hearsay has the effect of preserving the orality of the trial. Cases are tried, in general, by the spoken statements of witnesses, not be reading accounts of what witnesses wish to depose. The jury (or Magistrate) can study the demeanour of the witness, and he could be cross-examined to expose any deficiencies of observation, memory or reasoning, or any dishonesty. It was thought important to preserve this.

2) The objection to what may be called first-mouth

hearsay becomes far stronger for second-mouth hearsay, third-mouth hearsay, and so on. No one would normally attach weight to a statement that Mrs. Brown said that Mrs. Green said that Mrs. Black said ...

3) To allow the Prosecution to prove its case by witnesses' statements without calling witnesses would encourage the police to relax their efforts to produce the best evidence.

4) A special difficulty in criminal matters is that the defendant may be a professional criminal who has large funds, no scruples, and a great deal to lose by being convicted. Generally, there are one or two "bent" solicitors who are ready to connive at deceptions practiced by such defendants. If hearsay were admitted without restriction it would be possible to give evidence that some third person (who has since conveniently disappeared) called at the defendant's solicitor's office and confessed to the crime, or it would be possible to put in a written statement by a third person (who has since been "called abroad on pressing business") giving the defendant an alibi. The witness could not be cross-examined; and if it were alleged that his identity was unknown, the prosecution could not investigate whether he had a criminal record. The jury, pressed by the

rule that they must be satisfied of guilt beyond reasonable doubt, might be sufficiently impressed by such evidence to say that they had a doubt.

Arnup

I am in general agreement with the substance of this paper but I have some problems in connection with the drafting of the proposed legislation. In section 1(1) the expression is used "belief in the existence of a fact". I suggest that a past event is not an "existing fact" and that this clause should be redrafted so as to read "to communicate his belief in the occurrence or existence of a fact".

In section 1(2), in the second line the words "his trial or hearing" obviously should be "a trial or hearing".

Jarvis

I have great difficulty with the definition section on Page 9. The definition of "statement" seems to me to beg the question by including that the statement must be intended by the declarant to communicate his belief in the existence of a fact. I believe the definition would be more useful if the statement could be intended by the declarant to cause someone to think that the declarant believed in the existence of a fact.

In the definition of "hearsay" the word "statement" appears and should refer back to the definition of that word so that Section 1 (2) should make sense if the whole of Section 1 (1) is used in the place of the word "statement". When this experiment is tried the use of the words "declarant" and "statement" is seen to be ambiguous and confusing. Another fault of the definition of "hearsay" is the use of the word "his" in the second line. To be useful the definition should apply to evidence given by witnesses who are not themselves on trial.

I have not had an opportunity to give the matter any careful thought but may I suggest that the following definitions be considered:

Section 1. Definitions

(1) Statement - "statement" means verbal or other conduct indicating the existence of a fact or facts

(2) Hearsay - "hearsay" means a statement adduced by a witness while testifying which is not his own statement, but which he adduces as proof of the facts it asserts.

Section 2. Hearsay Rule

Would be improved if it were re-worded as follows:

"Hearsay" is not admissible as evidence except as provided by Section 3 or by any other act of the

Parliament of Canada.

Section 2. Hearsay Exceptions

Would be improved by being worded as follows:

The following are not excluded by the hearsay rule:

I have not had a chance to read the rest of the paper carefully but thought I would send these observations on to you for whatever use they may be.

British Columbia Law Reform Commission

Page 5, Section 1(2)

The definition of hearsay, as offered in evidence to prove the existence of the facts stated, is a definition not infrequently overlooked by lawyers and judges in practice. A statutory statement of that definition will be useful as a convenient guide to the meaning and purpose of the rule. In my experience judges have overlooked the distinction and have refused to admit evidence of a statement made by a third party led for the purpose of proving the statement was made, rather than for proving the truth of the statement.

Section 1(2), as the commentary at Page 10 shows, is intended to, and does, admit second and third hand hearsay. Logically there is no quarrel with this since it is open to counsel to argue and the triers of fact will probably consider

the multiplying dangers of imperfect recollection and expression as a statement is passed from mouth to mouth, till it reaches the witness who testifies of it in Court. Lawyers and perhaps the public generally, however may balk at so wide an admission of hearsay in a "knee jerk" type of response. Would it be the course of wisdom or cowardice to restrict the proposed legislation to admit of first hand hearsay only, and thus avoid the risk to total rejection by the profession and the public?

Schiff

Section 1 -- Definitions (pages 9-10)

Section 1 of the proposed legislation adopts the limited definition of hearsay previously adopted in the Uniform Rules of Evidence and the Federal Rules, but not adopted in the Model Code. The limited definition restricts hearsay to evidence of verbal and non-verbal conduct of a declarant (called the "author" by the Project) intended by the declarant to communicate his belief in the existence of the very fact whose existence is disputed at the trial and for the proof of which the proponent offers the evidence. Thus, evidence of the declarant's verbal or non-verbal conduct is not hearsay if the declarant did not intend his conduct to serve as his communication of his belief in the fact's existence for the proof of which the proponent offers the

evidence at the trial. And this is so even if the declarant is available to be called as a trial witness by the proponent and, as a witness, would be obliged to state precisely what was his memory of the event in issue which he perceived.

Apart from anything else, does the definition of "statement" in section 1(1) include the declarant's written entry in his secret diary which he hopes never to divulge to anyone, and does it include his uttered soliloquy when he was sure he was unheard? In both instances he intended to "communicate his belief" to himself, but not to others. Since the proponent of the evidence of the declarant's words would ask the trier of fact to treat the declarant's conduct as if the declarant had made a communication on the witness stand, these two items of evidence should be classified as hearsay. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept (1948), 62 HARV. L. REV. 177, 190-191, and E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 143-144 (1956)

To rebut the Project's limited definition of hearsay and to argue for a broader definition including all such evidence of a declarant's conduct offered by the proponent as circumstantial proof of the fact in issue, I can do no better than refer the Project to the brilliant analysis of the problems

in Morgan, Hearsay and Non-Hearsay (1935), 48 HARV. L. REV. 1138; Morgan, Hearsay Dangers and the Application of the Hearsay Rules, supra at 214-217, and Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence (1962), 14 STAN. L. REV. 682. The reasoning offered by the Project to support the limited definition, drawn from C. MCCORMICK, EVIDENCE, section 250 (E. Cleary 2d ed., 1972), and from the Advisory Committee's Note to Subdivision (a) of Federal Rule 801, does not serve to neutralize the powerful criticisms of Morgan and Finman.

The Project uses a detailed hearsay danger analysis of non-verbal conduct to support the proposed definition, although clearly the exclusion from the definition of verbal conduct which does not directly assert the fact to which the evidence is directed must be justified on the same basis. The argument I shall outline below based on a hearsay danger analysis encompasses both categories. As does the Project's, my argument focuses on evidence of conduct allegedly based on the declarant-actor's perception and memory of an external contemporaneous or previous event, which evidence is offered by the proponent to prove the occurrence of that event.

Depending on the particular circumstances, there

is often doubt whether the declarant-actor did intend to communicate his belief in the fact in issue so that relative danger of insincerity can be assessed, as argued near the bottom of page 9. Consider, regarding the seminal case of Wright v. Tatham, the real possibility that the letter-writers were deliberately trying to curry favour with Marsden by asserting to him between the lines that he was a man on intellectual power. And the problem of knowing whether or not one of the declarant-actors in Wright v. Tatham intended to assert the existence of the fact in issue would have been identical if he had, for example, not written words in a letter but rather sent to Marsden the gift of a complicated game requiring the player's intellectual power. It is no rebuttal to my argument to say, as does the Advisory Committee's Note to Subdivision (a) of Federal Rule 801, that the burden of proving the declarant-actor's intent is on the opponent who, alleging that intent, wants the evidence characterized as hearsay. By hypothesis the proponent is offering the evidence to prove the existence of a fact upon which the declarant-actor allegedly based his conduct, and the proponent is doing this when one or more hearsay dangers are involved in the evidence. Surely, in order to render fair the opponent's inability to test the hearsay dangers, the proponent of the evidence should at least be obliged to demonstrate the declarant-actor's lack of intent to communicate the fact in issue as a condition of admissibility

under the Project's proposed definition. Remember, the Project's definition renders evidence of conduct admissible even if the proponent could easily put the declarant-actor on the stand for his sworn testimony concerning the issues.

The intensity of the dangers of the declarant-actor's imperfect perception and memory (mentioned at the bottom of page 9 and the top of page 10) will vary from situation to situation. The relative guarantee of trustworthy perception and memory given by his conduct will naturally depend on the specific nature and value to the declarant-actor of the conduct compared to the significance to him of the particular conduct itself. For example, even to an unobservant nephew of poor memory the gift of a complex game to Uncle Marsden would have been worth the cost if the nephew had thought that the gift (among other things) would sufficiently endear him to his rich uncle to induce uncle to leave him a fat testamentary legacy. See, for example, the analysis by McCormick, The Borderland of Hearsay (1930), 39 YALE L. J. 489, 504, and by Falknor, Silence as Hearsay, (1940), 89 U.PA. L. REV. 192, 206, reproduced in S. SCHIFF, EVIDENCE IN THE LITIGATION PROCESS 311-313 (Draft ed., 1972). Clearly, if the declarant-actor's conduct (evidence of which is offered by the proponent) meant relatively little to the declarant-actor compared to his unexpressed reasons for so

acting, the guarantee of his trustworthy perception and memory urged by the Project is very small indeed. (And remember, as Morgan well pointed out, cross-examination of a witness called by the opponent is most needed to uncover the witness's faulty perception and memory.)

I take this even further. Depending on the declarant-actor's motives for so acting, there is not even much guarantee that he had any first-hand knowledge of the fact which the proponent uses evidence of his conduct to prove -- the fifth hearsay danger. An example is Marsden's nephew who has never met his uncle but who sends to him the complex game as part of a scheme to induce Marsden to leave him a testamentary legacy.

The Project omits entirely consideration of the problem that, in the absence of the declarant-actor, the opponent has no way to assess the meaning which the declarant-actor attached to his own verbal or non-verbal conduct. In my view, this corresponds directly to the hearsay danger of faulty communications through the declarant's possibly unusual use of language. For example, if the court admits evidence tendered by the defence at the accused's murder trial that another suspect fled the jurisdiction immediately after the crime was committed, the Crown has no way to test what the other suspect was "saying", that is, the opponent of the

evidence has no way to test the declarant-actor's subjective meaning for his conduct.

Finally, the Project also omits consideration of the problem that, since the declarant-actor has not been presented as a witness in court, the opponent cannot cross-examine him to elicit his testimony on the substantive issues or his testimony relating to the credibility of other witnesses.

The Project shifts gears in mid-page 10 and supports the exclusion of so-called "verbal conduct" simply as circumstantial evidence of the declarant-actor's belief in the alleged fact and thereby circumstantial evidence of the fact itself. Surely, the Project should not use this verbiage to disguise the same need for an ad hoc case-by-case analysis of the relative intensity of hearsay dangers in the particular tendered evidence of conduct.

It is no answer to the arguments I have outlined that, under the Project's restricted definition, the arguments now go to weight rather than admissibility. That answer could as easily be used against all hearsay evidence and the whole hearsay rule. But, clearly, it is not. And rightly not because hearsay evidence is excluded in the first

instance to protect the opponent's basic common law right to have the first-hand observer of the relevant event give his testimony in court under oath and subject to cross-examination.

Let me offer two examples of evidence of a declarant-actor's conduct admitted by two different courts under reasoning that the evidence was not hearsay. Both are examples of evidence offered to prove the existence of a fact in issue, the existence of which the proponent alleged founded the declarant-actor's subsequent conduct. In the first example, the conduct was non-verbal; in the second, it was verbal. Under the Project's proposed definition the evidence in both examples would not be labelled or excluded as hearsay. In both examples, the hearsay dangers in my view were impermissibly intense.

In Regina v. Mayling, (1963) 2 Q.B. 717, (1963) 1 All E.R. 687, as evidence that a declarant-actor not offered by the Crown as a trial witness had seen the accused and a third person perform a homosexual act in an otherwise deserted public lavatory, the Court of Criminal Appeal (England) approved the admissibility of a policeman's testimony that the declarant-actor emerged from the lavatory looking "annoyed and disgusted". Even though it is possible that the declarant-actor may have been physically prevented from seeing what the accused was doing, I put aside the hearsay danger arising from

his possible lack of opportunity for first-hand knowledge. But consider his powers of observation. Perhaps he was badly short-sighted and was therefore unable to see clearly what was happening. I may also put aside the hearsay dangers of imperfect memory and insincerity, which seem unimportant here. But surely the hearsay danger of imperfect communication of the declarant-actor's memory of perceived events looms very large. Without the declarant-actor's presence on the witness stand the opponent cannot test by cross-examination the declarant-actor's subjective meaning for his conduct. In this example, the declarant-actor may just as well have been reacting by his facial distortion to the stench of stale urine and the lack of toilet paper! Remember always that the Project's definition would permit admission of such evidence of conduct even if the declarant-actor were available to be called by the proponent. And, if he were called, he would be obliged in examination in chief to state his memory of the specific events he had perceived and would be barred merely from outlining his out-of-court conduct.

My example of verbal conduct, bristling with hearsay dangers, is Rex v. Wysochan (1930), 54 C.C.C. 172, At the trial of the accused for the murder of a woman by shooting her, the accused alleged in his defence that the woman's husband had shot her. Only the accused, the husband and the

wife had been present at the time of the shooting. Over accused's hearsay objection, the Court of Appeal for Saskatchewan sustained the admissibility of a witness's testimony offered by the Crown that, as the wife lay dying, she called for her husband and, when he appeared, she said to him, "Help me out because there is a bullet in my body", and "Help me, I am too hot". The court held that the evidence was simply circumstantial evidence of the wife's state of mind of friendliness to her husband (presumably tending to show that the wife believed that her husband had not shot her and therefore tending to show that he is fact did not shoot her). But the intensity of some of the hearsay dangers was very great. How could defense counsel have effectively tested whether the deceased declarant actually had any opportunity to perceive who shot her? (Maybe her back was turned or she had her eyes shut when the shot was fired.) How could defense counsel have tested her powers of observation? (Maybe she had poor eyesight and mistook what she saw.) How could defense counsel have tested her memory of the event? (Quite conceivably, as she lay there dying, her memory began to play tricks.) How could defense counsel have tested her sincerity? (Possibly the dying woman wanted to frame the accused.) And finally, how could defense counsel have tested her subjective meaning of the words? (Very possibly, even if she had seen her husband shoot her, as she lay dying she determined to forgive

him.) In my view, the hearsay dangers of opportunity for first-hand knowledge and defective perception, memory and ability to communicate accurately were all present in the evidence to an impermissible extent. Since admitting the evidence unfairly deprived the accused of his adversary right to effective testing of the crucial Crown evidence, the evidence should have been excluded as hearsay.

I could add an analysis of the impugned evidence in Lloyd v. Powell Duffryn (which the Project mentions on page 10) insofar as the evidence was directed to the evidence of the deceased's paternity of the claimant. In my view, at least the hearsay danger of the declarant's possible lack of first-hand knowledge that the mother had had no sexual relations with any other man and the declarant's subjective meaning when he spoke are significant.

The point I attempt to make with these examples is this. When the proponent introduces evidence of the declarant-actor's conduct (be it verbal or non-verbal) in order to prove the existence of some fact extrinsic to the declarant-actor and contemporaneous or pre-existing his conduct upon which the conduct was allegedly based, any one or more of the five hearsay dangers may be present in varying degrees of intensity. Therefore, admission of the evidence

is only fair to the opponent if, upon the trial judge's ad hoc analysis of the evidence in the context of the particular trial, the judge determines that the hearsay dangers are minimized compared to the proponent's other alternatives in presenting evidence to the same particular issue. In admitting the evidence on all occasions as non-hearsay without any regard to hearsay dangers, the Project's proposed definition sanctions this unfairness.

Thus far, although the definition of hearsay in section 1 encompasses evidence of the declarant's statement directly asserting his existing physical, emotional or mental state, following the Project's line of argument on pages 9-10 I have focussed solely on evidence of a declarant-actor's conduct offered by the proponent to prove the existence of a fact in issue extrinsic to the declarant-actor that occurred before or simultaneously with his conduct and upon which his conduct was allegedly based. But the analysis should be identical if the proponent directs the evidence of the declarant-actor's conduct to proving the declarant-actor's existing bodily, emotional or mental state, and the proponent does not intend that the trier of fact shall further infer from the relevant state of the declarant-actor the pre-existing or contemporaneous fact in issue alleged to have caused the state. The differences between the two classes of evidence are these:

First, the hearsay dangers of first-hand knowledge and defective perception and memory cannot arise regarding the declarant-actor's existing states of body and mind. And second, perhaps because of the first a well-recognized hearsay exception exists at least for evidence of a declarant's direct statement asserting his existing physical, emotional or mental state. Thus, I would be content if the Project's formulation excluded from the definition of hearsay, evidence of a declarant-actor's verbal or non-verbal conduct offered by the proponent to prove the declarant-actor's existing bodily, emotional or mental state <u>if (but only if) the proponent does not propose that the fact of the state shall support an inference to another fact, contemporaneous or pre-existing the state, which, the proponent alleges, caused the state.</u>

I believe that proper analysis must focus, not on the direct purpose for which the declarant-actor conducted himself, but rather <u>on the purpose for which the proponent of the evidence offers it.</u> Indeed, when analysts discuss clearly assertive verbal conduct, that distinction is always readily accepted. Thus, all analysts agree that, even if the declarant clearly intended by his words to assert the existence of fact A, evidence of his words is not hearsay if the proponent offers the evidence solely to prove that a hearer

of the words reasonably believed that fact A existed. See, e.g., cases in S. SCHIFF, EVIDENCE IN THE LITIGATION PROCESS 279-285 (Draft ed., 1972). The Project clearly agrees: see the definitions in section 1 and the comment on page 10 that "verbal conduct, even though intended to be communicative, if not intended to be assertive of the fact sought thereby to be proved is not hearsay within the definition".

Thus, if the proponent offers the evidence for a reason necessarily inviting the trier's inference that the declarant-actor conducted himself as he did because of his previous or simultaneous perception of a fact in issue extrinsic to the declarant-actor, proper analysis requires that the evidence should be labelled hearsay. As far as Professor Morgan was later concerned, Model Code Rule 501(1)(2) was designed to encompass such evidence within the Code's definition of hearsay. Morgan, The Uniform Rules and the Model Code (1956), 31 TULAINE L. REV. 145, 150. See also Morgan's definition in Morgan, Hearsay and Non-Hearsay (1935), 48 HARV. L. REV. 1138, 1144-1145, 1158, Maguire's definition in Maguire, The Hearsay System: Around and Through the Thicket (1961), 14 VAND. L. REV. 741, 769, and Finman's in Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence (1962), 14 STAN. L. REV. 682, 707n. 69. Under the definition I here offer, the judge should admit the evidence only after

he has assessed ad hoc in the context of the particular trial the intensity of the hearsay dangers from the opponent's viewpoint as against the necessity for the evidence from the proponent's viewpoint. If the declarant-actor is available and the proponent may call him for oral testimony there is no necessity; the evidence of his conduct should therefore be rejected. If the declarant-actor is not available, the judge must then determine whether the proponent has any (or sufficient) evidence of the particular fact in issue other than the evidence of conduct. If he has such other evidence, then again there is no necessity; the evidence of conduct should be rejected. But if the proponent has no (or insufficient) other evidence of the fact in issue, the judge must determine the bald question whether the intensity of the relevant hearsay dangers from the opponent's viewpoint overbalances the necessity for the evidence from the proponent's viewpoint, and he should admit or reject the evidence accordingly. The trial judge's decision on all these matters should be subject to reversal on appellate review only if he "abuses his discretion".

The best arguments against the enlarged definition I urge are those set out in E. MORGAN, SOME PROBLEMS OF PROOF IN THE ANGLO-AMERICAN SYSTEM OF LITIGATION 162 (1956), and in Falknor, The "Hear-Say" Rule as a "See-Do" Rule:

Evidence of Conduct (1960), 33 ROCKY MT. L. REV. 133, 137. (The arguments are very briefly mentioned in C. MCCORMICK, EVIDENCE, section 250 (page 599) (E. Cleary 2d ed., 1972). Morgan and Falknor argued that, since the hearsay quality of conduct evidence is not readily apparent to counsel or judge, counsel rarely take the objection. Falknor argued further that the consequent uneven operation of the definition is unfair. Professor Morgan added that, where counsel takes the objection, the necessary time for argument and judicial ruling causes undue and costly delays in litigation. In response, I can only say that ignorance of counsel and courts about properly conceived legal doctrine cannot be an excuse for abolishing the doctrine. If conduct evidence were clearly defined as hearsay in a statute, counsel would of course be better prepared to make the objection. And, if through ignorance or inattention some counsel missed the boat at a trial, existing doctrine concerning reversal on appeal for trial errors not earlier raised would handle the problem. As far as expense and delay are concerned, they will cause little problem if counsel and court are intelligent and aware of the definitions and the rationalia: counsel will not offer hearsay evidence in the first instance if they know the odds are against its admission and, if they do offer it, both counsel can be prepared to make succinct arguments and the court to make speedy rulings. At all events, the central issue is not delay or

kept available for subsequent examination to confirm or deny the making of the statement.

Sopinka

Section 38 - I assume that this section should read: "a statement previously made by a person who has been or is to be called as a witness".

In my opinion, this section would admit evidence of a witness' entire transcript of a preliminary hearing or examination for discovery, statements obtained from witnesses for the purposes of preparation for trial and statements prepared by a witness containing a resumé of his evidence in preparation for trial. While it might be suggested that this kind of evidence could be excluded under Section 5, I do not think that such evidence would necessarily be characterized as unduly prejudicial or involving undue consumption of time. There should be at the very least a restriction to eliminate statements made after the commencement of proceedings.

On the positive side, I think this section will allow a great deal of correspondence between the parties to be admitted which often sets out the facts at a point in time when the parties are not yet building a record. This kind

of evidence was previously rejected as being self-serving.

A Justice of the Supreme Court of British Columbia

Subsection (3). Prior Statements as Substantive Evidence.

I do not agree with the proposal to make prior statements, inconsistent or consistent, admissible to establish the truth of the matter stated. If, of course, the person making the statement is a party, different considerations would apply. I am dealing here with witnesses generally. I do not agree with the statement in the comment that the prior statement is subject to cross-examination. It cannot be subjected to cross-examination because there is no witness at the time, if it is a prior inconsistent statement, who is stating that it is true. The comment says "Existing law recognizes sufficient probative force are capable of using evidence in accordance with the instructions given them. I have seen too many instances of juries acquitting when they have been told that certain evidence may not be used for purposes of corroboration and the facts of the case are such that the absence of such corroboration is likely the reason for the acquittal, to think that juries are as wooden as the authors of the report would have us believe.

Schutz

The following is more editorial comment under subsection (3):

"The existing law requires an instruction by the trial judge respecting the limited utility of the previous statement as relevant only to credibility. Most would agree that this limiting instruction is usually a futile gesture and that most juries would have great difficulty in understanding or applying it. Its apt characterization as 'verbal ritual' is almost sufficient justification by itself to warrant the proposed change. ... under the present law since the jury, despite the instruction, will regard statements, though received solely for the purpose of impeachment, as substantive evidence."

This further comment, again derogatory of the jury, is only opinion. I question the accuracy of the comment and the basis upon which this bald generalization is made.

As a trial Judge, engaged in the conduct of criminal trials by Judge and jury, I do not subscribe to opinions sometimes expressed to the effect that the jury is unable to comprehend either the evidence or the summing-up of the trial Judge.

The tenour of the Study Papers is that the present rules of evidence fail to provide a fair trial and fail to enable truth to emerge and justice to triumph. Wherefore a Code is required to change out-moded, existing, rules of evidence.

The comment is adverse to the jury in the administration of justice. This is not the place to recite the important role of the jury in the administration of the law. It should be recognized that the vast majority of civil and criminal trials in Canada is determined by a Judge alone and that a jury functions in a relatively small number of criminal and civil trials.

McDonald

Sub. (3) establishes a new exception to the hearsay rule, namely that, when a prior statement made by a witness is admissible, it may be taken as evidence of the truth of the matter stated therein. At pp. 11-12, the Project points out that under the present law, such statements are received only for the purpose of supporting or impairing credibility, and cannot be considered as proof of the facts stated therein. The Project takes the position that, even though a jury is instructed that the sole purpose of the evidence is to affect the credibility of the witness, in fact

the jury will find it impossible to disregard the truth of the statement and will regard the statement as substantive evidence. Therefore Sub. (3)(a) merely recognizes this reality.

This may or may not be a real change in the law relating to the admission of complaints by the victim in rape cases; in such cases the law is that if the complainant testifies, evidence of her having made a complaint is admissible as corroborative of the complainant's credibility, and to negative consent. There has never been a decision clearly analyzing the nature of the evidence of the complaint if the complainant were, for example, dead. Her credibility would not be in issue; would the complaint then be admissible to negative consent? Probably it would. If so, is this an exception to the hearsay rule? One view is that it is not; an Australian case held that "The fact that fresh complaint was made is not evidence of non-consent". Presumably, according to this view, complaints are received, in Dr. Cross's words, "simply in order to rebut the presumption of consent which might otherwise arise." (p. 199). My own view is that in reality, the admission of a complaint to negative consent is really an exception to the hearsay rule, and Sub. (3) is not a real change in the law where consent is in issue.

However, in cases where consent is not in issue, such as having sexual intercourse with a female under 14 years of age, or indecent assault on a female under 14, or indecent assault by a male on a male person under 14, the provisions of Sub. (3).(a) are novel in that the complaint will now be admissible not only to support the credibility of the complainant as witness, but also to establish the truth of the statement. In such cases undoubtedly a new exception to the hearsay rule would be created.

Bowker

Prior statements: The recommendation for a discretion respecting consistent statements is sound. Section 5(3) which makes admissible a prior statement for the purpose of establishing its truth as well as on the issue of credibility, is an improvement. The present distinction is artificial, and as the report says, ineffective.

Bowman

At page 10, reference is made to the reception of prior consistent statements. I wonder what value these have. Does mere repetition improve truth? Certainly if an accused person gives an explanation which is then challenged as being a recent fabrication it is in order under our law to prove that a similar explanation had been given earlier, before there

was a reasonable time for concoction. This is an exception to the general rule and can only be invoked where this type of attack is made upon an account given by an accused. To permit the use of prior consistent statements would only lead to similar statements being endlessly examined by counsel seeking some small variation to keep the tribunal of fact from being overly impressed by a repetition of the evidence. Surely this is neither necessary nor desirable.

At page 12, the comment deals with the use of a prior inconsistent statement as proof of the matter stated. The comment makes a bow in the direction of cross-examination and then suggests that the prior statement promises greater accuracy since made when the event was fresher in memory. I ask simply, how do you cross-examine a piece of paper? The comment says that "existing law recognizes sufficient probative force in a previous inconsistent statement and its "surrounding circumstances to permit a jury to disbelieve present testimony. It is not consistent to deny that there is sufficient probative force....". This is another of the many misconceptions and misunderstandings of the law demonstrated by the authors of the various reports. The law recognizes no probative value in the statement itself. The law recognizes that the fact of having given a different account in a prior statement casts some doubt, and in some

instances great doubt, on the reliability and credibility of a witness' present testimony. It is a far different thing to say that a witness can no longer be believed because of his prior statements than to say that although you cannot perhaps believe him you should believe what he originally said. The result would be that we could have convictions registered on evidence which was never given in court, never testified to by any witness. It would be a situation which the Crown would undoubtedly relish. You could take the most unreliable and indeed repulsive of witnesses, secure a statement damning someone else and then prosecute the other party, secure in the knowledge that no matter how bad your witness might be, how clearly his perjury may be shown, that fact that he originally accused the other person is sufficient to warrant conviction. If the project authors are consistent, I presume that they will next abolish the doctrine of reasonable doubt and the presumption of innocence and indeed equate accusation with guilt and save the time, trouble and cost of all those unnecessary trials.

On page 13, on this same question, the comment fatuously suggests "the jury, despite the instruction, will regard statements, though received solely for the purpose of impeachment, as substantive evidence." If that is the only evidence, the judge will instruct the jury that there is no

evidence and that a conviction cannot be made. Perhaps some of the authors might do well to spend a week in the court-room for the first time in their lives.

Manitoba Law Reform Commission

We regard section 5(3)(a) as appalling! Prof. Penner noted:

This doesn't say a prior statement made by a party but by a witness. There he is on the stand, presumably at this stage of the proceedings, under cross-examination. He has made a statement under oath on the stand and now for purposes of the cross-examination, as the law now is, he can be cross-examined on a prior inconsistent statement. That's fine. It's a very useful way of getting at credibility. He may under cross-examination adopt part of that statement (under oath) and it's his evidence (under oath) which forms part of the proceedings and that's OK. But take the situation where after the whole thing is through and he has denied every damn bit of it and explained it best he can, the judge says it's going in as evidence that may be considered by myself or by the jury to establish the truth of the matter. It seems a little sweeping to me.

Mr. Lockwood elaborated:

You get a similar situation in civil cases where an adjuster or investigator goes out and asks the witness

loaded questions. They don't necessarily need them to describe what happened, but they take him through a series of questions which may consciously or unconsciously be designed to establish the case of the particular company they are working for. And then, if that's going to be received to establish the truth of the matter, what on earth is the point of having the witness there under oath making a statement and saying "well, you know, he didn't ask me the other questions and that really isn't my full statement or necessarily a true statement." I'm puzzled by that too.

Mr. Bowman posited:

> But to give it a probative value of its own is to leap from one valid use to a totally different one which simply would alter and deform the law completely.

As we perceive it, section 5(3)(a) could result in a statement or a multitude of statements, which every witness repudiates, being receivable to establish the truth of the matter stated. As a surefire device for securing convictions in criminal cases, or for confounding the issues in civil cases, this provision would not easily be surpassed. Any malicious accusation, zealously prompted "identification", or negligent mis-statement is rendered admissible by giving the witness an opportunity to deny it (section 5(2) and it is then receivable

as the truth! We utterly disapprove of the proposition enunciated in section 5(3)(a).

British Columbia Law Reform Commission

Fourthly, the prior statement by the witness once "received" is evidence of the truth of its content and not just evidence against the witness' credibility. I urge against this change. The National Commentary at Page 11 in my view mistakes the weight to be put on the test of cross-examination as a means of testing the truth of evidence. The real test is cross-examination under oath. The probitive force of a previous inconsistent statement is only enough to shake the Jury's belief in present testimony.

Consider the following example:

(a) Black swears that he never saw a gun in White's possession;

(b) Black is cross-examined and denies a previous statement to Green that on the day of the crime he saw a gun in White's pocket;

(c) Green is called and testifies that Black did tell him so.

We are left with hearsay evidence only, denied by Black, that White had a gun on the day of the offence. While

the contradiction is enough to make the Jury skeptical of White's evidence, there is still no authoritative evidence upon which they can find that Black had a gun.

The admitted difficulty the Jury faces in correctly applying the evidence of the contradiction would be better cured by clearer instructions to them by the trial judge. Indeed, there may be some merit to a jury carrying into a jury room with them a standardized set of basic instructions which would be provided by the court in conjunction with the judge's charge, and would form part of the record of the case.

Section 29 Exception: Statement of Person Unavailable as Witness

Schiff

Subsection 3(1) -- Author of Statement Unavailable (Pages 11-12)

I reject this proposed hearsay exception, and I find unconvincing the reasoning offered in the Project's text to support it. Clearly, the Project -- following the lead of the American Law Institute in 1942 -- here abandons all attempt to assure the opponent of the hearsay evidence that his inability to test the hearsay dangers is not unfair in the particular circumstances. Instead, the Project -- like the American

Law Institute -- simply stresses the "necessity" argument, viz., the declarant is not available. See Model Code Rule 503(a), and the Comment on page 234. As you know, that reasoning was rejected by the draftsmen of the Uniform Rules: see Comment on Rule 63. It was also more recently rejected by the draftsmen of the Federal Rules: see Advisory Committee's Note on Exception (2) of Subdivision (b) of Rule 804. I realize that Professor Morgan, as Reporter to the Model Code, may have accepted the reasoning in 1942, but the older, wiser Morgan rejected it in his later writings. I also realize that the reasoning was accepted by the Criminal Law Revision Committee, on whose section 31(1)(c) the wording of the Project's provision is largely based. But, as I have argued, the English Committee never understood (or even tried to understand) the significance of the hearsay dangers and the Committee proceeded almost completely on a botched necessity theory.

For the sake of argument I will assume for the moment that the Project is correct in the assertion at the top of page 12 that "the present (hearsay) exceptions do not foreclose all possibilities of error and that much hearsay presently receivable (under these exceptions) is of less probative value than some hearsay presently rejected." But these are not good reasons for the Project, by ignoring

factual hearsay dangers, to compound infinitely the alleged anomalies and errors of judicial history. Indeed, what the Project proposes is really the extension of the historic argument ad absurdum and then the adoption of the absurd conclusion. Just because the American Law Institute fell into that trap with Model Code Rule 503(a) is no reason for the Project to follow them.

But the assumptions underlying the Project's assertion quoted in paragraph 34 are not correct. No proper theory of exceptions to the hearsay rule demands that "all possibilities of error (are) foreclose(d)". All that any reasonable reformer should demand is relative minimization of the hearsay dangers in the particular evidence weighed against the relative maximization of necessity for the evidence in the context of the parties' trial at the particular time. Moreover, despite Morgan's argument to the contrary, when one carefully canvasses each of the existing hearsay exceptions to discover the intensity of each hearsay danger, one can find in most instances minimization of several dangers as well as an argument of necessity based on the declarant's death. For example, regarding the exceptions for declarations against pecuniary and proprietary interest and for declarations in the course of duty, all hearsay dangers are minimized. Regarding former testimony, all dangers are minimized because the declarant has previously

been subject to oath and cross-examination on the very subject-matter of the present trial by the present opponent or his privy. And, regarding dying declarations, all hearsay dangers except those of defective perception and memory are minimized. (At all events, evidence of dying declaractions was received well before the hearsay rule crystallized and, simply as a matter of stare decisis, such evidence was later rationalized as a hearsay exception.)

Moreover, "some hearsay presently rejected" (continuing to quote from the same sentence at the top of page 12) is rejected solely because most judges do not understand the hearsay danger foundation of the hearsay rule. If they understood that foundation -- as Lord Pearce did in Myers v. D.P.P. -- they could without difficulty admit hearsay evidence ad hoc where the particular hearsay dangers were minimized relative to the necessity -- as Lord Pearce would have done in Myers.

The Project misses an important point in the blanket assertion in the second sentence on page 12 that unavailability as a criterion of admissibility in some instances of hearsay exceptions has been accidental amd illogical. In those instances where courts accepted unavailability as a criterion, they used it as the badge of great necessity

along with some other indices of relative minimization of hearsay dangers. But in the more modern instances where courts have refused to countenance unavailability as a criterion, they have also refused (through ignorance, I submit) to go through any hearsay danger analysis. See, for example, the reasoning of the majority in Myers. As I will argue below, this modern judicial denial of the creative power of the court could be rectified, and in a manner superior to that used by the old judges when they created the existing hearsay exceptions.

As my argument set out earlier indicates, I agree with the Project's assertion in mid-page 12 that "it is impossible to describe for the future all the circumstances that might conceivably surround a statement that we are sufficiently assured of its trustworthiness...". And I also agree with the Project's conviction expressed at the bottom of page 12 that there should be a system whereby "the circumstances in each particular case can be measured with greater accuracy at the time of reception than by present diagnosis of a variety of future events". But, I disagree strongly that what the Project proposes in section 3(1) best achieves these aims consistent with due preservation of the rationalia of the hearsay rule. Instead, as I have argued -- and I have at least Lord Pearce in Myers on my side -- legislation should clearly empower

the trial judge to assess, from the opponent's viewpoint, the hearsay dangers of the particular evidence offered and to weigh it against the necessity, from the proponent's viewpoint, in the particular trial at the particular time. If the trial judge had this authority the very test the Project set out in the passages I have quoted in this paragraph would be satisfied: the trustworthiness and necessity of particular evidence would always be decided at the trial in terms of the particular hearsay dangers and the particular role the evidence would play in the trial at the time it is offered. The Supreme Court of Canada may have been groping toward this result in Ares v. Venner, (1970) S.C.R. 608, and Banque Provinciale du Canada v. Ogilvie (1972), 33 D.L.R. (3d) 419. Unfortunately, in Ogilvie, only Mr. Justice Laskin was sensitive to the need to give the opponent the opportunity to protect himself against hearsay dangers.

At all events, the present wording of section 3(1) does not provide even the protections set out in the comparable provisions of the Model Code or the Criminal Law Revision Committee's draft bill. The Project should examine carefully the extended definitions of "unavailable as a witness" in Model Code Rule 1(15) and the limitations in subsections (1), (4), (5) and (6) of section 32 of the draft bill. See also Uniform Rule 62(7) and the last paragraph of

Federal Rule 804(9).

Ontario Crown Attorney's Association

Hearsay Exceptions

Evidence of the following is not excluded by the hearsay rule:

1) Author of Statement Unavailable

Statements made by a person (1) who is dead or is unfit by reason of his bodily or mental condition to attend as a witness or,

2) who is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means or,

3) who, being present at the hearing and being compellable to give evidence on behalf of the party desiring to give the statement in evidence, refuses to be sworn, provided that the person's inability or refusal to testify is not due to any wrongdoing of the proponent of his statement committed for the purpose of preventing the person from attending or testifying.

At page 16 the author argues that "none of the reasons traditionally given for the exclusion of hearsay evidence appear to us to be compelling enough to warrant the absolute exclusion of such evidence." What are the reasons and why?

Is the author disagreeing with the comments of the English Criminal Law Revision Committee? The revision makes for all sorts of interesting possibilities; suppose the psychiatrist testifies that some lunatic, who by reason of mental condition, cannot attend as a witness, has never-the-less confessed to the crime and the psychiatrist says that he is capable of committing it, in fact may have committed it. It would appear that under the suggested provision this type of nonsense would be admissible. Surely, there should be a clause that states something to the effect that "where evidence would otherwise be admissible."

What reason is there for the provision dealing with the party who refuses to be sworn? Section 472 of the Criminal Code seems to deal with this adequately. And one can imagine the difficulty in proving that a person's inability or refusal to testify is due to any wrong doing of the proponent of the statement committed for the purpose of preventing the person from attending or testifying.

At page 17 the author then goes on the state "the testimonial and other dangers discussed above will of course affect the weight to be given to the statement," but compare this with the previously mentioned statement on page 16. Aren't we just creating another list of cases for

Judges to follow as to admissibility of hearsay?

In England there are in fact four restrictions attached to such liberalization of the hearsay rule, two of which are relevant and set out on page 17 of this paper. The English committee wanted to provide safeguards against manufactured evidence. Our Canadian committee does not seem to want to do this.

With regard to notice, the Canadian Committee says we should await the report of the Criminal Procedure Project on Discovery, but why is there any reason to wait? The thread through many of the papers is that we should wait for somebody else to do something. If the Committee has looked into this thoroughly, then it must either agree or disagree with the English provisions. The way our system works now if such evidence is called by the Crown you know the defence will be granted a stay or an adjournment or they will claim prejudice. But if this is introduced by the defence on the sixth day of the jury trial, will the Crown get a stay or an adjournment? Not too likely! An adjournment or stay interrupts the Judicial proceedings. This is not fair to witnesses, nor is it fair to the accused whose trial should be completed as quickly and as fairly as possible. Fair means fair to the Crown as well as the accused.

It is interesting to note that at page 18 it is pointed out that English Criminal Law Revision Committee was concerned that after he was charged a professional criminal might manufacture exculpatory evidence, but our committee points out that any restrictions against this activity might cause grave injustices, since such a statement might in some cases be a necessary part of the accused's defence. No doubt manufactured evidence is in fact an important part of the defence of many parties, but if manufactured, why do we make it easier for it to go in? Then it is pointed out that it seems much more sensible to admit such statements, and permit the time they were made and the circumstances under which they were made to go to weight. Another reference to weight, having earlier said that the law of evidence generally should not be concerned with weight.

With regard to statements made by the accused, after he had been charged, the Crown already has a burden of proving beyond a reasonable doubt that the statement is admissible. Is it not enough that the Crown must now unanimously convince 12 jurors beyond a reasonable doubt? And with the appeal procedures available? Must we allow anonymous confessions to be permitted? What about anonymous phone calls to friends of the accused, and anonymous letters to the Crown Attorney or Defence Counsel? Surely, such a communication

can have no weight, so why put it in to raise a red herring for a jury?

Suppose the Prosecution called a witness who say, "'A' told me that the accused told him he did it." 'A' is not a person in authority, no voir dire required, should this type of thing go in? And if not, what is the difference between this and the accused's proferred testimony? Is the State to be prejudiced, but not a small part of the State?

What about the last few lines of this section, "the trial judge would have a discretion to admit hearsay when the dangers are minimized by the conditions surrounding the making of the statement relative to the necessity." What does this mean? How can you look at conditions surrounding the making of double or triple hearsay?

It should be remembered that no appellate court would allow a conviction to stand where the evidence included double hearsay confession of the accused. And yet it is quite conceivable he could be acquitted on double hearsay anonymous confession. What part of our trial process now is so lacking and so unfair and so prejudicial to the accused that it cries out for the admission of this type of evidence?

Canadian Bar Association, Study Group, Edmonton

Section 3(1) and (2)

We all had strong reservations that the proposed formulation would be an improvement in the law and in fact we all felt it would lead to a worse situation. Note that Pierre Mousseau, however, would favor allowing in statements made by a person who at the time of trial is dead.

Our first reservation was that 3(1) is wide enough to allow in statements that would not have been receivable had the witness been fit enough to attend. For instance, in Sparks v. The Queen - a Bermuda case which went to the Privy Council - the evidence of a four year old child would have been allowed in if Section 3(1) had been the law because the four year old child would have fitted the definition of being unfit by reason of mental condition to attend as a witness. Also, why should a statement be allowed in just because the witness is now crazy and unfit by that reason to attend as a witness? The meeting was concerned about the person who was approaching death and who had a grudge against someone and made a statement that that person committed a crime. We understand that under the Project's proposals that statement would be allowed in. The meeting felt that while the present exception for "dying declarations" may have justification, it would be dangerous to extend it. It also

seems quite possible that accused persons might get statements corroborating an alibi from persons in a cancer ward who knew they were about to die and had nothing to lose by making a statement, i.e. the whole problem of manufactured evidence. In all these situations it is impossible to test the evidence by cross-examination and we think that cross-examination is a vital hallmark of our system of justice and it is too facile to shift the whole problem to the Judge by saying it is up to him to weigh the hearsay statements. We also can see all kinds of situations in which both Crown and Defence witnesses will be conveniently absent so that their statement may be read in rather than having the witness put on the stand and subjected to cross-examination.

We note the problem of the witness who refuses to testify but that of course is usually dealt with by a contempt citation.

British Columbia Law Reform Commission

Page 5, Section 3(1) - Author of Statement Unavailable

This represents a departure from the present law which admits statements by others only when they are dead and when their statement falls under certain well defined headings, such as statements made in the course of duty, statements

made in contemplation of death, etc. This proposal suggests the admissibility of the statement whenever its author is unavailable, and leaves it to counsel and the judge to challenge and test the weight to be put upon the statement depending upon the circumstances under which it was made and the light those circumstances throw upon the truthfulness and accuracy of the statement. The proposal apparently leaves it to the Courts to develop case law with respect to the necessity for suitably weighing the evidence, rather than incorporating a warning to the trier of fact to weigh the evidence within the framework of the proposed statute.

My one suggestion with Section 3(1) is that instead of referring to a witness who is unable to attend by reason of his condition, the reference should be to a witness who is unable to testify by reason of his condition. The change would make it clear that a judge may still adjourn a trial to a hospital bedside, where a witness is fit to testify but unable to attend. I submit it is preferable to encourage the giving of original evidence by the witness wherever possible, so that his evidence may be exposed to the tests of cross-examination rather than providing an opportunity to admit hearsay where the witness cannot attend, but could give the evidence if the Court were to attend upon him. I presume counsel would still tend to favour

taking de bene esse ebidence from a witness departing his life or the country prior to trial, to gain the advantage before the trier of fact of showing that the evidence was subject to cross-examination in the fullest sense.

Also within this section I comment upon the case of a party who refuses to be sworn. In N.L.R.C. Paper No. 1 (Competence and Compellability) it is proposed that the oath should be abolished. If the formal oath is done away with, those occasions where a witness for moral or religious scruples refuses to be sworn will be rare indeed. There may still be occasions where a witness refuses to make an undertaking, but they are likely to be very few. This exception to the hearsay rule perhaps provides the most convenient way of fabricating testimony, by having the author of a statement lie in the presence of another witness and then having the author refuse to give the undertaking, so that his own evidence cannot be heard, but his lie can then be repeated by the witness who heard him and who makes the undertaking and tells the truth. The witness who overhears and testifies would not be privy to the scheme. The opportunity for such a scheme by which the author could lie, knowing he would not be compelled to testify, because he refuses to make the undertaking or swear the oath would be lessened were the refusal to testify to be subjected to a substantial enough penalty, perhaps

falling under the heading of contempt of Court. If this section is reworded so that the exception covers only the case of a person present who refuses to give evidence (rather than refuses to be sworn or to make the undertaking), we avoid the risk of harshness in penalizing a man who for some genuine scruple refuses to be sworn or to make the undertaking. The alternative is simply to let the trier of fact take due notice of the fact that the author of the statement was present, but refused to be sworn or to undertake, and to weigh that circumstance as a factor challenging the accuracy of the author's statement, as repeated by the witness who does swear or undertake.

Section 30 Exceptions: Statements Against Party

Schiff

I agree that this exception should be codified in any statutory statement of common law hearsay exceptions. I question some of the explanatory text and the wording of some of the paragraphs of the proposed provision.

Contrary to the implication in the first two sentences on page 16, not all "extra-judicial statements made by a party to an action" evidence of which is admitted at trial are "admissions" within the meaning of this exception

to the hearsay rule. Only those extra-judicial statements of a party which are inconsistent with, or adverse to that party's case as formulated in his pleadings or presented at the trial are "admissions" within this hearsay exception. See 4 J. WIGMORE, EVIDENCE, section 1048 (Chadbourn rev., 1972); R. CROSS, EVIDENCE 431 (3d ed., 1967). Evidence of a party's extra-judicial statement other than an admission so defined is of course admissible for certain purposes but not ordinarily "as evidence of the truth of the matter". For example, evidence of the party's previous extra-judicial statement which is not his admission will be admitted as his previous inconsistent statement when offered by the opponent to attack his testimonial credibility as a witness. (Under the Project's proposed section 3(2), this limitation would of course be changed.) In addition, evidence of a party's extra-judicial statement which is not his admission will be admitted at the suit of the opponent, even if the party never testifies as a witness, as part of the proof that the party lied in the statement and therefore had a consciousness of liability or guilt. An excellent illustration of the latter use (although the party did testify) is Rex v. Mandzuk, (1946) 1 D.L.R. 521 (B.C.C.A.): see especially the reasoning of Mr. Justice O'Halloran, at 524 ("A denial cannot become an admission simply because it is untrue."), and at 527 ("If the statement by later relation to other evidence is found to be untruthful, inculpatory inferences

which may then arise..." etc.). Thus, Mandzuk does not support the Project's assertion for which it is cited in the second and third sentences of page 16 that "(t)hese statements...may be received as evidence of the truth of the matter stated... (even though they) need not be against the party's interest when made." The hypothetical example given in J. WIGMORE, supra, at 6 and the cases cited in footnote 5 are much better. The only time that evidence of a party's extra-judicial statement is admissible for the truth of its assertions even though it is not his admission is when the statement (even though exculpatory or self-serving to him for the purpose of his stance at the trial) is part of or fairly interconnected with a statement which was a true admission. See cases and text in S. SCHIFF, EVIDENCE IN THE LITIGATION PROCESS 373-378, 1031-1034 (Draft ed., 1972). Clearly, the reason for this is the adversary consideration of fairness: what's good for the goose is good for...

Despite the formidable support for the Project's argument on mid-page 16, I disagree that admissions are received "not because they carry assurances of reliability in satisfactory substitution for the absence of the oath and cross-examination..." but because of adversary considerations unconnected with the hearsay rule. Granted, the assurances of reliability are not assurances to the trier

of fact. But lack of those assurances is not the foundation of the hearsay rule: the lack of assurances of reliability founding the hearsay rule is the lack to the party-opponent of the offered hearsay evidence. Respecting this hearsay exception the opponent is the very person who spoke the words reported by the witness. Therefore, as Professor Morgan and others argued, the adversary cannot reasonably complain that he has had no opportunity to protect himself by exploring before the trier of fact the possible hearsay dangers implicit in his own reported words. Thus, in my view the relevant assurances of reliability and the relevant adversary consideration here mesh into one.

I concede this much to the Project's argument. One element of the legal doctrine regarding admissions does spring quite clearly from adversary considerations which are not the foundation of the hearsay rule. That element is the lack of necessity for the declarant's first-hand knowledge of the facts he admits. Of course the declarant's possible lack of first-hand knowledge is my added fifth hearsay danger.

Unlike Model Code Rule 506(b) and Uniform Rule 63(7), paragraph (a) of section 3(3) does not encompass a party's statement in his representative capacity. I recommend that the provision should be amended to correct this omission.

I realize that wording virtually identical to "has manifested his adoption or belief" in paragraph (b) of section 3(3) is found in Model Code Rule 507(b) and Uniform Rule 63(8)(b). However, I believe that the word "manifested" is not strong enough to denote the pertinent common law doctrine that the party must have adopted or agreed with the statement. Instead of the wording now proposed is paragraph (b), I recommend the following:

(b) A statement which the party, by his words or other conduct, has adopted as his statement or with which, by his words or other conduct, he has agreed.

I agree with the text concerning paragraphs (c), (d) and (e) as well as the proposed wording of the provisions. However, I again point to the anomalous contrast between the Project's supporting argument for paragraph (d) set out just after the quotation from Wigmore on page 18 (stressing the lack of hearsay dangers) and the argument offered in support of section 3(1) (ignoring hearsay dangers).

Ontario Crown Attorney's Association

(3) Admissions

One wonders if the author would like to admit in everything but confessions; that is, let in exculpatory

statements. How can anything be an admission if you don't have personal knowledge? See Regina v. Haas (1965) 2 C.C.C. 56 affirmed 2 C.C.C. 123 (S.C.C.) and R. v. Black, and Mackie (1966) 3 C.C.C. 187 (OCA) and R. v. Pappin (1970) 12 CRNS 287.

And what about declarations against interest of a witness who is not a party to the matter.

Who is the onus on, and what is the burden? Surely, whether or not a person has said yes I agree that it is right or whatever is a statement of fact to be determined by the trier of fact. See. R. v. Govadara et al (1974) 25 CRNS 1 (OCA). Silence will render statements made in the accused's presence admissible in certain circumstances.

Canadian Bar Association, Study Group, Edmonton

Section 3(4) and (5)

We think the proposals in Section 3(4) and (5) are good and in fact represent the present practice.

British Columbia Law Reform Commission

Section 3(3) - Admissions - Commentary at Pages 16-19

This portion of the proposed legislation expands the

admissions which can be let in as previous statements by the party. I question whether Sub Paragraphs (c) and (d) are really separate heads of admissibility. Should not a statement under (c) by an authorized person be admitted only if the person was authorized at the time he made the statement, in the same manner as the statement under (d) by an agent must have been made during the continuation of the agency? A person under (c) authorized to make a statement is no less an agent or servant for that purpose than the agent or servant referred to in (d).

I suggest that the word "then" should be inserted in the first line to read "a statement by a person then engaged with the party in common enterprise...." This would avoid the reception of the evidence of a statement made formerly by a person now in a common enterprise with a party to a lawsuit. The currency of their common enterprise ought not to be a ground for the admissibility of a statement previously made when the statement could not have been a part of the common enterprise, and could not have been the result of an agency relationship between the two parties to the common enterprise.

Section 31(a) Statements Made in Course of Regularly Conducted Activities

Schiff

I again note the anomalous contrast between the justification offered in mid-page 20 and the justification earlier offered for section 3(1).

I recommend that the text on page 20 outlining the common law exceptions should refer also to Ares v. Venner and contain some comment on how the case creates a new common law exception in the same area or, at least, expands the old common law greatly.

I disagree strongly with the deliberately restricted guarantees of reliability set out in paragraph (1) of section 3(4). I also disagree with the Project's argument at the end of the top paragraph on page 23 that "the duty to record in a regularly conducted activity" is a sufficient guarantee. Undoubtedly the recorder's duty to record gives some assurance that he accurately recorded what he personally perceived. But section 3(4) is deliberately wider than the scope of that assurance: the provision says that the document is not barred by the hearsay rule as evidence of the facts asserted therein even if the recorder had no personal knowledge of those facts and even if

the document is a mere record made by the recorder of alleged facts reported to him by some other person who was not acting under any duty or in the course of any regularly conducted activity in observing the facts or in reporting them to the recorder. Obviously, the "guarantee of reliability" the Project finds in the recorder's duty to record in a regularly conducted activity cannot possibly extend to the alleged facts he records under such circumstances. For similar reasoning see Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (N.Y.C.A.), and the Advisory Committee's Note to Federal Rule 803(6). I realize that paragraph (3) of section 3(4), which strengthens the admissibility of the document is the hypothetical situation I have outlined, has the antecedent of section 36(4) of the Ontario Evidence Act. But, in my view the scope of section 36(4) and its American predecessors is a bad mistake: the scope denies the very theory of trustworthiness inherent in documents made in the course of business activities. Compare the reasoning in Johnson v. Lutz where the statute under review also has a provision like paragraph (3).

I much prefer the scheme in Model Code Rule 514 (1), which clearly focusses on all the duty-links in the chain better to assure ultimate trustworthiness. Federal Rule 803(6) follows the Model Code scheme and the Advisory

Committee's Note demonstrates that they adopted this very reason. While Uniform Rule 63(13) uses a different mechanism, this mechanism is also designed to assure the trustworthiness of "the sources of information" and "the method and circumstances of their preparation". While I reject section 34 of the Criminal Law Revision Committee's draft bill because of the same defect as the Project's paragraph (1), section 34 at least limits the class of recorders in the same way as sections 31 and 32 had limited the class of first-hand hearsay declarants. In sum, I strongly recommend that the Project should abandon paragraphs (1) and (3) of section 3(4), and should follow the lead of the Model Code and Federal Rules here.

Sopinka

Section 40(b)

I submit that this sub-section goes too far in allowing an opinion or diagnosis to be admitted without a requirement that a witness be called. This would let in, for instance, a psychiatric report prepared by a psychiatrist in a mental hospital in which the accused had been a patient. There would be no opportunity to cross-examine the psychiatrist. In provincial evidence acts where a medical report is allowed in evidence, there is a safeguard in providing that a trial judge can require the witness to appear for cross-examination. This right is said to be absolute in Ontario cases.

The original draft prepared by the U.S. Supreme Court was very similar to the wording of (b). However, the Judiciary Committee of the House of Representatives was concerned about the trustworthiness of such records. The only requirement is that the record be made in the course of a regularly conducted activity, in addition to contemporaneity.

Because of the insufficient guarantees of reliability of records falling outside the scope of business activities, the Judicial Committee restructured the section in the U.S. Federal Rules so as to read if the record was made in the course of a regularly conducted business activity and added for further reliability, the proviso that it be "the regular practice of that business activity to make the record". This is similar to S.36 of the Ontario Evidence Act.

The emphasis is on the business nature of the record. That is what gives it reliability not just the fact that it was made in any regularly conducted activity.

British Columbia Law Reform Commission

The sub section permitting the admissibility of records is drawn very widely. The three tests that the "record" be made pursuant to a duty at or near the time and in the course of a regularly conducted activity, are

sufficient guarantees of trustworthiness to justify the reception of a "record" however it is described in Sub Section 3 (4)(i). I have reservations about the record of an opinion or diagnosis, however, since to let in the opinion or diagnosis in record form only, as evidence going to the truth of the opinion or diagnosis avoids the requirement that the author be qualified as an "expert" before he is permitted to give an opinion. A diagnosis is of course an opinion in another form. In raising this reservation I recognize that in many cases evidence of fact is really the evidence of the witness' opinion as to what the fact that he observed was. My reservation is directed not at that sort of fact (as in Ares vs. Venner where the nurses recorded that the patient's toes were blue, perhaps a matter of opinion), but at the sort of opinion where a doctor records in a note that the patient is suffering from such and such an injury, and is likely in the future to follow a certain course of rehabilitation, and reach a certain stable condition. While the B.C. Evidence Act among others, now provides for the reception of that type of medical evidence in report form only, without the doctor being called, it is limited to reports filed by qualified doctors. I suggest some requirement of qualification be put on the proposed section, to ensure that records of opinions only come in where the opinions are made by people who are shown to have reasonable qualifications to

express an opinion.

Under Section 3(1) and (2) all the available witnesses must be called. Under this sub section, however, a record may be put in evidence, even though the author may be available. I am in favour of requiring notice to be given of the intention to offer records in evidence, as proof of their content, so that the opponent can be forewarned and may enquire of the author and call him, should he choose, to rebut or modify the statement attributed to the author in the record. In my view the admission of hearsay evidence is justified where the original author is not available, or is available to be called upon the challenge the accuracy of the report of his statement if the parties choose. It is, however, never, or rarely if at all, better evidence than what the author could say himself, and where the author of a record is still available, the opportunity should be given to the opposite party to call the author and examine him on the statement set forth in the record. It would be preferable if the opponent who is given notice be permitted to cross-examine the author. Notice must presently be given of the intention to introduce medical records under the B.C. Evidence Act Amendment, 1973.

Ontario Crown Attorney's Association

(4) Records

(a) A memorandum, report, record, or data compilation, in any form of acts, events, conditions, opinions or diagnoses, made pursuant to a duty at or near the time in the course of a regularly conducted activity.

(b) Where information in respect of a matter is not included in memoranda, reports, records, or data compilations of a regularly conducted activity and the occurrence or existence of such information might reasonably be expected to be there found, the court may upon production of such memoranda, reports, records or data compilations admit the same for the purpose of establishing that fact and may draw the inference that such matter did not occur or exist.

(c) The circumstances of the making of such a memoranda, reports, records, or data compilations, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

With reference to subsection (a) we presume that the reference to "at or near the time" means time of the event, but in any event the legislation should clearly state what it is referring to. Interestingly, it would appear that this paragraph would save calling Police Officers or the witnesses since the report could just be filed.

Of course, one also wonders what effect the provisions will have with regard to contemplation of litigation with regard to this, and also what interesting judicial interpretations could be put on the word "near".

There is also concern about some sort of notice; perhaps where an essential ingredient of the offence is either to be proved or disproved, notice should be given.

In subsection (b) we may be asking the Jury to make a pretty big jump in saying that where something might reasonably be expected to be found in reports etc., and it is not found then the jury may draw the inference that such a matter did not occur or exist. The onus may be on those alleging that it did not occur or exist to show that it might reasonably be expected to be there found. And just what does inference mean? It is important to notice that the wording states "may" draw the inference, rather than must, and that we always have to make very clear to the jury.

We should also be concerned with how to deal with copies of matters as well as questions of authenticity, identification, and admissibility.

Section 31 (b) to (h) No comments

Sections 31 (i) to (L) Exception: Reputation Evidence

Schiff

As an introduction I say again that I find anomalous, in contrast to the earlier argument for section 3(1), the Project's continued insistence on minimal hearsay dangers as demonstrated by the reliance on Wigmore's explanation.

I find Wigmore's explanation unsatisfactory particularly as applied in modern large communities and particularly when the reputation is that among those "who... would know about him". I am inclined to believe that in these circumstances the reputation will be a quite untrustworthy index of the matter about which the reputation is held.

As the Project asserts just before the quotation, paragraph (a) does reproduce the existing common law exception. And I think that paragraph (b) is at least close to the common law. But paragraph (c) appears to alter the common law in three ways: by omitting the requirement that the declarant must be dead, by expanding beyond general and public rights the exceptions for boundaries or customs, and by including reputation concerning "events of general history...".

(At all events, regarding the last the court may always take judicial notice of events of ancient and modern history.)

I suggest that paragraph (a) should be amended to admit only evidence of reputation "arising before the controversy". That amendment will prevent the reputation of the person's involvement in the controversy from colouring his general reputation.

Ontario Crown Attorney's Association

Reputation

(a) A person's reputation arising before the controversy among those who know him or would know about him and

(b) Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history and

(c) Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

It might be a good idea to define reputation, and perhaps this whole section really deals with civil matters. We would, of course, want to have a look at paper number three dealing with character.

Reputation, as an exception to hearsay, is basically unsound, doing little more than to inculcate a belief in gossip and scandal. The English rule in this area is interesting in that it provides that if reputation of Crown witnesses is attacked, then you can attack the character of the accused. This deserves some consideration.

Canadian Bar Association, Study Group, Edmonton

With respect to Section 3(6) we think the words "the controversy" are weak, they are non-technical and will lead to ambiguity such as whether the controversy refers to the alleged occurrence or the controversy doesn't actually become a controversy until the charge is laid. If it is the former John Weir feels that the accused should be allowed to bring in evidence of reputation right up to the time a charge is laid or alternatively up to the time of the trial. Otherwise, we are in general agreement with Section 3(6).

Hearsay Exception for Learned Treatises (Contained in Evidence Project's Study Paper)

Schiff

The wording of the proposed provision is not parallel with that in the previous provisions. Minor changes in wording will remedy that.

As in Model Code Rule 529, Uniform Rule 63(31) and Federal Rule 803(18), the provision should include learned periodical articles and pamphlets written by experts in the particular field.

I am much impressed by the limitation on admissibility set out in Federal Rule 803(18) and by the supporting reasons offered in the Advisory Committee's Note: the danger that the trier of fact will not understand the contents of the treatise if unaided and unsupported by an expert witness. I recommend that subsection 3(5) should, for the same reason, contain a similar limitation.

British Columbia Law Reform Commission

In the paper on Judicial Notice, provision has already been made for the Court to refer to learned treatises as a means of assistance to decide the problem at hand. We

should not, therefore, object to the proof of statements in authoritative treatises by having them put in evidence by expert witnesses under this exception to the hearsay rule.

Ontario Crown Attorney's Association

Learned Treatises

Statements in learned treatises, periodicals, or pamphlets if identified as authoritative by a witness who is expert in the field with which the material is concerned, and any expert in the same field may be asked to explain statements contained therein. If admitted, the statements may be read into evidence but may not be received as exhibits.

This seems to be sensible, and to a large extent is accepted practice in the Courts presently, although it certainly has wider use in Civil matters.

Arnup

Under section 3(5) it is provided that the statements in learned treatises may be read into evidence "but may not be received as exhibits". I suggest the Commission consider changing this last portion to read "but need not be entered as exhibits". It may well be that the person against whom the statement is being read into evidence may wish to have the entire treatise put in as an exhibit, for

purposes to be developed by him later in the trial. As drafted, there is a prohibition against the statement ever being received as an actual exhibit.

Sopinka

Section 40(m) I fear that this would indeed authorize a battle of text books which might in many instances be of little assistance to the judge who is unable to resolve the conflict. The answer to the question posed in explanatory notes "Indeed if we accept an expert's opinion based on such works, why not the work itself" is that the expert can be cross-examined and weaknesses in his opinion exposed. A book cannot be cross-examined.

The U.S. Federal rule avoids this danger by limiting the use of texts as substantive evidence to situations in which an expert is in the box and can explain relevant excerpts.

Privileges

Sections 32 to 45 — Privileges
(Comments relate in the main to section 41, the general professional privilege)

Canadian Psychiatric Association (minutes of meeting)

All the members noted that in the Canadian legal scene, the position taken by his late Lordship Chief Justice Stewart in the case of Denby vs. Denby was an outstanding example of the court making a decision concerning privilege, which well might have become a precedent. There seems to be evidence to suggest that this decision has been challenged and, in fact, as a committee we are now of the opinion that such a decision should be examined by the Law Reform Commission, hopefully with the recommendation that there be legislation describing the privilege of the psychiatrist under these circumstances.

It was agreed that if a psychiatrist was placed in this position of being forced, because of lack of privilege, to give evidence that he had obtained during a therapeutic relationship with a patient, that he or she would have to make an individual decision of refusing, and suffer the possible

consequence of being held in contempt. Mr. Delisle cited a case identified in a recent article in the Lancet, in which a psychiatrist had taken this specific position. We agreed that the issue that was involved in this case was the specific issue of privilege between patient and psychiatrist who were involved in a therapeutic process.

By and large what we seemed to be identifying was the need of guaranteeing in the psychotherapeutic relationship that the material shared by the patient with the therapist was privileged material. There was unanimous conviction that this privilege should be guaranteed, although it was obvious that it presented certain very difficult problems.

(i) The psychotherapist was placed in the impossible position not only as regards a particular patient, but as regards his whole image as a confidante in therapy if, in fact, one had to warn the patient that this material would not be privileged if, in fact, a court appearance was requested of the psychiatrist.

We recognized the difficulty of identifying to the patient precisely where the privilege belonged. The question was raised whether the patient was the privileged person, or

whether it was a joint privilege between the doctor and the patient.

We also recognized that this privilege might extend, in terms of concern, to other professions who engaged in psychotherapy. We agreed, however, that our concern should be directly related to the psychiatrist as the psychotherapist, with the implications that this might have for others being a separate consideration.

We identified the reason for our concern over this privilege as being, first, that it was a prime consideration in psychotherapy that the patient feel free to discuss all personal and sensitive issues with the conviction that this would not be shared with others.

It is also recognized that if this privilege were denied in one case that other patients who might approach the therapist, and being aware of this law of privilege, might well be unable to fully enter into a therapeutic contact.

(ii) It was recognized that a patient in the therapeutic process might, in this process, provide the examiner with inaccurate information which if demanded by the court would, in fact, do a disservice to justice as it might indeed

be wholly inaccurate.

(iii) In our opinion there was no reason for examining this need of privilege to differentiate between civil action cases, such as divorce and litigation, and cases where criminal acts had taken place.

(iv) The Committee recognized the need to differentiate between ethics and privilege, and we mutually agreed that the ethics of our therapeutic relationship preceeded the concept of privilege.

(v) It was also recognized that where a psychiatrist may become party to information, in the process of therapy, where the public welfare was in danger because of the patient's disclosures, that an individual decision would have to be made in attempting to protect the therapeutic relationship and, at the same time, take into account the public welfare.

The legal advisers, Mr. Delisle and Mr. Schiff, who were present in this discussion, were basically of the opinion that the court should use its discretion in exercising the concept of privilege. The psychiatrists were somewhat reticent to totally accept this unless it was

complemented by some legislation that stated that privilege did exist and that, although we could appreciate that the legal system would prefer this to be at the discretion of the court, we would like to have some conviction that this discretion would be exercised in a way that would not divulge the material that threatened the therapeutic relationship.

(vi) The next area of privilege that was examined was related to the problem of providing psychiatric assessment either directly to the Court under statutory order, or to the client's legal counsel in the process of preparation for his trial.

The points that we recognized in the discussion of this area were as follows:

(a) It was agreed that when, as psychiatrists, we accepted the responsibility of providing an assessment for a legal counsel, that his client-lawyer relationship would extend to us while we were acting as his agent. It was recognized that if the report was not one that would serve a purpose in the client's defence, then it was up to the discretion of the lawyer, as once we were called as witness, and the report that we had rendered was cross-examined as an exhibit, there was no reason to believe that privilege would be extended by the court under these circumstances.

(b) It was noted that in some incidences of providing such an assessment, an immediate need for therapy of the client prior to trial might, in the opinion of the psychiatrist, be necessary. We agreed that it would then be very difficult to sort out the difference between the assessment, and the ongoing psychotherapeutic process with the patient. Several members of the committee had found themselves in this position at the present time, where they had patients in treatment, following an assessment for counsel, prior to trial. In one instance, the trial has been delayed approximately one year - a case of non-capital murder - and the patient is in constant therapy while awaiting trial.

In our opinion there appeared to be no way that one could legislate for privilege under these circumstances but, again, it would be hoped that the court would use great discretion in permitting a cross examination of the material obtained during the psychotherapeutic relationship.

(c) It was recognized that where we provide assessments for the court under statutory order of a judge, that the material presented in the assessment would be submitted directly to the court, and clearly would be used at the court's discretion. There is a tendency in such reports

to answer very specific questions, such as fitness to stand trial, the prisoner's mental state at the time of the alleged act and, in some instances, to offer an opinion re sentencing. We recognize that a defence counsel usually requests of a judge to be made aware of such an assessment, and it obviously cannot be considered privileged information.

There was a great lack of clarity in these areas but the concensus of opinion appeared to be that in the case of assessments, the question of privilege should again be at the discretion of the court.

(vii) Some discussion was directed towards the question of privilege in the situation of a physician examining an adolescent who is not of consenting age.

It was agreed that the major issue involved that of an ethical one, and that a decision to provide this information to the parents would be an individual ethical decision. The legal advisers in the meeting were of the opinion that there was very little likelihood of tort or liability against the physician if he exercised judgment as to what he considered was in the best welfare of the patient.

(viii) It was noted during the meeting that a

forensic psychiatrist practising in the Toronto area, had recently experienced having his report made to the judge accurately reduplicated in the local papers. It was our mutual feeling that this type of sharing of a report, although it undoubtedly represented some type of inappropriate leaking of information by court personnel, should be carefully guarded.

During the meeting we briefly commented on the submission made by Dr. Boyd, Director of Penetanguishene Psychiatric Hospital, in which he noted that with some frequency, files from his institution were subpoenaed by the court. Although the question he raised is more related to a concern how evidence is used, it was the opinion of the Committee that when a hospital file is subpoenaed that it should be accompanied by an appropriate professional person in order to interpret the material accurately to the court, otherwise a disservice, either to the court or to the patient, might occur.

Canadian Psychiatric Association (brief)

We recognize that for centuries the tradition of medicine and its specialties has been to identify with the ethic of the Hippocratic oath, that we would hold sacred the information that our patients share with us. In fact, there

is no such privilege assigned by law to this material shared with the physician.

In assessing an individual's mental state and more specifically when entering into a therapeutic contract with this person as a patient, there is a need to reassure the patient that the material being shared will be dealt with as confidential. We recognize that although the relationship is entered upon with great conviction by the psychiatrist, there is a hidden concern that some of the material may, at a later date, be requested by a court if his patient becomes involved in court proceedings, either of a criminal nature or in civil action, such as divorce. The content of the therapeutic sessions, which have been deemed to be confidential, may be placed before the court, and may be damaging either to the patient or to others. If a psychiatrist is subphona'd to give evidence concerning the patient in subsequent legal actions, the psychiatrist faces the untenable position of denying his original contractual relationship with his patient, or facing the possibility, if he refuses to divulge the information, of being charged with contempt of court.

The Committee recognized that the question of confidentiality between the psychiatrist and the patient had different dimensions, depending on the nature of the contract

between them. These were identified as follows:

1. The psychiatrist - patient relationship in psychotherapy where the patient has been referred for assessment and treatment, or is self referred, and the psychiatrist has agreed to enter into a contractual therapeutic relationship with the patient.

2. A client referred by legal counsel for the purpose of obtaining a psychiatric assessment that may contribute to the defence of his client in court.

3. A defendant who is referred by the Crown or the Court for psychiatric assessment in order to assist the court in decisions concerning fitness to stand trial, the mental state of the defendant at the time of the alleged act and, in some instances, to assist the court by offering opinions concerning sentence and treatment.

4. The confidentiality of records where therapy has preceeded the appearance in court and the psychiatric record is subphoena'd by the court.

5. The confidentiality of hospital records and the interpretation or misinterpretation of information obtained from these records when subphoena'd by the court.

6. The relationship of confidentiality between the psychiatrist and a minor.

(1) Confidentiality and Privilege in the Psychotherapeutic Relationship

The first and main area of consideration, in the opinion of our Committee, was the concern which was manifested by many psychiatrists, and all members of the Committee, as to the relationship of a psychiatrist to his patient, once he has entered into a therapeutic contract, which must be accepted as confidential and consequently should be deemed to be privileged information. The major commitment made by the psychiatrist in psychotherapy, is to establish a relationship of trust, through which the patient will feel confident in sharing with the psychiatrist the most intimate material, ranging from memories of interpersonal relationships and feelings, not only within his present time reference, but also memories and feelings relating to his early developmental phase. This material will often identify confidential matters relating to a third person.

There are many techniques employed in psychotherapy but, regardless of the technique, the universal element is a trust relationship between the patient and the psychiatrist. The main confirmation of this trust is that the material shared will not be shared with others without mutual agreement of the therapist and the patient. We recognize that although this relationship is entered upon with conviction by the patient

and the psychiatrist, at the same time there is a hidden concern that some of the material may, at a later date, be requested by the court if the patient is involved in court proceedings resulting from criminal actions, or in civil actions such as divorce. It is recognized that clinical material recorded during this relationship might indeed be very damaging to the patient or to a third party in the case of future litigation.

We have identified in our enquiry that such is, indeed, the case and we have found a number of instances where the psychiatrist was forced to place himself at the discretion of the court in refusing to give information, recognizing that he had no legislative right of privilege.

The decision made by the late Chief Justice Stewart in the case of Denby vs. Denby, in which his Lordship granted privilege to the psychiatrist relevant to the material recorded by the psychiatrist in the course of therapy, although creating a precedent this decision in no way guarantees that this would be upheld by other Judges, and we would request that this decision, in some appropriate manner, be translated into legislation. The psychiatrist, without this privilege, is placed in an impossible position, not only as regards the particular patient but as regards his image

as a confidante in therapy. If, in fact, one had to warn the patient that the material would not be privileged if at any time the psychiatrist was brought before the court, the therapeutic relationship might not only be harmed but prevented.

Our concern over this lack of privilege is strongly emphasized, as it is a prime condition of psychotherapy that the patient feel free to discuss all personal and sensitive issues with the conviction and reassurance that it would not be shared with others. It was also recognized that if this privilege were denied in one case that other patients in treatment, or might otherwise come for needed treatment, would feel threatened and the potential for providing appropriate treatment to others might be denied.

It was also recognized that a patient in the therapeutic process might provide the examiner with inaccurate information which, if demanded by the court, would, in fact, do a disservice to justice.

In our opinion there is no difference in the necessity for privilege in civil actions or criminal action cases.

The Committee recognized the need to differentiate between ethic and privilege and we mutually agreed that the

ethics of our therapeutic relationship has a much greater priority than being granted privilege as a right. It was our opinion that our concern was directly related to our wish to provide therapy and, at the same time, assist the court where possible.

It was also recognized that the psychiatrist may become party to information in the process of therapy that would cause him concern that the public welfare was in danger, because of the patient's disclosures. In this case, it is obvious that an individual decision must be made in attempting to protect the therapeutic relationship and, at the same time, exercise appropriate procedures to protect the public welfare. Psychiatrists are certainly not going to insist on confidentiality under these circumstances.

As the issue of privilege and psychotherapy was discussed with legal advisers, it appeared that the legal opinion would be that the court should exercise its discretion in exercising the concept of privilege. They referred to the case of Denby vs. Denby as creating a precedent, but also recognized that this precedent might not be upheld.

The psychiatrists, however, were reticent to be dependent on precedent and the discretion of the court, and

indicated that in our opinion legislative right of privilege is necessary.

(2) Referral of Client for Psychiatric Assessment by Counsel

In regard to the problem of privilege when providing psychiatric assessment to a client's legal counsel in preparation for his defence, the points that we recognized in discussing this area were as follows:

- It was first agreed that when a psychiatrist accepted the responsibility of providing a psychiatric assessment of a client for counsel, that the lawyer-client relationship would extend to the psychiatrist, who was acting as the lawyer's agent. It was recognized that if the assessment and report were not such that would serve the purpose in the client's defence, that its use would be left to the discretion of the lawyer. It was also recognized that once the defence called the psychiatrist as a witness, and if the report were submitted as an exhibit, then cross examination would be done and there is no reason to suppose that privilege would be extended to the psychiatrist under these conditions.

- In some instances of providing such an assessment, an immediate need for therapy of the client prior to trial might, in the opinion of the psychiatrist, be necessary. It was agreed that it would then become very difficult to

differentiate the material provided by the patient during assessment and in the subsequent therapy.

- Several members of the Committee had been placed in a position where they found it necessary to enter into a therapeutic relationship with the patient prior to trial. In one example the trial of a client, charged with murder and assessed for the defence counsel, has been delayed for a full year and during that time the patient has been in constant out patient therapy.

- It was our opinion that there appeared to be no way that we could anticipate legislative privilege under these circumstances and it would be hoped that the court would use great discretion in permitting cross examination of the material shared with the psychiatrist during the therapeutic relationship.

- The Committee was of the opinion that when a psychiatric assessment is submitted to a defence counsel, in which we assume that his privilege extends to our report, that where the report is not used by the defence counsel in court, it should not be made available by subphoena to the Crown. We recognized that this issue was debatable and were of the opinion that further discussion between the legal

profession and the Psychiatric profession should be requested concerning this issue.

- This particular issue frequently presents a problem where a legal counsel, acting for a client who is protesting wardship proceedings, has requested a psychiatric examination of his client. When this assessment is not in favour of his client's expectations, and has been performed in good faith for the counsel, it is debatable if such a report should be made available to the court. We agreed that this whole issue of custody demanded further dialogue.

(3) Referral of Patient by the Court or the Crown for Assessment.

It was recognized that where psychiatrists provide assessment for the Court under Statutory Order of a Judge, that the material presented in the assessment would be submitted directly to the court, and clearly it would be at the Court's discretion as to how this assessment would be utilized.

There is a tendency in such a report to answer very specific questions, such as fitness to stand trial, the accused's mental state at the time of the act and, in some instances, to offer an opinion as regards sentencing.

We recognized that the Defence counsel usually requests to be made aware of the content of such a report, and it obviously cannot be considered privileged information. There was a lack of clarity in these areas, and much individual differences in the way that the courts utilize the psychiatric assessment.

It was agreed that if the psychiatrist acts in this regard for the court, that the question of privilege was clearly at the discretion of the court.

(4) Confidentiality of Psychiatric Records

Concern was expressed by a number of psychiatrists as to the question of confidentiality and privilege when a psychiatrist's private file of a patient was subphoena'd by the court. It is obvious that these files would contain material related to the psychotherapeutic treatment of the patient. If privilege is to be granted to a psychiatrist when he is involved in psychotherapy, then this privilege clearly has to extend to his files.

It was the Committee's opinion that if the court maintained the right to subphoena a psychiatrist's file that the court be asked to exercise great discretion in the

utilizing of this material, and would request and require that the psychiatrist be present to interpret the material in the file and be prepared to protest if some of its content were deemed by the psychiatrist to be privileged.

The problems that are presented by the investigation of health insurance claims, in which the physician's files are liable to be seized by the authorities for investigation of services rendered, presents a relatively new problem of confidentiality.

In our opinion some method to assign the confidentiality of the physician's file must be stabilized.

Although it is obvious that the right to investigate and substantiate claims made by the physician for service rendered to a patient is justified, it in no way follows that the seizure of records that contain confidential information shared in good faith with the physician, should be seized and examined in detail.

It well may be that new methods of maintaining records, that identify an analysis of services rendered to a patient, separate from those clinical records that contain condifential material, may have to be established.

We would consider that the seizure of all clinical files with subsequent review of the material by an investigating agency is a transgression of the patient's rights to be assured that the information he has shared with the psychiatrist is confidential.

In reviewing this issue we were unable to specifically assign our concern to the specialty of psychiatry, as it would be equally applied to all medical specialties.

(5) Confidentiality of Hospital Records

It was recognized that the court had the privilege of subphoenaing hospital records. It was the opinion of the Committee that this raises very important questions as to how the material in the record is to be used. It was the opinion of the Committee that when such a record is subphoena'd by the court that it should be accompanied by a suitable professional person from the hospital staff, in order to interpret the material to the court, otherwise a disservice either to the court or to the patient might occur.

(6) Confidentiality between a Psychiatrist and a Child or Adolescent

The question of privilege between a psychiatrist and a child or adolescent, who is not of consenting age,

was discussed.

It was agreed that the major issue was an ethical one and that the discretion to divulge information, shared by the child, to the parent was an individual ethical decision to be made by the therapist. Legal advisers to the Committee were of the opinion that there was very little likelihood of tort or liability against the psychiatrist if he exercised sound clinical judgment in the best interests of the child or adolescent.

SUMMARY OF RECOMMENDATIONS

(1) We have defined that confidentiality is the prime feature of the psychotherapeutic relationship between the psychiatrist and the patient.

We are of the opinion that this must be protected if therapy is to be successful and, consequently, we are strongly recommending that legislation be sought to provide the psychiatrist the privilege of refusing to divulge information shared with him in confidence by the patient, or others, in the process of psychotherapy.

It is our opinion that to leave this issue to the discretion of the court is not sufficient safeguard, nor is it

sufficient to rest on precedent in cases where the privilege has been granted.

(2) It would be our recommendation that in offering a psychiatric assessment of a client for a defence counsel that we be assured that we are acting as the counsel's agent and that the privilege that is inherent in the lawyer-client relationship be extended to us. We recognize that following the submission of a report to defence counsel, it becomes his prerogative as to how he will make use of this report. If he submits the report to court, we appreciate that we must be willing to be cross examined in detail.

If, following the initial assessment of the client, however, the person is involved in therapy prior to the trial, we would expect that information derived in the process of therapy, in so far as it has a bearing on the court proceedings, may be cross-examined. We would, in this regard, request that the court's discretion be applied.

We would request that the court's discretion be applied if certain questions that would involve third parties, or issues which do not have direct relevance to the proceedings, are raised in court or in the process of examination.

(3) We would recommend that where a psychiatric assessment is ordered under Statutory authority by the court that this report be utilized with great discretion. An example cited by one psychiatrist, where his report submitted to the Crown was quoted verbatim in the press, exemplified in our opinion an inappropriate distribution of the assessment. We would comment that rarely does this type of assessment present a problem of privilege.

(4) We would recommend that the psychiatrist's records maintained in the process of treatment of a patient be seen as confidential and privileged. If the court see fit to subphoena such a file, the clinical information in this file should be considered as confidential and privileged.

We recognize the paradox involved in this recommendation and again would make a plea for the discretion of the court and would strongly recommend that the psychiatrist be present in the court to interpret the material.

If files are seized in the process of police investigation, or in the investigation of a psychiatrist's business practice, in our opinion the material should be held in confidence and the identity of individual patients in no way be made public property.

(5) We would recommend that when hospital records are subphoena'd by the courts that such a record should be accompanied by a competent professional person who would interpret the material to the court. A number of instances have been described where hospital files have been subphoena'd and where no such professional person was available to interpret the material.

Hospital records have always been considered to be highly confidential and any release of information from such files to other physicians or agencies has only been granted after obtaining a formal release from the patient. This principle should be strongly adhered to and the whole issue of dealing with records - in some cases it may be many years into the past - should be carefully considered by the Law Reform Commission.

Ontario Association of Professional Social Workers

This brief is submitted by the Ontario Association of Professional Social Workers on behalf of its members. Membership in the Association carries with it two criteria of particular importance in any consideration of "Privileged Communication": (a) To be eligible for membership in the Association one must have achieved a prescribed level of professional education and (b) Members must subscribe to

the Code of Ethics of the Association.

At the outset we would like to commend the Commission on the quality of its study paper on "Professional Privileges before the Courts". In discussing social work, however, the paper does not accurately reflect the nature of social work practice nor the variety of work environments in which the members of our Association are employed.

Members of the Association are employed in a wide range of settings. Child welfare, hospitals and clinics, schools, probation services, family agencies, youth services, community centres, courts, are some of the more typical ones. Regardless of the setting, the common factor is that the goal of social work is to help people who find themselves in distress. Such distress may be personal, or inter-personal - as with marital, custody, family problems. It may be complicated by illness, by brushes with society. Techniques and methods of help vary.

Our interest in the idea of "Privileged Communication" arises because in our efforts to help, the content of our contacts frequently include very personal information which members of the Association often would be reluctant to disclose. Our reluctance would be based on the fact that such

information is given to us in the course of getting help with the expectation that it will not be disclosed. To disclose it would seem to be a breach of that confidence and at variance with our Code of Ethics.

After studying the working paper on Professional Privileges before the Courts, we were strongly tempted to come out in full support of privileged communication for all professional social workers. We, however, were persuaded to the point of view that we should support the concept that the presiding judge in a court of law have the right and power, laid down in legislation (as opposed to simply relying on certain judgments) to exercise discretion in granting the protection of privileged communication. We recommend this position for two reasons:

1. It is probably unnecessary to have a full right to privileged communication since the courts presently seem to exercise reasonableness and discretion when social workers are asked to testify on matters relating to their clients. If this factor did not exist, if social workers were being asked to divulge confidence indiscriminately and on a large scale, if sensitivity to the therapeutic implications was absent, then we would have no other recourse but to strongly support full privileged communication.

2. We would not like to see the powers of the court unnecessarily obstructed, tying its hands as it were from obtaining as full and as complete information as possible in the execution of justice.

If the courts are seriously hampered in obtaining readily accessible information we believe that this will ultimately be against society's best interests and against the preservation of justice.

Therefore we are prepared to support the suggestion made in the study paper and stated as follows:

1.* The legislative recognition of the attorney-client privilege, of its conditions and limitations;

2. The granting of discretionary power to the courts in all other cases, when the courts believe that it would be unfair and inequitable to compel a witness to testify as to facts confided in him in the exercise of his profession and for the purpose of obtaining professional assistance, and that the prejudice caused by disclosure would be greater than the benefit which the administration of justice might derive from it.

*Law Reform Commission Study Paper #12, Professional Privileges before the Courts 1975, p. 21

We would further support two of the three principles cited in the study paper:

1.* The protection privileges relate, without exception, to all the confidential facts revealed or observed during the professional relationship;

2. The privilege belongs under all circumstances to the person who confides. The latter can renounce or waiver his right provided he does so voluntarily, being aware of the consequences; We believe that these suggestions are just as applicable to all of the helping professions and not exclusive to social work. We would not, therefore, be prepared to recommend the above suggestions, in isolation to the other helping professions. Certain helping professions should not be singled out as being given privileged communication while others are not afforded the same privilege. We would suggest that they all, as a group, be treated in a like manner.

*Law Reform Commission Study Paper -12, Professional Privileges before the Courts 1975, p. 21

Primrose

I have just read study paper #12, Professional Privileges before the Courts, and think it is excellent.

I would suggest an addition under the heading of Ratification of Privilege for other than Professions, of confidences between client and chartered accountant, which has become a very important aspect of business life in the last few years. I would think that a chartered accountant be extended the same privileges that a solicitor has with his client and can see no difference between the two in principle, so you might consider it.

Primrose

Thanks for your letter of August 22nd, about Professional Privileges Before the Court. I suppose in the case of other professions, it could be left to the discretion of the judge, however, it seems to me it might be better to define the privileges, because in many cases I am sure they are not claimed. I had a trial a year or two ago, which I think was reported, where I allowed professional privilege, in the case of a chartered accountant, which from some subsequent letters I got, I gathered was somewhat of an innovation. I would suggest, that particularly in the case of the C.A.S, probably the privilege should be defined. With kind regards

and best wishes for your continuing work.

Osborg

This epistle here refers to your paper: Evidence: Professional Privileges Before the Court.

About a year ago, there has been an exchange of letters between you Chairman, Mr. Justice E.P. Hartt and myself on the subject of privileged status for volunteers working in emergency telephonic help services.

I would now like to plead their cause: I would, in fact, ask you to consider them entitled to be included in that special class of people who enjoy privileged status before the Courts of this country.

Before I get into medias res, I want to make it perfectly clear that I am making this appeal as a private citizen without any official position in any Canadian organization connected with help-line-services. Having said this I want to say that I have been interested in and worked with organizations operating in the field of emergency telephonic help for about eight years.

The volunteer -- whilst manning an emergency

telephone -- is a professional within the definition of the term professional. He or she has been trained by professionals and whilst on duty is under the supervision of professional persons. Therefore, he or she should therefore be offered the protection which, I think, the general public justifiably expects a person who handles confidential information, should possess.

The basis of operation -- and the acceptance by the general public -- of the Help-Line service IS confidentiality. Without it, it can not exist. Confidentiality is in fact the Alpha and the Omega of the service.

It seems to me that the Wigmore Definition -- if it may be so called -- clearly and unequivocally describes the Help-Line service. Based on this rather general, and generous, definition, I would like to ask the Commission to include the volunteers of the Help-Line-type services in the group of privileged professional persons.

Quoting from your paper, page 20, para 2: 'The recognition of privilege does not mean absolute protection for all confidences in all cases and under all circumstances.' I quite agree.

The decision of what should and should not be included in the final definition must obviously be left to the Members of the Commons, but on the other hand the Commission might well include the category of telephone volunteers in its list of recommended professions to the Members of the House.

Hemmerick

Your recent paper, Part 12 - Evidence, has prompted me to write to you to say that the Canadian Council of Churches has had a Commission dealing with confidentiality in the Courts as it applies to religious advisers. The proposal has gone forward to the various churches before being presented to you in a formal way, but we considered the Evidence Acts of Newfoundland and Quebec (civil code, Article 308), which both provide a form of privilege. It is our draft suggestion that the Evidence Act should be amended to include the following two sections:

"1. Priests or other ministers of religion cannot be obliged to divulge what has been revealed to them confidentially by reason of their status or profession.

2. For the purposes of Section 1, a Priest or other Minister of Religion shall mean a person who has been

ordained or appointed according to the rites and usages of the religious body to which he belongs, or is, by the rules of that religious body, deemed ordained or appointed, and that the religious body to which the person belongs is permanently established both as to the continuity of its existence and as to its rites and ceremonies."

I must emphasize that this has not as yet been approved by everyone, but I have no reason not to suspect that it will not be approved and I thought you might be interested, at least in some of our thinking.

Our real concern has been that so many clergy act as religious counsellors in criminal matters as well as in divorce matters, and particularly insofar as their role in the Courts is concerned we feel that any statements made to them be brought out in evidence, although probably the Priest or minister involved would refuse to divulge it. It would be unfortunate to have such a confrontation.

I am enclosing herewith the Newfoundland and Quebec statute references as well as the 1964 private member's Bill, C-122 which unfortunately was not passed.

Haines

My comments on your study paper will be limited to the problems of the mentally disordered. As you know, I am the Chairman of the Ontario Lieutenant Governor's Board of Review and each year our Committee must re-examine approximately 200 warrant cases. Not all of these people are in institutions. Many are in the community. As a result, we have had the opportunity of encountering a great many practical problems.

First of all, I would like to refer you to the Manual for the Classification of Psychiatric Diagnosis. It is based on the international classification of diseases and can be gotten from Statistics Canada Health and Welfare Division. You will be amazed at the hundreds of mental disorders and their duration and treatment. Between the insane within section 16 of the Criminal Code and the normal, there is not a clear dividing line, rather there is a wide spectrum. And within that spectrum the condition of the patient varies and many recover and are returned to the community.

Psychiatrists are medical doctors who treat mental symptoms. Often they disagree on the diagnosis and prognosis. Frequently the basic disorder continues but may respond to the miracles of modern chemotherapy.

The treatment is usually on a team basis, both in and out of institutions. There may be many psychiatrists, psychologists, hospital nursing staff, social workers and others. Each reports to the other. Without doubt, communication to these people and communication by the patient to others are accorded a substantial degree of privacy because without it communications so essential to diagnosis and treatment would be impaired. On the other hand the treating team has a duty to the patient and society. A patient whose condition is apt to be dangerous to himself or others, yet relatively safe if kept on medication, is one whom the team must warn others who may be affected. Indeed if they do not do so I think the doctor and hospital and all those treating the patient may be liable for those suffering injury including the patient.

Psychiatric hospital histories bear little resemblance to histories in ordinary hospital cases. Psychiatric histories are based on observations by the psychiatrists, the staff and an amazing amount of information collected from others, often from the time of the patient's birth. The informant may not be reliable, he may suffer a mental disorder himself. Everything of possible interest is often recorded in the history by nurses, ward attendants and other patients. Batteries of tests at frequent intervals are taken. The

patient's recorded thoughts in regard to his psychotherapy sessions are often revealing - as are those of the therapist. At frequent intervals there are staff conferences in which they may disagree. The psychiatrists often disagree. Bizarre but possibly true items are recorded. Sexual fantasies may not be entirely fantastic. Mental disorders often travel in cycles and at times the patient is frankly psychotic and at others he is in remission. It has been my experience that never having seen these histories few of the other professionals appreciate them. If they did they would recognize how destructive they could be to the patient and to others. In my opinion a sound set of rules should be propounded as to what must be recorded in a psychiatric history and provision made that no disclosure should be made other than to treating personnel without order of the court.

Finally in regard to the witness. Questions concerning his mental disorder could be utterly destructive of his reputation and make the witness box a place of terror. I am enclosing a copy of a recent address I made entitled "Pity the Poor Witness" which touches on this subject. We must get away from the effect of Toohey and the Wray cases. Relevancy is not the sole answer. If so, litigants could be tyrants. Discretion in the trial judge to balance the interest must be reestablished.

May I respectfully suggest that before formulating a Code your Committee confers further with clinical psychiatrists, trial judges and trial lawyers. My emphasis on clinical experience is in my opinion absolutely essential. The danger in future legislation lies in dedicated civil rights theorists dedicated to logic and ignoring the practicality so essential in dealing with the mentally disordered.

Fulton

Recent newspaper comment on Mr. Justice Edson Haines' "call for a change in the law so that a psychiatrist cannot be forced to reveal in court what a patient said in consultation", has focussed our attention in this area.

The Toronto Star in an aditorial of February 4, 1975 ended by saying that the clergy should be given positive protection. We wish to support this position.

In the instance of clergy or priests there is in Ontario no instance on record that the privilege of the confessional or ministerial consultation has been breached. Nor can we see a court demanding such information from a priest, minister, or Christian Science practitioner.

Such privileged information which has been recognized

by law should, we feel, be formalized and put into legislation.

Presently Canadian courts, with the exception of Newfoundland and Quebec, can require clergymen to disclose confidential information received as clergymen.

The Church Manual of The First Church of Christ, Scientist in Boston, Massachusetts, Article VIII Section 22, page 46, under Practitioners and Patients reads,

> Members of this Church shall hold in sacred confidence all private communications made to them by their patients; also such information as may come to them by reason of their relation of practitioner to patient. A failure to do this shall subject the offender to Church discipline.

We note the reference to "sacred confidence". Should change in the law be contemplated, we would wish to support the extension of privileged information to include this ministerial religious category in the legislation.

This view of the members of The Church of Christ, Scientist has also been expressed to the Honourable Otto Lang, Minister of Justice for Canada.

Ordre de la Chambre des Notaires

L'Ordre des Notaires souscrit pleinement aux lignes générales de la politique législative suggérée dans le document de la Commission. Le droit fondamental du citoyen de consulter un conseiller juridique doit s'accompagner d'une protection adéquate des confidences ainsi faites.

Bien qu'assurés que l'expression de conseiller juridique comprenne le notaire, nous croyons cependant qu'il vaudrait mieux expressément inclure celui-ci dans la définition. Si cette suggestion était retenue, la première règle énoncée à la page 24 du document pourrait se lire comme suit:

(1) Une reconnaissance législative du droit au secret du conseiller juridique et de ses conditions et limites. Au Québec, le terme de conseiller juridique signifie un avocat ou un notaire.

Dans cette perspective, le présent texte a pour but de démontrer les principes suivants:

1. Le droit du notaire au secret a toujours été reconnu au Québec;

2. Le droit du notaire au secret est reconnu dans le droit fédéral canadien actuel;

3. Le notaire est un conseiller juridique, la profession juridique au Québec étant partagée dans son exercice entre les avocats et les notaires. Il apparaît ainsi nécessaire de maintenir le droit au secret notarial dans la perspective d'une refonte du droit fédéral canadien.

I - Le droit du notaire au secret en droit québécois.

Bien qu'il ait sans doute des racines plus profondes remontant au treizième siècle, (1) le secret du notaire français est formellement consacré par l'ordonnance de Villers-Cotterets promulgée en 1539 par François Ier. Il y était interdit aux notaires de révéler "le secret des parties". (2) Traitant du secret professionnel dans l'ancien droit français, Perraud-Charmantier (3) écrit:

"L'obligation au secret du notaire n'est pas absolue: le client peut toujours le délier, si le secret n'intéresse que ses affaires personnelles. Quant à l'objet de cette obligation, Domat estime, qu'il doit comprendre non seulement les actes authentiques eux-mêmes, mais encore tout ce qui s'est passé avant leur rédaction, le désir des parties qui confient, à cette fin, leurs secrets au notaire étant évidemment de compter sur sa discrétion. Le notaire est déjà considéré à cette époque comme le dépositaire de la confiance publique. Le théorie de Domat, controversée et

hardie, a été de notre temps développée par la doctrine notariale.

La plupart des auteurs enseignent, que cité en témoignage et questionné relativement à des faits en rapport avec les actes qu'il a rédigés, le notaire doit garder le silence, qu'il s'agisse d'une affaire civile ou criminelle: en toute hypothèse, il est dispensé de témoigner."

Tel était l'état du droit français lorsque la fonction notariale commença à être exercée en Nouvelle-France par un greffier dès 1621 (4). Les années qui suivirent marquèrent l'apparition des notaires seigneuriaux. Au lendemain de sa création, en 1663, le Conseil Souverain nommait le premier notaire royal à Québec.

La littérature juridique sur le secret du notaire en Nouvelle-France est quasi inexistante. Il apparaît cependant indiscutable que, dans la nouvelle colonie régie par la coutume de Paris, le droit des notaires au secret ait été respecté à l'instar de celui de leurs collègues de la métropole. Ce secret, on le verra plus loin, semble avoir toujours fait partie de notre droit.

Le notariat de la province de Québec, après 1760,

connut la même survie que les lois civiles françaises auxquelles il était associé historiquement et institutionnellement. Toléré pendant le régime militaire, mis en veilleuse pendant dix ans à compter de 1764, le droit français était officiellement maintenu par l'Acte de Québec de 1774. Il n'a jamais cessé d'être en vigueur: la loi de 1857 (5) décrétant la codification des lois du Bas-Canada en matières civiles le confirme en effet dans son préambule:

"Considérant que les lois du Bas-Canada en matière civile sont principalement celles qui, à l'époque de la cession du pays à la couronne d'Angleterre, étaient en force dans cette partie de la France régie par la coutume de Paris, modifiées par des statuts de la province, ou par l'introduction de certaines parties des lois d'Angleterre dans des cas spéciaux..."

Si le droit civil français n'a connu aucune solution de continuité au Québec du XVIIe siècle jusqu'à nos jours, il en est ainsi de l'institution notariale qui, sous l'Union, devait posséder sa première loi organique.

Parallèlement, le droit du notaire au secret avait été maintenu depuis 1760. La preuve en est fournie par les commissaires à la codification. Dans leur huitième rapport

publié en 1866 et traitant de la procédure, les commissaires expliquent: "Les commissaires ne se sont par crus appelés à rédiger un code de procédure nouveau, mais se bornant à remplir les exigences du statut, ils ont exposé la procédure telle qu'elle paraît être actuellement...". Ainsi, proposèrent-ils l'article 279 qui allait devenir 275 au Code de Procédure Civile de 1867:

> 275. Il ne peut être contraint de déclarer ce qui lui a été révélé confidentiellement à raison de son caractère professionnel comme aviseur religieux ou légal, ou comme fonctionnaire de l'Etat, lorsque l'ordre public y est concerné.

Or, à l'article précité, le rapport des commissaires ne suggère aucune modification du droit existant. Bien plus, il cite entre autres comme autorités le "Parfait Notaire" .83 et 1 Pigeau 278 pour établir la conformité de cet article au droit alors en vigueur.

Dans la doctrine et la jurisprudence québécoises, il n'y a jamais eu de doute que l'expression aviseur légal mentionné à l'article 275, comprenne le notaire. Ainsi, le Code de Procédure Civile de 1867 a-t-il le double effet d'établir l'existence antérieure du droit du notaire au secret et de la consacrer par un texte de loi qui, bien qu'apparaissant à un code de procédure, n'en constitue par moins un principe

juridique fondamental (6).

Ce principe d'ailleurs allait être réitéré dans le droit public: le Code du Notariat de 1883 (7) mentionne en effet pour la première fois le devoir du secret:

18. Les principaux devoirs des notaires, outre ceux indiqués ci-dessus ou qui peuvent se trouver dans d'autres dispositions du présent code, sont:

9. De garder le secret des parties confié d'office;

En 1897, le nouveau Code de Procédure Civile, à l'article 332, reprenait entièrement le texte de l'article 275 du code précédent.

Le Code de Procédure Civile de 1966 comportait l'article 308:

> 308. De même, ne peuvent être contraints de divulguer ce qui leur a été révélé confidentiellement en raison de leur état ou profession:
>
> 1. Les prêtres et autres ministres du culte;
>
> 2. Les avocats, les notaires, les médecins, et les dentistes; à moins, dans tous les cas, qu'ils n'y aient

été autorisés, expressément ou implicitement, par ceux qui leur ont fait ces confidences;

3. Les fonctionnaires de l'Etat, pourvu que le juge soit d'avis, pour les raisons exposées dans l'affidavit du ministre ou du sous-ministre de qui relève le témoin, que la divulgation serait contraire à l'ordre public. (C.P. 332).

Récemment, cet article 308 n'a été maintenu que pour le fonctionnaire de l'Etat et a été, pour le reste, remplacé par l'article 9 de la Charte des droits et libertés de la personne:

> 9. Chacun a droit au respect du secret professionnel.
>
> Toute personne tenue par la loi au secret professionnel et tout prêtre ou autre ministre du culte, ne peuvent, même en justice, divulguer les renseignements confidentiels qui leur ont été révélés en raison de leur état ou profession, à moins qu'ils n'y soient autorisés par celui qui leur a fait ces confidences ou par une disposition expresse de la loi.
>
> Le tribunal doit, d'office, assurer le respect du secret professionnel.

Cette nouvelle disposition maintient le droit au secret des notaires auxquels la loi du notariat (8) présentement en vigueur impose le devoir suivant:

> 15. Les principaux devoirs d'un notaire, outre

> ceux qui lui sont imposés par la présente loi, sont:
>
> a) de ne pas divulguer les faits confidentiels dont il a eu connaissance lors de l'exercice de sa profession, à moins qu'il n'ait été expressément ou implicitement autorisé à le faire par ceux qui lui ont fait ces confidences:

Au terme d'une existence plusieurs fois séculaire en France et au Québec, le secret du notaire conserve aujourd'hui dans notre droit une position privilégiée (9).

II - Le droit du notaire au secret dans le droit fédéral canadien.

Le droit fédéral actuel assure implicitement ou explicitement, selon les lois, la protection judiciaire du secret notarial.

La très grande majorité des lois fédérales, ne comportant aucune disposition sur le secret professionnel, les instances mues en vertu de ces lois sont régies par le droit de la preuve actuellement en vigueur au Québec (10), lequel garantit explicitement le secret professionnel du notaire. La situation juridique se transformerait radicalement si, comme le propose le document de la Commission, la loi sur la preuve au Canada réglementait le secret professionnel: la nouvelle réglementation empêcherait tout recours en ce domaine au droit du Québec. Aussi, nous apparaît-il

nécessaire, dans la perspective de cette réforme, d'assurer d'une façon explicite la protection judiciaire du secret professionnel des notaires.

Le Parlement canadien a déjà posé des jalons en ce sens. La loi de l'impôt sur le revenu (11), reprenant le texte de la loi antérieure (12), assure le "privilège des communications entre client et avocat". L'avocat est ainsi défini:

> 232. 1 c - "avocat" signifie, dans la province de Québec, un avocat ou notaire et, dans toute autre province du Canada, un barrister ou un solicitor.

Le Code Criminel ne reconnaissant que le droit supplétif issu de la Common Law (13) assure-t-il au notaire du Québec le respect judiciaire de son secret? L'analyse des fonctions du solicitor autorise une réponse affirmative.

Le juge Irénée Lagarde (14) commente le problème en ce sens:

> Avocats et notaires:
>
> Dans les provinces anglaises du pays, le domaine légal n'est pas divisé contrairement à ce qui existe dans Québec, entre avocats et notaires. Tout le domaine légal, dans les autres provinces, relève des "attorneys".

Si, dans Québec, il n'y a pas de doute que l'avocat, membre en règle du Barreau, est soumis au secret professionnel, en est-il de même du notaire, membre en règle de la Chambre des notaires? En matières civiles, le code du notariat, se référant à l'article 332 du code de procédure civile, reconnaît l'existence du secret professionnel des notaires. En est-il de même en matières criminelles? Selon le "common law", il paraît bien établi que toute communication relative à la vente, à l'achat, à l'hypothèque d'un droit immobilier est privilégiée et à l'abri de toute divulgation volontaire ou forcée par "l'attorney" ou de toute divulgation forcée par le client.

In the Matter of the executors of Aitkin (1820) 4 Barn. and Ald. 47 (p. 49), 106 E.R. 855 (p. 856):

(Juge Abbot): En tant que le transfert de titres immobiliers ("conveyance") exige la connaissance de la loi, la confiance du client repose sur le fait que son représentant est un "attorney".

Shellar v. Harris (1833) 5 Car. and P. 592, 172 E.R. 1113:

(Juge Parke): Une demande de rédaction d'un acte

de transport d'une propriété immobilière est une consultation professionnelle.

Carpmael v. Powis (1846) 1 Phillips 687, 41 E.R. 794:

(Juge Lyndhurst): Il est impossible de diviser les devoirs du "solicitor". Je considère que tous ces devoirs (préparation d'un acte de transfert d'un immeuble fixation des enchères, etc.) font partie d'une seule opération, à savoir la vente d'un immeuble pour laquelle on emploie ordinairement un "solicitor". Dans cette affaire, le tribunal décide que les communications entre un client et un "solicitor", aux fins de préparer un acte de transport d'un immeuble, de fixer les enchères, etc., sont privilégiées.

Harring v. Clobery (1842) 1 Phillips 91, 41 E.R. 565:

(Juge Lynhurst): Lorsqu'un client emploie un "aviseur légal" ("solicitor") en sa qualité professionnelle pour traiter d'affaires professionnelles, j'émets comme règle que toutes les communications qui ont lieu entre eux, dans le cours et pour le bénéfice de ces affaires, sont privilégiées peu importe qu'elles se rapportent ou non à des sujets

relatifs à un litige commencé ou en perspective.

De son côté, Wigmore (15) traite ainsi du "privilege" de "l'attorney" dans des domaines qui sont ici généralement réservés aux notaires:

"It has already been noticed (ante, al. 2309) that the fact of execution of a deed has commonly been declared to be without the privilege, partly because it was not a subject of communication at all, and partly because, if a communication, it was not impliedly a confidential one. On the other hand, the contents of the deed are generally within the privilege (ante, al. 2308). No further examination of the principle as applied to deeds is here necessary.

But for wills a special consideration comes into play. Here it can hardly be doubted that the execution and especially the contents are impliedly desired by the client to be kept secret during his lifetime, and are accordingly a part of his confidential communication. It must be assumed that during that period the attorney ought not to be called upon to disclose even the fact of a will's execution, much less its tenor."

Le "privilege" de la common law s'attache au

conseiller juridique et non au seul "barrister". "A client whether party or a stranger, écrit Phipson (16), cannot be compelled, and a legal adviser (whether barrister, solicitor, the clerk or intermediate agent of either, or an interpreter) will not be allowed without the express consent of his client, to disclose oral or documentary communications passing between them in professional confidence". Il serait donc illogique de restreindre le "privilege" de la common law, alors que les auteurs classiques prennent le soin d'énumérer les diverses activités particulières du conseiller juridique. Le fait que ces activités puissent être exercées par deux types de professionnels: avocats, notaires, ne saurait modifier la portée du "privilege".

Le notaire québécois remplit les fonctions du "solicitor" et bénéficie du "privilege" conféré par la common law dans une instance régie par la code criminel.

III - Le Notaire, un conseiller juridique.

L'Ordre des Notaires ne saurait se borner à démontrer que ses membres possèdent la protection judiciaire de leur secret dans le droit actuel. Il convient de plus d'établir que, dans la perspective d'une réforme du droit, le notaire doit conserver cette protection.

Les raisons données dans le document de la Commission à l'appui du secret du conseiller juridique militent pour la plupart en faveur du maintien du secret notarial.

Il importe donc de revenir sur le principe que le notaire remplit la fonction d'un conseiller juridique.

La passation de l'acte authentique et la représentation du client devant les tribunaux constituent les deux pôles de la profession juridique au Québec. Alors que le domaine de l'acte authentique est l'attribut des notaires, le mandat "ad litem" est réservé aux avocats. Entre ces deux points, les activités des membres des deux corporations se chevauchent continuellement. Il y a d'ailleurs de plus en plus d'avocats qui se spécialisent dans le droit immobilier, l'examen des titres et la planification successorale.

Une première observation ferait réaliser l'illogisme d'une situation juridique dans laquelle le secret de ces avocats serait protégé alors que celui des notaires ne le serait pas.

Le notaire est primordialement un conseiller juridique. Loin d'atténuer cette qualité professionnelle, le caractère d'officier public en découle. C'est, en effet, à

ce titre de professionnel du droit possédant la préparation académique requise, que la loi autorise le notaire à conférer l'authenticité à ses actes.

Il ne saurait d'ailleurs exister aucune différence au plan des relations client-professionnel entre en notaire instrumentant un testament authentique et un avocat qui prépare un testament sous la forme dérivée de la loi d'Angleterre.

La loi du notariat (17) déclare:

> 2.1. Les notaires sont des praticiens du droit et des officiers publics dont la principale fonction est de rédiger et de recevoir les actes et contrats auxquels les parties doivent ou veulent faire donner le caractère d'authenticité qui s'attache aux actes de l'autorité publique et en assurer la date.
>
> 4.3. Nonobstant toute loi à ce contraire, tout notaire peut prendre les titres de "conseiller juridique" ou de "title attorney".
>
> 4.(3) Notwithstanding any law to the contrary, any notary may assume the title of "legal adviser" or "title attorney".

Les notaires peuvent aussi fréquemment devenir les mandataires de leurs clients: le Code civil le prévoit (18).

Le droit de représenter leurs clients devant les

tribunaux dans des procédures non contentieuses appartient aux notaires en vertu de leur loi constitutive (19). Un jugement déclaratoire récent de la Cour Supérieure (20) a décidé que la loi du notariat autorisait les notaires à "représenter leurs clients dans les procédures en adoption."

Si on en croit Wigmore (21) la justification ultime du secret professionnel serait d'assurer au public la liberté de consulter un conseiller juridique.

De plus, le rôle joué par le notaire dans la vie personnelle et familiale des individus donne au secret professionnel du notaire une exceptionnelle gravité. Adoptions, tutelles, donations, conventions matrimoniales, modifications à ces conventions pendant le mariage, testaments, autant d'actes juridiques qui constituent des moments importants de l'histoire d'un individu et amènent des révélations confidentielles. "Le notaire, écrit Me Jean-Louis Baudouin, a toujours été considéré, avec raison d'ailleurs, comme le gardien de la paix des familles. De par sa profession et à raison de l'exercice de cette dernière, il est amené beaucoup plus que l'avocat, à pénétrer dans l'intimité familiale. Les secrets qui lui sont confiés intéressent en général beaucoup plus de personnes que le seul confident; ils intéressent toute la cellule familiale. Il est

donc normal et juste que le notaire soit tenu au secret le plus strict, car de par leur nature, les actes qu'il reçoit (testaments, donations, contrats de mariage, etc.), sont pour la plupart destinés à maintenir chez leur rédacteur le secret absolu des affaires de famille." (22).

CONCLUSION

L'Ordre des Notaires apprécie hautement le souhait de la Commission de Réforme du Droit du Canada de recevoir des commentaires. Dans cet esprit de collaboration, l'Ordre soumet à l'attention de la Commission le présent mémoire.

NOTES

1. Me Paul-Yvan Marquis, La nature juridique et les causes principales de la responsabilité civile du notaire officier public. Thèse de doctorat, 1972, page 389.

2. Marquis, op. cit. p. 389.

3. André Perraud-Charmantier. Le secret professionnel, ses limites, ses abus. Paris 1926, p. 67.

4. André Vachon. Histoire du notariat canadien 1621-1960. P.U.L. 1962, p. 10.

   Les notes sur l'histoire du notariat proviennent de André Vachon, op. cit., de J. Edmond Roy. Histoire du notariat au Canada depuis la fondation de la colonie jusqu'à nos jours, 4 vol. Lévis 1899-1902 et de Thomas Chapais. Cours d'histoire du Canada, 8 vol. Montréal 1944.

5. Statuts Refondus pour le Bas-Canada, ch. II

6. Me J.L. Baudouin. Secret professionnel et droit au secret dans le droit de la preuve. Paris 1965 N. 9, p. 9.

7. Code du notariat. 46 Vict. ch. 32 - art. 18 - al. 9.

8. Loi du notariat. 1968 L.Q. ch. 70 - art. 15 - al. a.

9. En France, le secret notarial s'est aussi maintenu. Voir le document même de la Commission de Réforme du Droit.

10. Loi sur la preuve au Canada. Art. 37.

11. Loi de l'impôt sur le revenu. 19-20-21 El. II, ch. 63 art. 232.

12. Loi de l'impôt sur le revenu, 1952, S.R.C. ch. 148 - art 126A.

13. Code criminel. Art. 7.

14. Irénée Lagarde. Droit pénal canadien, Mtl. p. 2650 et s.

15. Wigmore. On Evidence, 1940, vol. 8 No. 2314 p. 610

16. Phipson. On Evidence, 11e éd. n. 585 p. 584.

17. Loi du notariat, 1968 L.Q. ch. 70 - art. 2 et alinéa 3 de l'art. 4.

18. Voir art. 1732 C.C. et, pour ne citer qu'un auteur: André Nadeau et Richard Nadeau: Traité pratique de la responsabilité civile délictuelle. Montréal 1971 N. 281, p. 291.

19. Loi du notariat 1968 L.Q. ch. 70, alinéa E de l'art. 9.

20. La Chambre des Notaires du Québec et la Cour de Bien-Etre Social et le Barreau du Quebec, 1971 R.P. p. 241

21. Wigmore, op. cit. n. 2291. "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed..."

22. J.L. Baudouin. Secret professionnel et droit au secret dans le droit de la preuve. Paris 1965, p. 69 N. 96.

Part II

Authentication and Identification

Sections 46 to 48 No comments

Title V

Methods of Establishing Facts

Part I General

Section 49 No Comments

Part II Witnesses

General

Section 50 Affirmation

Section 51 Instructions by Judge

Provincial Court Judges

In my opinion and experience it is a rare witness that takes the oath prior to giving evidence with an attitude of conscientiously or religiously binding his conscience as between himself and God or a Supreme Being. It is my opinion that people tell the story that they want to tell without

thought of eternal damnation or other pious recriminations. I believe that the fear of being caught in a lie and the possibility of being charged with perjury or some like offence is the motivation whereby witnesses adhere reasonably closely to the truth and accordingly a sanction compelling the truth by fear of punishment upon a subsequent conviction for perjury or some like offence to me would be the most effective manner of assuring as best as we can that the witness is telling the truth.

Accordingly I believe that this legal sanction should be clearly stated in an affirmation calculated to impress the witness with his duty to tell the truth. For those of real conscientious scruples it is anticipated they would tell the truth regardless of the form of oath or affirmation.

With respect to children of tender years the only change I would contemplate is to substitute an affirmation setting out the sanction as mentioned above for the religious oath and have the trial judge examine the child as to his understanding of the necessity of telling the truth.

As a postscript, I have often observed people of a non-Christian faith glibly swear an oath on the Bible which I do not believe would be binding on their conscience,

e.g. Chinese, Japanese, Hindu, etc.

The Court should make an extensive inquiry into the witness' theological understanding if the oath per se is to be taken as recommending credibility.

If a witness completely rejects religion and does not believe in God there is absolutely no reason for him to take the Oath. If the Oath is to be taken as recommending credibility, what assurance does the Court have that this witness will testify truthfully?

The Oath; it appears to me that many of our young people are today falling away from the Church and any religious beliefs. It appears that any oath taken on the Bible to many of them means nothing. I do feel that it does not compel them to tell the truth. I do feel however, that a simple declaration that he will tell the truth would be preferable and I feel that the word "Oath" should be removed from the Statutes entirely. I feel that the oath per se does not at the present time recommend credibility, so that I do not feel that the Court should inquire into the witness' theological understanding. In my experience I believe that a declaration would be just as efficient in assuring the truth from the witness as the present form of Oath. With respect to

advising the witness with regard to perjury I feel that perjury is a well known law and it should not be necessary to state the definition of perjury to a witness when he makes a declaration.

I suspect in many instances, the best assurance of truth is the knowledge by the witness that he is subjected to cross examination and the fact that his evidence is viewed in the light of other evidence available. No doubt the appeal to conscience (the oath) has a very important affect on some persons, but it may be rather difficult to distinguish between those to whom conscience appeals and those to whom it does not. Our Courts simply do not have the time to enquire with any depth as to a witness' theological understanding. Indeed, our experience with such enquiries when trying to ascertain whether a young person can be sworn, indicates the futility at times of such an exercise. In fact, it seems that few persons are able to express clearly and succinctly their understanding of theological concepts and sanctions if in fact they have any clear understanding. If a witness is not bound by the oath and does intend to give false evidence he does not hesitate to state that he is so bound if it suits his purpose. In fact it is very likely the witness who takes the initiative and volunteers that he is not bound by the oath, and objects to taking it,

will be a truthful and reliable, responsible witness. It is my view that a witness should be affirmed and in the affirmation his attention should be directed to the meaning of and consequences of perjury.

I think paras 1, 2 and 3 together contain all the provisions that can be reasonably expected to give the best assurance of the truth of tendered evidence but I think they should be simplified to provide a uniform form of "certification" by a witness that impresses on him his duty by law to tell the truth. In our present society of multitudinous religious, agnosticism, and atheism, I feel that inquiry into a witness's religious beliefs or lack of them may frequently lead to digression and argument that may waste time and detract from the feeling of duty required to be impressed on a witness. I do not see any practicable way to dispense with or vary the provisions of para 4. I think in the majority of cases, particularly with the more educated witness, the real or at least the most important sanction compelling the truth is the prospect of punishment consequent upon a subsequent conviction for perjury. Having this view, I think this legal sanction should be clearly stated in the affirmation.

Judges: Ontario Provincial Judges' Association

While the religious aspect of this matter is talismanic to some, it is of great significance to many, I believe to the majority of the public. On the other hand tolerance of the individual preference is an essential part of our philosophy of life and the individual who does not wish to take the oath should not have to give his reasons and should not be treated as a second class witness.

For these reasons I respectfully submit that each adult witness should have the choice of swearing or affirming and he should be asked to make that choice before the oath or affirmation is administered.

With respect to youthful witnesses, a great deal of difficulty is created by the phrase "a child of tender years" as it appears in section 16 of the Canada Evidence Act. Not only is this phrase impossible of any precise interpretation, but the criteria used to determine the competence of youthful witnesses to be sworn varies so greatly from judge to judge when uniformity in this area is essential to good administration of justice.

The vast majority of children are without guile and their lies, if any, are easily detected. I also submit

that it would be unusual for a child to have any real theological understanding of the oath. And further, I submit that while the age of fourteen years is a strictly artificial choice of age at which there is a presumption of competence, that can be accepted as a practical and realistic presumption. It seems to me that children under 14 years of age should be determined by statute to be incompetent to take the oath but competent to affirm after their legal and moral obligation to tell the truth has been adequately explained to them.

This approach, I submit, would make for consistency in application of the law and a realistic approach to the competency of youthful witnesses.

It is also my view that the frailties of the evidence of youthful witnesses should be the subject of a section so that it will be more uniformly considered in weighing their evidence.

See the decision of Spence, J. in Horsburgh v. The Queen (1968) 2 C.C.C., 288.

It would seem to me most impractical to alter in any way the present presumption that very person fourteen years of age or older has sufficient theological understanding

to take the oath and sufficient knowledge of the law to fear punishment for perjury.

It seems to be the experience of the great majority of our judges that it is the formalities surrounding the taking of the present oath rather than its historic religious content which remind and impress upon the witness the moral and legal necessity of telling the truth as he sees it. No-one suggests that such a formal reminder of this personal obligation should be abolished, although most are agreed that its content should be amended. In general, our conclusions on this subject are distilled in a draft by Judge Perkins which we might refer to as the "Perkins Amendment" to the Canada Evidence Act.

PERKINS' AMENDMENT

1. Every court and judge, and every person having by law or consent of parties, authority to hear and receive evidence, has power to administer an oath or an affirmation to very witness who is legally called to give evidence before that court, judge or person.

2. (1) Any person who is called or desires to give evidence shall be asked to make oath or affirmation

in the following words:

"Do you solemnly swear (affirm), having regard to your moral and legal obligation to be truthful, that the evidence you will give to this court touching the matters in question will be the truth, the whole truth and nothing but the truth?"

or in such other manner and form and with such ceremonies as will bind his conscience.

(2) Any such person who is apparently under the age of fourteen years, shall, before being put to his oath or affirmation, be instructed, in his moral and legal obligation to be truthful, in the following words or words to the same effect:

"I must tell you, before you answer the questions that will be asked of you in this court, that the law requires you to tell the truth, and will punish you if you are not truthful, and that you owe a moral duty to be a truthful person. The clerk will ask you to promise that you will answer the questions truthfully."

(3) Upon the person making such oath or

affirmation his evidence shall be taken and it shall be deemed that he has bound his conscience in accordance with the terms of such oath or affirmation.

3. Where a person is required or desires to make an affidavit or deposition in a proceeding or on an occasion whereon or concerning a matter in which it is required, or in which it is lawful, whether on the taking of office or otherwise, that such person bind his conscience to be truthful or loyal, such person may in his discretion make oath or solemn affirmation, either of which shall, when made, be deemed to bind such person's conscience in the terms of the oath or affirmation made.

4. A witness whose evidence is admitted on oath or affirmation under section 2, or any person having attained the age of fourteen years who makes an oath or affirmation under section 3 is liable to indictment and punishment for perjury.

5. In weighing the evidence of a youthful witness, the judge, justice, or other presiding officer shall consider the frailties of the testimony of children, and no case shall be decided upon the evidence of a witness who has not attained the age of fourteen years without

corroboration by some material evidence of another witness.

Judges: Provincial Judges Association of British Columbia

Section 2 of the Commission's proposal reads as follows:

(1) A witness shall not take an oath or make an affirmation, but shall be instructed by the Judge or other person presiding at the proceedings in the following manner: "You are obliged to tell the truth. Deliberately failing to do so is a serious offence".

(2) The Judge or other person presiding at the proceedings may, in his sole discretion, give such additional instructions as he may determine to any child, person of defective mental capacity or other like witness."

The main question involved here, is, as to persons who do have deep religious convictions. We think that, despite the casual regard which many witnesses display for the sanctity of the oath, it is, in fact, binding upon the consciences of many witnesses, and does deter some people from deliberately lying. The very solemnity of the procedure has its effect, as well, on some people. To many, the oath is a promise to their god that they will not commit the sin of telling a falsehood. On the other hand, the oath may be meaningless

to those persons who have no religious convictions, as well as to those who profess to have them. There is undoubtedly a good deal of hypocrisy and can't involved with some witnesses, but not all of them.

On balance, we think that the Commission is correct that the sense of responsibility of a witness should issue from his responsibility as a citizen in a democratic society, and not from a reminder of divine retribution.

We think however, that it would be advisable that the Judge or presiding officer should address some words to the witness so that the solemnity of the occasion is impressed upon him. The words of a solemn declaration seem appropriate.

"You are obliged to tell the truth. Deliberately failing to do so is a serious offence. Do you solemnly declare that the evidence you are about to give shall be the truth?" Witness says: "I do".

Justice of the Supreme Court of British Columbia

I agree that the more or less universal use of a religious oath in judicial proceedings should be done away with. However, I think people are more likely to tell the

truth if they have first gone through some ceremony. I base this on what I saw and heard of witnesses when I was practising law. I think that in the case of some witnesses at least the taking of the oath calls to their attention the importance of what they are about to do. I doubt if the religious content has much bearing today. That religious content, however, does give some half educated people an opportunity to parade what they believe to be their superiority to the rest of mankind by indicating that the oath is beneath them. I would remove that opportunity by requiring each witness to affirm rather than to take an oath. I do not know whether there are any people who prefer on religious or other grounds to take an oath rather than to affirm. I do not think any inference would be drawn against the witness affirming in favour of the witness taking an oath if the normal method was to affirm. On the contrary, I think the witness who tries to divorce himself from the rest of mankind is the one against whose testimony an inference is most likely to be drawn. Consequently, if there are persons who, on religious grounds, prefer to take the oath, I would give them the right to do so.

Tyrwhitt-Drake

"I argue with your proposal to abandon the oath: but since some form of ceremony is of value, why not simply

make the current mode of affirmation universal."

Macdonald (H.J.)

I would agree that a witness be given a choice of affirming or declaring but whether a witness has any belief in God or not, I feel that the witness should commit himself to tell the truth. This commitment, whether it takes the form of an oath, an affirmation or a declaration, impresses upon the witness the seriousness and solemnity of the occasion before he begins his evidence. Once the witness has committed himself I feel that he is affected psychologically and is much more apt to be careful and accurate in his evidence. It is true that the existence of a sanction will have a powerful influence but the sanction at best is that of an outside pressure. A personal commitment does create an obligation on the conscience which in many cases, if not most, may have a more practical effect in favor of truth-telling.

The matter of whether the commitment should be in oath form is perhaps debatable, but there can be little doubt that once an oath is taken the obligation is impressed on the individual. If the witness feels no obligation from within himself after taking an oath then it is doubtful if any other form of words would be a satisfactory alternative,

excepting where because of conscience an affirmation or a declaration were taken.

It has been my experience that by far the great number of witnesses respect the oath taken - perhaps they would equally respect an affirmation or declaration. In short, I am convinced that the obligation taken by the witness himself has the desired effect in most cases. I do not feel that the practice of requiring the witness to commit himself should be abandoned, because in a minority of instances the witness proves untrustworthy. One could as readily make a case in favor of abandoning any obligation on the witness because some witnesses do lie. It is perhaps true that few may feel compelled because of the danger of hell-fire or the threat of prison - these are negative influences and threats and fear may have ceased to have their one-time influence. However the pride of the individual and his desire for the respect and regard of his fellow-man is still strong and so it is felt that the positive influence of a commitment will work in favor of the commitment being honored.

It may be that with most witnesses a promise to tell the truth will be just as effective as an oath - with some witnesses it would not be as effective. It is suggested the desirable position would be to exact a promise in the form

most binding on the conscience in any particular case. Perhaps this might more readily be accomplished in having the witness repeat all the words of the vow taken rather than have it mumbled over to him by a bored clerk. The Evidence Act might simply require that the witness take the vow by stating the required words.

Bruce Smith

I object somewhat vigorously to the Project's suggestion that the use of the oath in judicial proceedings be eliminated and that it is perhaps no more than a harmless relic. I disagree with the Project's views that the presence of the oath is incongruous. To the contrary, my view is that the administration of the oath or the affirmation to a witness, is a matter which adds to the dignity and solemnity of court proceedings and at this time, when there seems to be a general moral deterioration going on in the world and there is a general air of permissiveness, it would be an unwise step to eliminate the oath or affirmation of a witness in a judicial proceeding.

Monk

The administration of the oath does not at present prevent perjury although it may make it more difficult to prove.

An honest person will tell the truth whether on oath or not and whether or not he believes in a system of rewards and punishments after death.

The reasons set out in support of the suggested change certainly justify the substitution of the solemn affirmation or declaration for the oath, provided the same penalty continues to be imposed for a false affirmation or declaration as is now imposed for perjury.

Schiff

I do not quarrel with your argument that (a) a person should not be forced to declare his religious beliefs or lack, and that s.14 of the Can. Act is: an undesirable solution of a problem; but (b) the trier may well view the affirming witness as less credible than the swearing witness.

I also agree that the oath has become a meaningless ritual, and the view of religious persons that, in the present context, continued oath-taking is blaspheming.

But I disagree with your argument that the ritual should be replaced by the witness's sense of responsibility and his fear of consequences imparted by the admonition.

This ignores the significance of ritual in retaining for the court its moral force in settling social disputes: the witness should receive such warning and should say such words as impress him with the solemn process he is involved in.

I therefore recommend, if oath is to be abolished that all witnesses take the declaration "I solemnly declare that..." and judge also give them the warning you propose.

Judges: Committee of County and District Judges Association of Ontario

The committee rejects the proposal that the oath be eliminated. Suggestions were made by some members of the committee with respect to amending the form of the oath, and to incorporate in a new form of oath some of the words proposed in section 2.

It is submitted that the practical experiences of Judges in the Courts demonstrate that the respect for sanctity of taking an oath by a witness cannot be ignored. If there be objection to taking the oath, or if there be objection to invoking the name of God, a witness may affirm. The argument which is often advanced, that an indication by a witness he desires to affirm may weaken his testimony,

particularly before a jury, is not supported by practical experience.

The administration of an oath or affirmation to a witness should not be performed by a Judge. The committee submits that the existing rules and principles with respect to the evidence of children ought not to be changed. However consideration should be given to permit a child to affirm in a proper case.

University Women Club (Vancouver)

We agreed that the oath be abolished completely on religious grounds, but we would recommend that the witness be required to personally sign an affidavit certifying that he is telling the truth.

Justices of the Supreme Court of Ontario

Re Section 2: The Committee was nearly unanimous in the feeling that the present oath should be retained. Of those answers received by judges submitting notes, one was in favour of the proposal in section 2; one was in favour of doing away with the oath but substituting an affirmation, and the other two submissions were opposed to change. Your committee finds that the comments in the study are not convincing. Your committee feels that, from their experiences, at least

50% and perhaps as high as 80% of the population still believes in the sanctity of the oath. We feel that more than half of the population are much more impressed with the binding character of an oath than they are with fear of any possible perjury or criminal charges arising out of the warning which is suggested to be given under this section. Since it is our belief, from practical experience, that this large body of citizens still believes in the sanctity of the oath, it would be a mistake to make this change at this time. Those who object to taking an oath may, at the present time, affirm. Therefore, the sole reason to make a change would be where the person does not believe in the sanctity of the oath. Those people would be guilty of perjury if they told an untruth having taken the oath or affirming, the same as they would be guilty of perjury were they to tell a deliberate untruth with the intent to mislead, after having been warned as set out in this section. The mere fact, therefore, that some people do not believe in the sanctity of an oath is not a good reason for dispensing with the oath.

Dubinsky

As to Study Paper #1, I disagree that the judge or other person presiding at a proceeding should say to a witness, "Deliberately failing to do so is a serious offence." If the witness is going to tell the truth (as most witnesses

do), he does not have to be cautioned that failure to tell the truth is a serious offence. On the other hand, if he is not going to tell the truth, I doubt if he will be deterred by the suggested admonition. I think it is quite sufficient for the judge or whoever presides at the proceeding to simply say to the witness, "You are obliged to tell the truth."

Montreal Lakeshore University Women's Club

Replacing the oath by a non-religious affirmation administered by an officer of the court, possibly repeated by the witness, received almost unanimous assent from members at our last general meeting. It was agreed that this form of affirmation would more than likely prove to be far more meaningful than the present form of oath and we are entirely in agreement with the opinion that no one should have to reveal in court the presence or absence of religious beliefs.

Black

I agree that the oath is a tradition which has probably outworn its usefulness and become a handicap. I think there is some value, however, in having a witness commit himself to the truth, instead of merely being instructed to do so by a presiding officer. Nothing can ensure the reliability of a witness, but a personal pledge might have slightly more meaning:

I promise to tell the truth. Failure to do so constitutes a serious offence.

British Colubmia Civil Liberties Association

Competence and Compellability

We approve of the elimination of the oath. An oath forces a witness to state his religious convictions publicly and invites discrimination on religious grounds.

Goodwin, C.H.

Oath

It goes against my grain to say so, but I cannot see that taking the oath makes liars truthful. Those who are honest will tell the truth anyhow as best they know how. By the warrant it puts on all evidence, an oath tends to make lies equally deserving of acceptance. Elimination of the oath might put more of an onus on Judges to evaluate evidence more closely and not feel bound to accept lies simply because they are sworn to, (as they often will do as the easy way out) and no one has the information necessary to show them for what they are.

Hurlburt

I do not think that I am with you on the oath. I do think that a ritual in which one takes part is more likely to be effective than a growl from the Bench. I think that even the oath element has some meaning in some cases, and in any event I think that something positive in which the person himself is involved would be better. I do not really think that it is too serious to have to say that one has conscientious scruples in order to avoid the oath, but if this point is thought to be serious then the oath could be reduced to "I affirm" or "I declare". This would, equally with the abolition of all statement by the witness, do away with any distinction in the mind of the trier of fact between the oath and the affirmation. It may be that the witness' sense of responsibility for telling the truth should issue from his responsibility as a citizen in a democratic society, but I do not think that I agree that this can be imparted to him just as effectively by the proposed legislation. I must say that even speaking personally I would stop to think a little more carefully after having involved myself by a form of words or even by answering a form of words.

Stevenson

The Oath: One must, of course, agree with most of your structures about the oath. However, I would suggest

that unless it were abolished in toto, in all statutes and by all governments, the very problem you suggest would continue to remain, namely, that proceedings in court might be considered as vested with less sanctity than other proceedings where the oath is still used. I think also that it ought to be recognized that the seriousness and solemnity of the oath does have an effect on some witnesses. How great a number, I wouldn't venture to say, but I have seen, and heard, witnesses whose evidence was obviously affected by the recognition of the seriousness of the oath. I would also suggest that the judge's little warning doesn't have the same psychological effect as the witness pledging something himself. I think that if the oath were to be abolished, the witness still ought to be required to make something in the nature of a solemn declaration, albeit on a sword rather than on a Bible. I might also say that if the triers of fact which you have in mind are so competent as not to be affected by evidence which they ultimately reject, they can certainly be relied upon to accept evidence under oath equally with that of evidence given by affirmation or declaration. My most serious concern is that I really think the courtroom is going to have to be the last place where the oath is abolished.

New Brunswick, Law Reform Division

There was a certain amount of ambivalence on the question of abolishing the oath. The Crown Prosecutor for Fredericton was very much opposed to the abolition of the oath and felt that it should be reinforced by the type of proposal suggested in the working paper. He felt that part of the problem we seem to be facing presently derives from the fact that oaths are administered in a perfunctory fashion and that people are no longer made aware of the seriousness of not telling the truth. I think there is some merit in the suggestion in the working paper that the requirement of the oath discriminates against the witness who does not wish to take an oath, in so far as his failure to take an oath, as opposed to a statutory affirmation, may discredit his testimony in the minds of some jurors. The other thought is, that if truth telling is to be enforced solely by criminal sanction, a more effective means of sanctioning liers is going to have to be devised. If the only sanction imposed is a cumbersome penal provision, its ineffectiveness may well militate against the telling of truth on the stand. Undeniably, many people still take the oath seriously, and before the oath is done away with it seems necessary to ensure that the substituted sanction will compel people to be truthful.

Ontario Crown Attorney's Association

We agree that the oath should be abolished and presume however that the laws of perjury may well require a reconsideration by the Commission.

However with respect to the suggested instruction which is to replace the oath or affirmation it was felt that the wording should be strengthened and that the witness acknowledge not only his obligation to tell the whole truth but, in addition, that he fully understands the instruction given to him.

Sheenan

In relation to Section 2 Sub Section 1, I would agree with the oath as it presently stands means nothing to those who want to lie or tell an untruth at the onset. I do, however, believe that there are a considerable number of the population that do take an oath seriously and, we in the police service hear the old cliche "I would swear on a stack of bibles that it is the truth". The most important point to consider in relation to this Section is the retention of perjury sections of the Code and it would seem to me that the proposed change should possibly include some reference to some sort of penalty for not telling the truth at a trial.

We certainly agree wholeheartedly with the fact that the Judge, or other person presiding at the proceedings has the discretion to give additional instructions as far as children and mentally defective persons are concerned. I would like to see some sort of wording which reminds the witness of the purpose of the trial and the possible consequences of his evidence, and this appears to be the case in the proposed new proceedings.

Lawlor

The oath - I agree with the suggestion put forth. Today there seems to be less and less respect for a person giving testimony under Oath. I believe if it were stressed by the Judge as to the seriousness of giving evidence as indicated in the report this would be sufficient.

Winnipeg Police Department

The use of the oath in judicial proceedings is an incongruous ritual for the obvious reasons. However, it is felt that the wording of the proposed Section 2 is inadequate and the penalty for not being truthful should be spelled out detailing the offence and the maximum penalty.

British Columbia Law Reform Commission

The suggestion that the religious sanction contained

within the oath be abolished ought to be followed. The B.C. Act does not set out the wording of the oath although it does set out the affirmation in Section 24(1)(b). The wording of our affirmation might be preferable to the admonition recommended in the National Report at page 1 although the latter ensures the witness is aware of some criminal consequence of perjury. A combination of the two is much to be preferred, the witness affirming and also being admonished either before or after the affirmation. Deleting the religious content of the oath has the following beneficial consequences.

(a) The growing number of citizen to whom the religious sanction of the oath becomes less and less meaningful is not required to perform a charade.

(b) In the case of infants or other persons of undeveloped mind the qualifying process is not confused by difficult theological questions.

(c) No doubt is cast upon the validity of the oath among those who subscribe to its religious consequences since those consequences attach theologically whether or not the name of God is invoked.

The British Columbia Act Sec. 24(a) has already gone far to reducing the oath to the status of an affirmation in

any event. If the form of oath is to be changed for witnesses then the form should be changed also under the B.C. Act for Court Reporters and indeed for any other public officer who is required to take a note such as parliamentary representatives, judges, lawyers on call and admission, etc. (beyond our purview at the present time).

Manitoba Law Reform Commission

We are not greatly excited about the prospect of doing away with invocation of the Deity by believers who are to testify, but it probably accords with the precepts of modern secular (that is, public) administration. We do think, however, that every witness ought to be required (since he is compellable, n'est ce pas?) to affirm solemnly that he will speak the truth. We think it advisable that assertions about telling the truth proceed from the witness, and be so recorded, and not merely be announced to the witness, as proposed in the Study Paper.

Bowman

Concerning sub-sec. (3) of Sec. (1), compellability; these questions are of vast import and indeed, some of them are dealt with in the comments following the proposed formulation and I will deal with them at that time.

Sec. (2), Sub-sec. (1), abolition of oath or affirmation; the problem of proving perjury is complicated by this procedure. The question of who has authority to so instruct a "witness" might be an interesting one. What of a situation where these precise terms are used by a police officer or an employer to an employee. Is his failure to tell the truth on those occasions to be deemed perjury? Why not a simple affirmation? Forget the oath but let each person affirm upon his or her conscience that they will tell the truth.

With reference to the question of oath, affirmation or instruction by the tribunal, the comment, at page 9, suggests that "triers of fact may take the view that an affirmation is a less powerful deterrent; that a witness who affirms is less reliable than one who swears." Nonsense! This is another example of the academic, theoretical and totally baseless prejudices of the authors of the Study Papers. If the law requires an oath, the courts will require an oath. If the law requires an affirmation, the courts will require an affirmation. If the law allows either, the Courts allow either. My experience over a goodly number of years in the courts has been that no judge I have ever seen has so much as raised an eyebrow at a witness who wished to affirm.

To leap from this baseless and theoretical problem to the conclusion we should therefore abolish oaths or affirmations altogether is a simple exercise in semantic stupidity rather typical of much of the Study Paper.

In my view, an instruction from the court would create or might create certain other problems and, in any event, there is no desperate need to be overcome. Rather, simply require everybody to affirm and perhaps frame the law so that those wishing to swear may be permitted to do so without any bias in their favor or against them. In today's world, for every juror who is impressed by their piety there will be two who will consider it an act or who personally reject a diety and are unimpressed by a zealous oath-taker. Consequently, we will rest again on an equality of affirmation.

Judges and Justices of Manitoba

The comment they make about the oaths, I'd be in agreement with. I think we've reached the point where the use of the oath in Court proceedings can be abolished.

Well, what advantages do you think are gained by eliminating the oath, as compared to advantages that may exist even to a small degree -- of, having taken an oath,

that he was going to be truthful? We know that there are many instances of a person taking an oath and it doesn't mean a thing; we may as well call a spade a spade. But how about the advantage to those to whom it would mean something more than just saying "I want you to tell the truth"?

I think their comments, appearing on pages 8, 9, etc. of that -- we all know that people come into Court now, and the use of the oath is just a formality. I don't think it has very much effect, if any; and I think the suggestion in the earlier part of this section, telling the witness, "You're obliged to tell the truth and deliberately failing to do so is a serious offence. I think Justice Hall had some other words that he thought might add to that.

Yes, I think it's a small point; but I think nonetheless, an important one -- that the oath should read, or the statement, "You are obliged to tell the truth; deliberately failing to do so is a serious offence punishable by law". I think the idea of communicating that there is punishment attached to it, is that -- it has more significance than just saying it's a serious offence.

Well, are you not in favor like that -- of abolishing the oath?

Yes, because I think it's ludicrous. In fact, the present system is this ludicrous, that we go to all sorts of pain in the case of a child -- a person of tender years -- to make sure that he understands the nature of the oath, so that we satisfy ourselves that he'll likely tell the truth. With an adult person, we just simply ask them to take the oath. Well, I think we should go through more instruction to the adult witness than we do with the child witness. The child witness is more likely to tell the truth than the adult, you know. I mean, it's a monstrous procedure, when adult people routinely get up and take the oath from the Bible; we don't question that at all. We don't decide it. We don't find out whether they're atheists, or whatever they are. But when a child gets up there, we have to make sure that they understand the Christian doctrine, or a belief in God, before we can allow them to give evidence. Well, that seems to me to be a paradoxical situation, because we all know that children are not as much as adults in need of instruction about telling the truth. So I think it's an unreal procedure and ritual, that is out of keeping with realities; and I say that, recognizing the -- being of the Christian faith myself, which is the whole basis of this oath; the Church of England -- the laws of England, you know, emanates from the Church of England.

If I may say only this: I -- especially since in

recent years we see -- somebody has raised already -- witnesses from so very many different countries, and Manitoba is a very good example of that; we have very differing kinds of witnesses. When I see a Caribbean doctor, or a Nigerian x-ray technician, I have sort of a qualm of asking them to take the oath; because I don't know whether he has any affinity to the Bible that happens to be lying there, or not. Yet we do this. I tend to agree that this is an area of reform that very much needs updating. But what I'm concerned about is that I still believe that there is some value in attaching some solemnity to taking the witness stand. Whether that be in the way of an oath-taking, or perhaps -- I find these three lines just a little too -- I won't say "flippant", because that's obviously not what is said there; but I would encourage among us some fairly well-worded and longer declaration: "You are under this duty; you may be punished for this" -- some kind of an admonition to the witness, even if it's not... I think what you were saying, what we lose by it; well, for a certain person, still, the oath is a very serious thing. If we substitute it by something that isn't as equally serious in that person's mind, we perhaps lose some degree of likelihood of ...

That's the point that I'm getting at: are we getting any advantage by doing this? To those to whom the

oath doesn't mean anything, we're not being effective; and much as I do not like to say, that those to whom the oath means something, that if they were asked to say something under oath, they would lie -- I can still say that that particular sort, in their mind, over their head, by virtue of their religious upbringing -- the family life -- may not regard it as serious.

Well, in truth the problem was you see, flexible enough, you must recognize that religious beliefs other than Christianity it admits any form of oath that a person feels binding on their conscience. You know, that's the -- I've often wondered, I'd like to see that principle in practice, but I haven't seen too many examples of it.

Well, you know, it's just urreal for us -- any of us -- to think that we can -- that the oath as is presently administered is expeditious in the litigation process; and that it's a meaningful exercise. And I object very strenuously to the duty cast upon judges to question people of tender years, about whether they understand the sanctity of the oath -- the nature and obligation of the oath.

No, I don't think that's what Mr. Justice Matas is getting at; but more as, "Here's a five-year-old child; can we get across to him what we're here for today?" and "All we

want to hear from you is just what did happen". And "Is he old enough to be able to understand his purpose for being there?"

Yes, that was the point I had, and I wondered whether we should have to go through that or not. Now, Hall thinks that we should just take the evidence and ...

weigh it.

And weigh it; not have any restriction on any age.

The difficulty about what you're proposing is that it's based on the assumption that the judge presiding is going to be competent to explain this to a child in appropriate words. But there are many people who -- the point I raise is that it may be just muddying the waters; because the magistrate or the judge might go off on tangents trying to explain to the child of tender years what this proceeding is, and therefore the necessity of telling the truth. He may give a sermon for an hour, and may not be getting the message through. I just can't understand -- why shouldn't a child of five years of age, or six, be able to come into the witness box and have the clerk read this out to him, take his evidence? And then it's up to the tribunal of fact to attach such weight to it as it appears to him to deserve.

The judge and the jury are certainly going to cover it in this charge.

He'll weigh that child's testimony appropriately to the case. That's what he does eventually anyhow. All I'm suggesting is, is this necessary; or is it only muddying the waters? Is it only complicating the procedure?

I think there has to be something -- my own view would be that there should be some sort of a cutoff at a certain age, whatever it is -- twelve or fourteen or whatever; and anybody over that, there's no question -- you don't have to go into any discussion at all. And under that, the judge ought to try to determine whether the child really knows why he's here, and if he understands the purpose of the proceedings.

Supposing the child -- you come to the conclusion that the child in not really perceptive of the nature of the proceeding, and so on; why should that nevertheless preclude the child from purely arbitrary age limit, and so on, may just be more complicating as far as taking the evidence.

The test of credibility. Don't you think it would also help the administration of getting the truth, rather than

just bring the little five-year-old or seven-year-old child to the witness stand he's in a strange atmosphere, and all that sort of thing. Would you not see any advisability of the judge speaking to him to put him at ease?

It doesn't tell you not to do that.

It would be common sense, in any event, I think...

That's allowed for the judge to say to the child, "Look, this is a court of law, and I'd like you to decide a certain question, and I want you to tell me the truth as best you know". Such additional instruction as he thinks might be appropriate. The real purpose of this revision is to expedite the truth-finding process, you know, and to get rid of these attitudes that judges and lawyers have that seem to put barriers in the way of discovering the truth.

Section 52 Witnesses Must Have Personal Knowledge

Outhouse

Section 14 appears to be unnecessary and will probably cause difficulty if enacted. The present law recognizes a great deal of hearsay evidence and the proposed code envisages a broader scope for such evidence. Such

evidence, while not based on personal knowledge, is clearly intended to be admissable. Moreover, section 14 would perpetuate the difficulties which are sometimes caused by the present prohibition against lay witnesses giving evidence.

Section 53- Interpreters and Translators
Competence and Compellability

Section 54- General Rule of Compellability

Judges: Provincial Judges Association of British Columbia

We further recommend that the present practice whereby the Judge examines the child touching on his intelligence and understanding of the duty to speak the truth, should also be abandoned, as a test for the child's competence to be a witness. The Judge should continue to ask questions touching on these matters, with the right of counsel to continue the examination, and the whole matter will be left in the area of the weight to be given to the evidence presented by the child.

The child might be asked to say "I understand that I must tell the truth and will do my best to do so", or some such language.

Justice of the Supreme Court of British Columbia

Mental Capacity

It is proposed to remove mental incapacity as a disqualification. I am thinking now of lunatics, but the

matter also arises under children, which I will discuss later. They suggest that the jury "properly instructed by the trial judge" take into account any incapacity in assessing the weight. I have no objection to this although I think there are conditions of mental incapacity which should prevent the witness going before the jury at all and I wonder what is meant by "properly instructed by the trial judge". If they need some special instruction beyond what they are given in respect of any witness, perhaps it would be better to leave it to the judge, and in any event I would like to know what instructions they have in mind. Further, if the jury are to make the assessment, what is necessary, rather than any instructions by the trial judge, is that some inquiry take place before them as to the capacity or otherwise of the witness, and the section makes no provision for that.

Children

In this article an attack is made on laws which are no longer in effect. Since the decision in Bannerman it has not been necessary for children to answer questions based on someone's theology. Under the proposed legislation a child of two could be called to the witness stand. I think it is necessary for someone, either the judge or the jury, to determine whether the child is "possessed of sufficient intelligence and understands the duty of speaking the truth." Some

provision for going into those questions must be made or the judge or jury will not have the necessary material upon which to base an assessment. Further, if witnesses are to be sworn or affirmed (which will be dealt with later) it is my view that a particular witness should not be sworn or affirmed if the ceremony means nothing to him. In the case of a young child, therefore, I think it is very necessary that before his testimony is clothed with whatever virtue attaches from the oath or affirmation, he be questioned as to whether he understands the nature of that oath or affirmation. I think these matters can best be inquired into and determined by the trial judge, but I would be satisfied if they were inquired into and determined by the jury, although it would certainly be awkward for them to do so.

The statement, "Although the preliminary questions now asked the child might impress upon his mind the seriousness of his testimony, this can be achieved directly by specifically instructing the child regarding the importance of telling the truth," misses the point. We are interested not merely in impressing upon the child the importance of telling the truth but also in ascertaining to what extent that lesson has been learnt and that cannot be achieved without questioning the child.

Schiff

1- I am unconvinced by the arguments: no-one, in my view, should be competent to testify if he does not possess at least a minimum capacity to perceive correctly, remember, and relate accurately - & so the common law has held.

2- While counsel may rarely tender mentally defective or ill persons and judges may struggle to draw the line, the judge's power to exclude should not be remanded.

3(a)- So also with children: it is not a matter only of the capacity to be sworn - I doubt that what I am after is sufficient handled if, the child has, under present law, sufficient understanding to give unsworn evidence.

(b)- The dangers inherent in a young child's infirmities: power to perceive, remember and relate, and his childlike love of fantasy, require more than (a) the screen of the statutory tests; (b) the warning to the trier re: determining facts on the child's unsworn testimony.

(c)- I believe that children too should be excluded on judge's ruling that they do not sufficiently possess the requisites.

4- Perhaps it could be handled by a general provision giving judge power to exclude any evidence whose probative value is substantially outweighed by dangers of unfair prejudice, confusion of issues and sorn.

Ontario Crown Attorney's Association

On the issue of mental capacity generally the basic premise that incapacity should go to credibility only and that subject to this, any person may testify was felt to be fraught with some danger. It would be incumbent on the trial judge to see that only admissible evidence is testified to by such a witness. It may be necessary, should the turn of events demonstrate the witness's incapacity, to permit the trial judge to interrupt the witness and even in the end result require the witness to retire from the stand. Beyond this the value of a witness's testimony is a matter for the trier of fact properly instructed.

Lawlor

Competence and Compellability

Here, I believe, are the basic fundamentals of all evidence. In the case of children who are called as witnesses, their very approach to the Court is that of a timid manner, and, when they are being admonished by the presiding Judge and on being told of the seriousness involved in giving evidence, they tend to become fearful of saying anything and are, in many instances, unable to connect facts due to bordering on hysterics; therefore, I suggest a parent (or guardian) should be present and he or she should be instructed to advise the child why he or she

is present. This I believe would, in all probability, give the child more confidence.

Canadian Bar Association, Criminal Justice Sub-section, Manitoba and British Columbia Branches

Section 1 - General Rules Respecting Competence and Compellability

The Manitoba Sub-section agreed with the proposal set out in Section 1.

The British Columbia Sub-section agrees with the modern trend to allow as many witnesses as possible to give evidence to assist the court.

(a) Mental Capacity

The British Columbia Sub-section feels that further study is necessary in this field, especially with respect to trials with juries. While the present system can be improved with respect to the procedure followed in questionning a potential witness on the question of capacity prior to receiving his evidence, prior determination of the question of capacity is in itself a very real safeguard.

(b) Children

Both Sub-sections agree that the state of childhood

should have no special protection and with the general comment set out in the study papers. The British Columbia Sub-section was especially interested in the "Israeli experiment" and agrees that steps should be taken to look to new concepts with respect to reception of evidence in special cases.

British Columbia Law Reform Commission

Competence and Compellability

1. It is agreed that the modern trend should be to make as many witnesses as possible competent to testify and therefore available to assist a Court in arriving at the truth. Subject to certain specific social interests which are dealt with hereunder the over-riding interest of the State in both criminal and civil enquiries is to arrive at the truth of the matter.

Mental Capacity (N.R. page 2)

I disagree with the admissibility of the evidence of mental defectives or any other person (such as a young child, senile adult person with a grossly inadequate understanding of the language of the enquiry) who is unable to comprehend either the duty of telling the truth or the question as put to him and answers that he gives. At present the Court enquires of a mental defective to deter-

mine his ability to understand the nature and consequences of the oath and to deal with the questions and answers rationally. This qualifying stage, in the case of infants, is criticized elsewhere because judges apply an inconsistent standard of questioning. I submit that the method is sound and that an improvement in the training of judges on this issue is the better approach to this problem. The mental defective (or child, etc.) having qualified under the judge's enquiry, the use to be made of his evidence is then a subject of weight for the tribunal. (Consider whether a Court would hear a drunken witness or whether it would wait for him to sober up.)

Children (N.R. page 2)

See comments under "Mental Capacity" supra.

Elsewhere the Commission recommends doing away with the religious sanction of the oath and taking a simple statement of understanding of the duty to tell the truth. This step will obviate the problem of the impossible question put to a child by a trial judge. It is relatively simple to be satisfied whether or not a child knows the legal consequences of perjury.

(1)(d) "Preliminary Hurdle" to a child as to any witness who may be incaple of understanding the duty to tell the truth

or of understanding the questioning process serves two valuable functions; first it excludes from the danger of wrong consideration evidence of a witness who has no ability to assist in arriving at the truth; secondly it saves the time of the tribunal in listening to evidence which on a proper direction it ought not to consider as having any justifiable weight.

(2)(d) Theological difficulty in qualifying a child (or other incompetent witness) is now proposed to be done away with by changing the nature of the oath to a simple admonition.

> "You are bound to tell the truth as well as you are able and deliberately failing to do so is a serious criminal offence."

With reference to the oath see our comments, infra, dealing with oath and favouring both an affirmation or undertaking from the witness and an admonition from the Court.

(3)(d) The reference to the Israeli experiment is interesting. Victims of sexual crimes, and particularly children, frequently undergo a traumatic cross-examination sometimes justified and sometimes unjustified. While it is important to a trial lawyer to have the tribunal see the witness and assess his or her credibility under cross-examination, which

the Israeli system will not apparently permit, there may be a means of achieving both the desired result of protecting the child and of exposing it to the tribunal by making use of a child's evidence taken in front of an accused, both lawyers and the trial judge or a special examiner versed in dealing with children and in televising the session, editing out objectionable questions and answers or irrelevant material and presenting that portion of the case to a jury by video-tape. [C.F. The Ohio Bar experiment reported in Ohio Bar Journal (volume unknown).]

Manitoba Law Reform Commission

Although the Israeli institution of "youth examiners" is not specified in the Possible Formulation of Proposed Legislation, it is more than hinted at in the Comment. Without having access to "the results of empirical studies", as noted in the said Comment, we can hardly make an incisive pronunciamiento on the subject, except to say that we should be inclined to reject the "youth examiner" proposal, and for the same objective reasons stated at pages 9 and 10 of Mr. Bowman's memo. Even a child, because of the potential importance of the result of believed testimony, ought to undergo cross-examination by or on behalf of the accused.

We doubt the efficacy of threatening the child

witness with serious offences if he deliberately fails to tell the truth. Here again, we think his evidence should be received either solemnly affirmed, or not affirmed if the Court should conclude that the child doesn't understand the responsibility which is required of witnesses, or not received at all. In any event, pursuant to section 12 of the Criminal Code, all children under the age of seven years are immune from conviction of any offence, serious or not. On this matter, Mr. Conklin, who attended our meeting, had this to say:

I think that in practice there is a very real problem with the child witness who is asked to describe the offence which was alleged against the accused of a sexual nature. Having recently had experience as a Crown attorney, I can recall several instances where we had a great deal of difficulty eliciting what I thought was the truth from that witness. Now if the object of the rules of evidence is to assist the eliciting of the truth, then there must be some means devised by which the child witness can be an effective part of this process. Now I don't think that, for instance, this proposal dealing with competence and compellability would be in any way an assistance to that problem. "You are obliged to tell the truth. Deliberately failing to do so is a serious offence". Can you imagine telling that to the child to begin his testimony? I can't. I think it

will automatically cause the child to freeze. Especially if the judge, realizing he is dealing with an infant, as suggested here in the paper, explains to the child what he meant. What he just meant was "if you lie, you go to jail." You really don't if you're a child. So he can't say that. He's going to say - I don't know what he's going to say. So you have a real problem there. How can we explain that to the child?

Professor Penner suggested on this subject:

You have to decide the prior question of whether or not it's going to be admissible under certain circumstances. We say: well there may be dangers, there may be dangers with children's evidence, there may be dangers of evidence of people who are somewhat feeble-minded. But you have to decide at the beginning whether you are going to have a rule of admissibility or of non-admissibility; and then decide the question of the weight to be attached in each instance.

...

It seems to me that if you are in some way to expand the way in which a child could give evidence, and I'm not opposed to that, then we might have to look pretty carefully at the point at which corroboration is required. The Criminal Law Revision Committee report decides that the way to get

around the issue of when a child may or may not take the oath so as to require corroboration is setting an artificial age limit, say 14 years - below 14 then the child is not sworn and above 14 the child is sworn. That would be a very simplistic way of solving that particular problem.

We think that the testimony of children ought to be received, if at all, either solemnly affirmed or not affirmed -- a distinction which would operate as to weight. The circumstances in which the intended testimony would be inadmissible, and the circumstances in which corroboration would be required (either as to weight or admissibility) ought to be considered. The same rules could well be made applicable to "any person of defective mental capacity or other like witness."

Omer Côté

Les raisons données dans vos commentaires sont suffisantes pour faire accepter sans aucune restriction les dispositions des dits articles. Je ne ferai qu'une remarque et elle s'appliquera aux témoignages des enfants. Mon expérience m'a appris, comme vous le dites si bien, qu'il vaut mieux tenir compte de l'infériorité de l'enfant dans l'appréciation de sa crédibilité et non en à faire une question d'habilité à témoigner.

Comme deuxième remarque, je reste septique quant au néo-droit dans les cas d'infractions sexuelles qui permet que la communication au tribunal au témoignage des enfants par l'intermédiaire d'une personne chargée de recueillir une déposition, sans exiger la comparution de l'enfant devant le tribunal. Je reste sous l'impression que cela donnerait ouverture à un grand danger de mauvaise interprétation et, si la Commission de Réforme juge à propos de suivre l'état d'Israel en exemple, j'exigerais, quant à moi, l'intermédiaire d'au moins deux personnes, comme on le fait souvent dans le cas d'experts.

Rioux, G.

Le système en vigueur en Israel m'est inconnu; comme il est dit dans votre publication, le système en Israel permet la communication au Tribunal du témoignage des enfants par intermédiaire d'une personne chargée de recueillir la déposition, sans exiger la comparution de l'enfant devant le Tribunal.

Quant à moi, sans exclure un tel système ou procédé, je ne crois pas que l'on devrait cesser d'exiger la comparution de l'enfant devant le Tribunal.

Si vous adoptez en notre pays, le système en

vigueur en Israel, il faudrait, je pense, que la communication au Tribunal du témoignage de l'enfant (et donc pris antérieurement) se fasse à voix haute et devant le Tribunal, toutes parties étant présentes, y compris, il va s'en dire l'accusé et l'enfant lui-même appelé à témoigner tout comme auparavant et selon la Loi actuelle.

Ainsi cette communication du témoignage pris antérieurement serait présenté au Juge Président la Cour, par le Procureur de la Couronne et une copie remise à l'avocat de l'accusé, et ce, sans aucune exception.

Une telle communication ainsi faite en audience publique et devant le Tribunal aiderait grandement la Couronne qui parfois constate que le jeune enfant ne veut plus parler, étant intimidé soit par l'accusé, soit par l'avocat de l'accusé, soit par l'ambiance de la Cour ou soit encore par les autres témoins appelés à témoigner immédiatement après lui et qu'il vient de voir dans la chambre des témoins.

Il est important je pense que l'enfant soit vu par le Juge, même si une telle communication du témoignage écrit antérieurement est ainsi produite devant le Tribunal. M. le Juge Président du procès, pourra ainsi se rendre

compte de la personne du jeune enfant témoin et voir:- le comportement - les tares visibles - la personnalité - l'apparence - la physionomie - la grandeur - les défauts physique - et même l'expression du visage...

Bowman

Sec.(2), sub-sec.(2), competence of children and others; How will the judge determine whether a child or "person of defective mental capacity" or "other like witness" is such and needs special instruction? What of the right to objection by counsel requiring an inquiry in a particular case?

With respect to the evidence of children of tender years, the comment suggests that it is sufficient that judges instruct the jury with respect to the "frailty that is inherent in a child's immaturity which may affect his capacity ---" and that there is "no reason for erecting an additional preliminary hurdle for children---". This statement typifies the approach embodied in the comment respecting competence. It ignores a number of factors. One need only think of the Horsburgh case which had to go to the Supreme Court before the cleric in question was acquitted. One can think of at least twenty or thirty similar cases in one's own experience. In many of them where there is no corrobora-

tion of a child's evidence, save perhaps that of another child, and where there is definite reason to believe that there may be a concerted attempt to smear or denigrate an accused, it would be far, far better if the safeguards were such as to prevent the case from ever going on, that is, to allow the court to rule that it would not receive the evidence of the particular child (particularly sworn evidence), since their competence was subject to sufficient question as to make it dangerous to do so. The alternative to this is what has happened in a number of cases and will undoubtedly happen again. Evidence on which no rational human-being should act to the detriment of an accused person may be admitted. When there is enough of it from enough sources, which may be equally tainted, the processes of rationality give way to a sense of horror at the crime and the alleged criminal, and the person involved has to go through multiple appeals before vindication. The present system is far from perfect and allows far too much latitude and far too much harm to be occasioned to a citizen by the vaporings of children. To take the step proposed in the comment and the proposed legislation would be merely to make it that much worse. The comment on page 3 of that portion with regard to the "Israeli system", permitting the reception of the evidence of children in sex offenses through a "youth examiner's testimony, without

insisting on the child's personal attendance" is one to make any trial lawyer blanch in the utmost horror. One can picture from one's experience of social workers of various kinds, an enthusiastic and sympathetic "youth examiner" retailing the gory, sordid and garish tales as recounted to him by his under-age charges while a respectable citizen watches the prison-doors close about him. It is hard enough to cross-examine children, considering their capacity for invention and the tenderness of the courts towards them. To cross-examine second-hand through the youth examiner is not only impossible, it is a situation which would lead any self-respecting trial counsel to either suicide or retirement, not necessarily in that order.

Goodwin

Children

In many sex cases when there was not going to be a plea of guilty, I have weighed the prospective harm to child witnesses (even young teenagers) and the harm that might be done by not proceeding against the accused. Whatever harm may have been done to the child, I am extremely reluctant to compound it many times over by having him or her weeks or months later subjected to the absolutely dreadful and traumatic experience of having to recall in minute detail a

disagreeable incident before a Court with all the rigours of examination, cross-examination, etc. I was forced into it once by a couple of moronic oafs who pleaded not guilty, a girl's parents who insisted that their daughter must be vindicated and a young lawyer who wanted to be a local defence bar star. The girl's health was broken for months after and I'm not sure she will ever be right. How much better it would have been to let the girl forget it.

But you will say, is not this unfair to those who will plead guilty? It could be, but of these cases I take what might be called a therapeutic view rather than a punitive one. As for the short comings of my approach, I can only say I do not make the laws, I have to take the law as I find it and to the best I can. I think the law as it is is barbarous and some other way must be found than keeping memories of such events alive in the mind of a child. A principal object of any new approach must be to enable the child to forget the whole thing as soon as possible. Delays must be eliminated.

The catechism to which a child is subjectd to by a Judge is outrageous, yet the cases seem to say that the Judge cannot instruct the child - though a police officer may have done so five minutes before. The child must come

to the stand instructed and aware. Then the child must answer the ridiculous catechism which few adults could conscientiously answer if they could make sense of it. It is foolishness like this that justifies Mr. Bumble's famous observation - "If the law says that, then the law is an ass". The whole business is too silly to dwell on further.

Section 55(1) Incompetency of Judge and Juror

Justices of the Supreme Court of British Columbia

Section 1 -- Competence and Credibility:

To proclaim that a judge or juror may not be a witness seems unnecessary because the rule is so old, the requirement so self-evident. We don't need codes to tell us this.

British Columbia Law Reform Commission

Judge and Juror (N.R. page 3)

I suggest no quarrel at all with this topic. Under present conditions it ought always to be possible to recommence a trial in front of a different tribunal should a judge or juror be required to give evidence in either a civil or criminal matter. They should be incompetent as witnesses in the case in which they are sitting as tryers of fact or judges of law.

Bowman

Specific Comments on Study Papers

Competence and Compellability of Witnesses:

The Sections (1) and (2) as outlined are unexceptionable save as follows:

(a) Sub-sec. (2) of Sec. (1), concerning judge or juror as witness, is obviously unnecessary. Any judge having sufficient knowledge that he might be considered as a witness would, and must, disqualify himself. Any juror concerning whom it was discovered that he had such knowledge would be very rapidly disqualified by the judge and if necessary, a mistrial ordered.

British Columbia Law Reform Commission

Lawyers (N.R. page 4)

I recommend agreement with this section. On some technical matters lawyers are sometimes the only witnesses in their client's case. They should remain competent with a right in the trial judge to determine whether by reason of the evidence given by the lawyer he should continue in the role of counsel in the case. However since a codification of the law is planned and for fear of leaving the matter in doubt by exclusion it would be preferable to include a provision by which lawyers remain competent as witnesses but by which the tribunal has a discretion to prevent their continuing role as counsel.

Canadian Bar Association, Criminal Justice Subsection, Manitoba and British Columbia Branches

(c) Lawyers

Both Sub-sections agree with the Commission's

suggestions on the basis that in certain cases lawyers are necessary witnesses to their client's cause. Lawyers should remain competent, but the British Columbia Sub-section suggests that the Court should have discretion to restrict any person continuing as Counsel in a case in which he has been called as a witness.

Justice of the Supreme Court of British Columbia

Lawyers:

I do not agree that it should be left to legal governing bodies to decide whether counsel may be witnesses. I have always firmly refused to let them be both and would be unconcerned by the opinion of any lawyers' association on the subject. If counsel must be a witness his client must get other counsel. One cannot have counsel cross-examining witnesses as to transactions and later contradicting their evidence. The opinion of your committee is not acceptable to me. The rule I enforce involves no hardship since it does not prevent the lawyer from being a witness but prevents the witness from acting as counsel.

Judges: Provincial Judges Association of British Columbia

Lawyers:

The Commission recommends that this be handled

as a question of professional ethics by provincial law societies. We do not agree. We have all encountered cases where considerable confusion exists among counsel as to their their status as witness in the trial in which they are involved as counsel, and we think the matter should be dealt with one way or another. The simplest answer would be to exclude such lawyers altogether, but we can foresee problems in small places where there may only be one or two lawyers. In any event, the matter should be dealt with in the Code, with some discretion left to the Judge to decide the matter.

Section 55 (2) No comment

Section 56 No comment

Section 57 Marital, family, etc. Exception

A Provincial Court Judge

There are those cases wherein the Crown calls a common law wife to testify against her common law husband regarding a communication made by him to her. In many of these common law relationships the parties have resided together as man and wife, for all intent and purpose, for many years; have had children; and have purchased property together as joint tenants. Why should these parties be excluded from Section 4 of the Canada Evidence Act?

If Section 4 is to remain then there should be no difference made between a man and wife who reside in a common law relationship and a man and wife who reside by way of a legal marriage.

A Provincial Court Judge

There continually arises the question of the status of persons in a "common law union", whatever that may be; and, of course, it is not provided for in law but a number of authors, I gather, from time to time consider

that the people living in a common law union are entitled to some further benefits of our law but I suppose that the strongest thing against granting them any of these benefits is that there are no bonds of any kind attached to their relationship.

In this matter with respect to privileged communications, it is my view that, first of all, those things which are privileged should be codified and not left to judicial discretion for a particular purpose in a particular trial where the judge thinks it is in the interests of justice because this judge-made law may lead to an unequal application of the alleged principles of privilege.

Should the privilege with respect to marital communications be extended to the conjugal family unit and include minor or dependent children? There are many examples where members of the family unit convey marital communications and this is an example of something which might not be privileged and so should the family unit have the benefit of the privilege.

Should the privilege belong to the cummunicant rather than the recipient of the communication? This makes sense in my view; in fact, possibly they should both have the privilege.

I believe that the privilege with respect to marital communications should subsist after the death of one of the parties.

In addition, possibly the privilege should cover all words, letters, gestures, or other private or confidential acts done in one's own home or one's conjugal family group.

There are many occasions when a wife will allege that she has been assaulted. The police will subsequently attend and meet her at the street line and she escorts them to the house. Upon the officer entering the house, the husband tells the wife to stay out of the fracas and all is love and roses between husband and wife again and the officer is told to leave. Being somewhat inexperienced, he does not leave and is assaulted by the husband in the marital home. Upon a charge of assault police in the execution of their duty, the wife cannot be called as a witness against the husband to establish that there was an original complaint of assault and they are, therefore, left with the evidence of the officer alone as to whether or not there are grounds for him being in the execution of his duty. Therefore, some consideration might be given to an enlargement of the circumstances under which a wife may be called

to deal with a situation where charges arise out of the wife having complained of some assault.

A Provincial Court Judge

I respectfully submit that the law with respect to compellability of spouses should remain as it is with one exception. To be realistic the protection of non compellability should clearly, by statute, be extended to persons living together as husband and wife when there is adequate evidence of reasonable permanence in the relationship.

A Provincial Court Judge

I have encountered sufficient difficulty and inadequacy in section 4 of the Canada Evidence Act that I firmly believe that a spouse should at all times be competent and compellable. I further believe that there should be no privilege relating to communication between spouses prior to, during or after marriage.

Judges: Ontario Provincial Judges' Association

Because of the lack of any authorized or universally accepted definition of the "state of marriage" we conclude that only a spouse whose marriage is recognized by law is entitled to exemption from compellability to testify. This would exclude a "common law" relationship as the term is understood in Ontario, no matter how permanent that relationship may appear to be.

It is our experience that there is a significant number of prosecutions relating to various offences, but particularly involving assaults by a spouse on persons other than his or her spouse or child, which cannot succeed without the testimony in court of the non-involved spouse. For this reason we feel that serious consideration should be given to extending the competence and compellability of a spouse to testify on all matters except communications between spouses during the period of the marriage.

Gosse

I am not convinced that there should be any change with regard to the competence and compellability of spouses of accused persons unless it is to ensure that the spouse is compellable in those situations to which section 4(4) apply. I think that the privilege between husband and wife should be changed so that the spouse making the communication would have the benefit of the privilege, and not the privilege removed as your study paper proposes. It may be that the privilege should also be extended to the confidences that minor children repose in their parents.

McQueen

May I respectfully suggest that consideration be given by the Law Reform Commission to amending Section 4(2)

of the Canada Evidence Act, by adding Section 245(1) and 245 (2), where the victim of the assault is a child of either spouse, or a child in the care and custody of either spouse.

The amendment would permit a wife or husband to testify against each other in cases of child beating. Frequently it is only the wife or the husband who is the only witness of the beating given to a child, one parent will want to prosecute the child beater, only to find that he or she is not a competent witness against his or her spouse and the child victim of the assault is too young to testify.

McDiarmid

Our Department recently had cause to prosecute a case of assault causing bodily harm contrary to section 245(2) of the Criminal Code in which a child sustained severe injuries at the hands of his stepfather. On the basis of the evidence, there appeared to be no doubt whatsoever that the stepfather was, indeed, responsible for the injuries which were described by a doctor to be "unreasonable in terms of the Act" in reference to section 43 of the Criminal Code concerning unreasonable force. The mother, who was not at home when the assault occurred, examined the child on returning home and, after confronting her husband, the latter admitted that he did in fact assault the child.

The case was disposed of most reluctantly by His Honour Judge Kenney on the basis that the wife, the informant Vivian Logan, was not a competent and compellable witness for the prosecution under section 4(4) of the Canada Evidence Act. His Honour stated that section 4(4) of the Canada Evidence Act applied only if the spouse is actually affected in his or her person, health, or liberty. His Honour further stated that one of the bases of section 4(4) of the Canada Evidence Act is the necessity for such evidence to be admitted in order "to protect the human dignity of the person, or the human dignity of the spouse. However, the Canada Evidence Act and the Courts appear to have overlooked the human dignity of a child". His Honour Judge Kenney referred to the decision of Regina v. Bowles in which Magistrate MacKenzie stated "if a husband severely beats his child causing serious injury, under our law as it stands, the wife would be incompetent to testify even if she were the only witness to the offence." It would appear that His Honour Judge Kenney is correct when he states that children "may be savagely beaten with impunity by any person either in private, or in the presence of his or her spouse, as long as no independent witnesses gain any personal knowledge of the matter, and as long as the matter does not come within section 4(2) of the Canada Evidence Act."

It is our contention that the matter could be rectified by simply amending section 4(2) of the Canada

Evidence Act to include section 245(2) of the Criminal Code in the list of offences on which the wife or husband of a person charged could be a competent and compellable witness for the prosecution.

Judges: Provincial Judges' Association of British Columbia

Spouses: We are in substantial agreement with the Commission's recommendation that (1) the spouse shall be a competent witness for the Crown; (2) that the spouse be a compellable witness for the prosecution in all cases; (3) that the privilege for marital communication be abolished.

We think, however, that this is just as much a sociological question as a legal one, and that the views of the lay persons in the fields of religion, sociology, etc., should be fully canvassed before a firm recommendation is made by the Law Reform Commission.

A Justice of the Supreme Court of British Columbia

I will deal first with compellability. I agree with the authors of the report that the present reason for making a spouse incompetent for the prosecution is that if one spouse was compelled to testify against the other spouse, it would be unseemly and it would endanger the marital relationship. However, the report seems to proceed on the basis

that "endanger the marital relationship" means lead to marriage breakdown. I think the concept goes further than that. A good family relationship requires a great deal of mutual trust and confidence. Whether a marriage breakdown in the sense of something that comes before the courts, resulted or not, the giving of testimony by one spouse against another would, I think, have an effect on the atmosphere in the home. I can still remember the shock felt by people in this country when children gave evidence against their parents in Hitler's Germany. Far from making a spouse a compellable witness for the prosecution, I would extend the principle to cover children and parents. I do not think it is right to compel a parent to give evidence against a child. I think the law needs amendment here but not in the direction suggested in the report.

As to Competency

I am in favour of leaving matters as they stand. A person who is competent but not compellable is not altogether free from compulsion. Particularly during times of social or political change a spouse might be subjected outside the courtroom to pressures to testify. At least before any of these changes are made, something should be brought before us to show that the law as it presently stands is, in fact, resulting in improper exclusion of testimony.

I myself have never been exposed to a case in which justice in the larger sense was defeated because a spouse was not competent or not compellable.

The harsh results possible under the proposed legislation cannot be avoided as suggested by the author of the report by giving the trial judge "the right after weighing the competing interests of family harmony and society's protection in the particular case, to exempt such a witness from any of the civil or criminal consequences of not testifying". In time, of course, a body of law might be built up to guide judges in the exercise of such a discretion, which body of law might, in effect, restore the law as it exists today but in the early years at least, such a provision would give no witness any assurance of protection and would, I think, put too great a burden on the trial judge.

Marital Communications

Here, again, I think amendment is required but not the amendment suggested by the authors of the report. I think a man or woman should be able to relax in the home free from the hazards of the outside world and that consequently the privilege in respect of communications made during marriage should continue and the law should be amended so that that privilege should

(1) continue after death and divorce, and

(2) be available to the spouse making the communication and to the spouse to whom it is made. I do not think it correct to say that "few citizens today even know of the privilege".

I ran a short test and everybody I spoke to knew about it, although not very accurately. I have given no thought as to whether it should be extended to cover acts done in the presence of the spouse or whether it should embrace the family unit as a whole. Offhand I think communications between husband and wife deserve more protection than other family communications and the question of other members of the family would be taken care of by what I propose in respect of the competency and compellability sections.

A Justice of the Supreme Court of British Columbia

The rules of evidence relating to the competence and compellability of spouses should be retained.

These rules may not be logical but the present rules do, to an extent, preserve rights of privacy which are extremely important to our way of life.

Judges and Justices of the Courts of Manitoba

Well, personally, I'm not in favour of abolition,

because I think there's still a pretty close relationship between husband and wife in regard to that communication.

The difficulty about this area is that the marital relationship is that today's society is probably different in many respects, out of common law relationships and rather tenuous marriages. If one spouse chooses to testify against the other, I don't see why the Court, which is in search of the truth, in all cases, shouldn't permit that testimony to be received. It's sort of an unreal barrier to the search for the truth in many cases.

Speaking for myself, I kind of agree with the concluding remarks in the statement there, that is recognized in some cases it may appear harsh to require family members to testify against an accused in the solution they give the Trial Judge the right, after waiving the ..... interests of family harmony in society's protection, in a particular case, to exempt such a witness from any dissimilar criminal consequences of not testifying".

At the present time, of course, the section doesn't include a power to the presiding Judge to exempt a witness from not testifying, and I guess this is a suggested - I'm somewhat skeptical of the - you know - I can see it as a fairly difficult decision having to be made, where a witness

will protest he should be exempted and have a virtual trial within trial on whether or not that can - and there can be very many grey areas in that kind of situation, I think.

It's pretty hard for a Judge to make that decision...

Well, the whole draft code is replete with new powers to a Judge which he may not want to exercise, in which the profession would find objectionable, but I don't see how - I mean, there's many more difficult tasks than this one in this draft code.

I, personally, favour the draft code, the principles contained therein, in respect to the competence and compellability as opposed to - it's a kind of a daily search of the truth being paramount.

Well, I still have some concern about it. Although, the Commission's basic reason for suggesting - it seems to be at the top of Page 5 - "This decision was made after weighing the competing interests of the possible protection of marital relationships and the protection of society from those who may be dangerous". I wonder, frankly, what that - how substantial the percentages of cases are, that are, in fact, seriously affected by the wife not being compellable or a husband not being compellable.

That's just the thought that was going through my mind, but you worded it a lot nicer than I could have expressed it.

Although there are certain dangerous cases, or there are other cases where the last thing you should be worried about is preserving some tenuous, really, relationship that we call marriage, when there may be a very dangerous person around. Or some other ...

Or where the testimony of a spouse is very vital to a decision in a particular case.

...And particularly perhaps, in the civil areas, which I'm not really familiar with at all. He may have a very good reason for - or a family Court problem or such.

But the Crown can't. Well, you see, to me this is anomaly of the law that I find hard to accept. If she can come into Court and support her husband in a criminal trial, why shouldn't she be compelled to come in and - when she's not supporting him, if she has knowledge of the facts, if it's a good case. I mean, what's so - you know - what, then terms - criminal law processes - what's so sacred about a marital relationship, in determining whether or not an accused person has committed a crime.

I guess they're looking at the overall picture of the family relationship as a whole, to the detriment of the accused.

It doesn't seem important in a Province like Manitoba, where a good many criminal offences, serious ones, are - arise out of a marital relationship, in all crimes of passion and so on. Well, it's also very difficult to discover the facts. I don't know why - and I don't understand what's so sacred about the marriage relationship vis-à-vis the criminal law process.

Well, in a way you'd think it borders on having a new avenue of evidence. It's almost like planting a listening device into the home, and saying, "Aha, you can't put a policeman there all day and night, but we can make the wife our agent, and whenever we want something out of that home we'll call the wife", and she's around a lot more than any police officer could be - and you know - I personally can't see anything so sacred in a marriage relationship that, in a given case, one spouse shouldn't be required to tell the Court what they know about the case. That's my personal view. At the rate at which we put through divorces each week, and with Women's Liberation movement, and this idea that prevails in our society today certainly doesn't indicate to me any great sanctity in a marriage contract in terms of what we're talking about here.

Schiff

I find myself appalled by the thought of spouses being generally competent and compellable witnesses for the prosecution in criminal cases - while it bothers me much less, in civil cases.

University Women's Club

After much interest and discussion, our Committee agreed with the recommendation that the privilege for marital communication be abolished. We also agreed that spouses be compellable witnesses for the prosecution in all cases, and not just those enumerated in Section 4.

Montreal Lakeshore University Women's Club

The competence of a spouse to testify and the compellability of such evidence aroused much more mixed reactions. A majority of the members were in favour of a spouse being declared competent. The privilege of marital communication was discussed and if this remains in the law, then changing the law of testimony will have little effect. Therefore, we agree with your recommendation that it be abolished. We are also in favour of the Law Reform Commission's proposals that spouses be compellable witnesses for the prosecution in all cases.

Because of our lack of knowledge of the present laws we could not formulate legal safeguards that would

provide protection and relief in certain sensitive or complex cases. Could an arrangement be made for intimate testimony to be given "in camera" to protect the marital privacy and reduce the emotional effects of a spouse's testimony on the jury and public? Has the Commission consulted with the medical professions, including psychiatrists and psychologists as to the mental effect on an insecure spouse of testifying? Perhaps studies have been made in regions where compellability is in force.

Another suggestion was for a procedure that would allow refusal to answer specific questions on the grounds that answering them would endanger the family's well-being.

All members would be happier if safeguards could be written into the law for use in special situations. The ideal should be that justice should have priority over any contract but there are reservations about the ability of the legal system to make adjustments suitable to the exceptional case.

British Columbia Civil Liberties Association

We object, however, to the proposal that spouses be competent and compellable in all circumstances. The present rules on this subject often do not fulfil their

purpose and sometimes do not make any sense at all. Clearly, reform is needed. However, we believe that the right of privacy requires that some protection be given to married persons. We find it repugnant that one spouse should be required to make confidential matters public. Recent divorce legislation does not constitute a rejection of the principle that marriage is a special and private relationship. Therefore, we suggest that the protection given to spouses be modified rather than abandoned. We also suggest that the protection be extended to common law relationships. Such an extension would avoid de facto discrimination against groups in which such relationships are the norm.

The National Council of Women of Canada

Further to our correspondence of March of this year in regard to the proposed amendment to the Canada Evidence Act which would require that a spouse be compelled to testify in the matter of a battered child.

The National Council of Women of Canada meeting in plenary session in June of this year in Toronto endorsed a resolution on the clause which would require that spouses be compellable witnesses in cases related to child beating. This resolution was to be presented as an emergency resolution to the International Council of Women meeting in July in Vienna, Austria.

On behalf of our Canadian Council I presented this resolution to the plenary session and spoke in support of it. Many countries had submitted resolutions dealing with the 'battered child' but Canada was the first to suggest a resolution dealing with a Compellability requirement. The resolution was unanimously endorsed by sixty two countries. A copy of the final draft is attached for your perusal.

Toronto Star

The Law Reform Commission of Canada, which is trying to modernize the Criminal Code and other federal laws, has come up with its most controversial recommendation to date. It proposes to scrap the rule that husbands and wives cannot give evidence against each other.

This is an ancient common law rule which has been somewhat modified by later legislation. As the Canada Evidence Act now stands, a husband or wife can testify for the defence when the other spouse is on trial. But with certain exceptions, he or she cannot be compelled to testify, or even testify voluntarily for the prosecution. The exceptions are cases involving certain sexual crimes, contributing to juvenile delinquency, and marriage offences such as bigamy.

The Law Reform Commission apparently feels that this provision is an outworn relic of the past. As one of its members, Judge Rene Marin of Ottawa, told the Canadian Association of Chiefs of Police, "We wondered if society, in the case of a serious crime, has a greater interest in trying to preserve a marriage or in bringing the individual who committed the crime to justice."

Most Canadians, we suspect, will disagree. There is something peculiarly repugnant in the thought of a wife being forced to testify against her husband or a husband against his wife - in the private conversations of a married couple being aired in court. The family is the basic unit of society and the law should show a proper respect for it.

From a practical standpoint, too, the proposed reform would produce endless trouble. A grest many married people would undoubtedly refuse to give evidence against their partners, whatever the law might say. Then the judge would have no option but to commit the recalcitrant wife or husband to jail for contempt until he or whe was ready to talk.

In most such cases, public opinion would undoubtedly sympathize with the imprisoned spouse, and the prestige of the courts would suffer.

There is one class of trials in which the proposed change would be justified. That is the so-called "battered baby" case, in which one parent is accused of killing or seriously injuring a small child. In such cases the other parent is often the only available witness, and there is some justification for compelling him or her to testify; it may be the only way to check a peculiarly detestable crime. A case may also be made out for permitting husbands and wives to testify of their own free will for the prosecution where the judge is satisfied that no compulsion has been placed on them by the authorities.

But apart from these exceptions, the law should be left as it is. This is one place where reform needs to be attempted very gingerly.

Branson

While I am not totally opposed to the suggestion on page 7 of the study papers to the effect that there should be a discretion given to the trial judge concerning the admissibility of testimony from family members I feel that it is probably wrong. I do not feel that a just result should depend upon the vagaries of a particular family situation. It would seem to me that a possible result flowing from this provision would be that evidence coming from a member of the family who was not on good

terms with the accused would more likely be admissible than that which is sought to be obtained from someone close to him.

Goodwin

Testifying against Spouse

We have currently before the Courts this case: The accused and his girl friend, after an extended drinking bout, went around to the house of a man with whom they had had dealings earlier in the day. The accused battered the resident to death. The girl friend was the only witness and she gave the police a full statement. Strenuous efforts were made on behalf of the accused to get him released and it was well known that the object of the exercise was to enable him to marry the girl and so make her unavailable to the Crown as a witness. Apparently at the time she was willing, however this did not come about. She is now in the States and we can only hope she will return. If she does not we may be relying on the transcript of the preliminary hearing. However, the point obviously is that if she had married him, she could be silenced about something that happened before the marriage. Without her evidence the Crown has virtually no case. Had they married that would have been the end of it. Suppose she were to marry him now, would this render the transcript of her evidence at the Preliminary unavailable to the Crown?

By the present rule, would it not serve any real purpose needed to be served if the protection was extended only to: (1) communications between husband and wife during marriage; (2) when the offence charged occurred at a time when these two parties were married, and; (3) only when claimed by a witness.

University Women's Club of North York

In brief, we agree with the proposals that spouses be competent and compellable, but we have some reservation concerning the privilege for marital communication.

More specifically, we agree with the argument that the protection of the marital relationship must be weighed against the protection of society, but we were puzzled by some of the other reasoning of the Study Paper.

On page five, the reason given that because children are not given these immunities, they should not pertain to parents does not recognize the difference in the relationship of children and parents and that of the married pair.

In regard to the statement on page six, line six, that society was unwilling formerly to imperil a marriage, but does not now believe it should be preserved at all

costs, we feel that although important reforms in divorce legislation were necessary, marriage is an institution recognized by the state as well as religious bodies and should not be found less worth preserving.

On page seven, line three, a statement is made about the lack of evidence of marriage breakdown due to compellability of spouses in civil cases. We would be interested to know what proof you might have on this point, which seems to be quite controversial.

Having presented a strong case for compellability of spouses to this point, the Paper surprises us at seeming to reconsider, on page seven, line seven. More details of possible circumstances for the use of judicial discretion would be useful.

In the section on Marital Communications, the reasons given made us question the attitude toward marriage of the Study Paper. Certainly it would seem the reason for the law was not to encourage frankness in marriage, but to recognize the special relationship of a marriage partnership.

We realize that to accept the concepts of competence and compellability and to balk at marital communication may be inconsistent; but we are very concerned that the

possible threat to society must be very great before disclosures which would impair matrimonial trust must be made. If in some areas compellability may be harsh, as is suggested in the Study Paper, then it would follow that in some areas, disclosures of marital communication would be similarly harsh. The stability of the family of the accused is worth preserving and family harmony must be considered an important factor in the rehabilitation process.

A society which permits no privileged communication would certainly hamper the free spirit of its members.

Barker

The right of an accused before a court to claim silence for himself, and to compel it in certain others standing in special relationship to him is compendiously referred to in the law of evidence as privilege. Common expressions of privilege are to be found in the rule against self-crimination, which rule has been statutorily sanctioned by the Canadian Bill of Rights; the rule providing for marital privilege which receives explicit recognition in the Canada Evidence Act; and the rule providing for solicitor-client privilege which rests upon judge-made law. Other less important forms of privilege are to be found in evidentiary rules relating to State and

Diplomatic privilege, which need not be of concern here. Discussion will be confined to the Evidence Project's proposals to recommend to the Law Reform Commission:

1. That spouses become competent to testify on behalf of the accused in all cases;
2. That spouses become competent to testify on behalf of the prosecution in all cases;
3. That testifying spouses may be compelled to disclose marital communications made during the course of the marriage.

These proposals will work a fundamental alteration in the present law of evidence relating to marital privilege. As the law now stands in those areas served by the Canada Evidence Act, a spouse is a competent witness for the defence - s. 4(1). A spouse of an accused is incompetent as a witness on behalf of the prosecution save in the case of those offences enumerated in s. 4(2), and those offences involving personal violence by one spouse against the other. In every case where a spouse is testifying either for the prosecution or the defence the witness spouse may not be compelled to reveal any communication made during the marriage - s. 4(3). This privilege belongs to the accused spouse.

Assuming that the present rules relating to marital privilege represent an expression of social policy at the time the rules were codified by the Canada Evidence Act, we are entitled to inquire as to whether or not there is any clear evidence that such an alteration as is proposed is warranted. Let us examine the arguments put forward by the Evidence Project in support of their proposal. It should be noted that no evidence in support of the proposals is advanced - rather, there are only arguments. These arguments follow in a summary form which hopefully does them no violence:

1. The present rules are a product of history and are not the reflection of a clear-cut policy decision.
2. The rules do not apply to all members of the family unit and there has been no suggestion that they should be so extended.
3. Easier divorce indicates that the Community may now consider it more important to convict the guilty than to preserve a small number of family units which the proposals may destroy.
4. It is difficult to decide which crimes should be added to the list of those exceptional crimes which presently permit the compelling of one spouse to testify against another.

5. The present rules may cause the spouse a certain amount of discomfort in deciding whether or not to testify against the spouse.
6. The present rules may cause animosity between the spouses as the accused spouse might consider the attendance as a witness as a voluntary act.
7. The present rules do not apply in civil cases and provincial prosecutions, and there is no evidence of marriage breakdown resulting therefrom.
8. It is not certain that the right of one spouse to confess a crime to the other spouse is necessary for a viable marital relationship.
9. It is not certain that the right of one spouse to confess a crime to the other spouse is an important value worth protecting for any reason.
10. The present rules probably have no effect on disclosures between husbands and wives because few husbands and wives are aware that such disclosures are privileged.
11. The present rules probably have no effect on disclosures between husbands and wives because they might not apply after divorce.
12. The present rule protecting marital communications does not make sense because it is given to the wrong person.

13. The present rule protecting marital communications does not cover private or confidential acts done in the presence of the spouse.

14. The present rule protecting marital communications does not embrace the family unit.

The Present rules are a product of history and are not the reflection of a clear-cut policy decision

It is impossible to find any legal rule without a history. Any point chosen along the historical continuum of a rule represents as decisive a statement of social policy at the point chosen as can exist. In short, any present legal rule equals a statement of a chosen policy. The Project's argument here attempts to ignore the historical justifications for the rules maintaining marital privilege and suggests without the benefit of evidence that these justifications have disappeared, if in fact, they ever existed. The duty upon one who asserts the truth of a proposition is clear. He is obliged to persuade his audience of the correctness of his assertion or risk losing its adoption by his auditors. To simply assert that the rules are merely an absent-minded legacy of history, as the Project has done, without evidence, is to abuse the mandate which the Law Reform Commission has been given.

The rules do not apply to all members of the family unit, and there has been no suggestion that they should be so extended

To say that a rule is not universal in its application and therefore it ought to be abolished, particularly when there have been no known requests for its extension, is similar to an argument to the effect that because not all the population enjoy the benefits of a free system of public education and do not request the extension of those benefits to themselves, free public education ought to be abolished. That such an argument should seriously be advanced in support of a proposal to alter a legal rule beneficial to individual accused persons does not encourage confidence in the ability of the Project to deal with the tasks it has been set in a competent manner. Perhaps arguments of this kind, put forward by the Project, are inevitable, given the assumption which the Project appears to have adopted. This assumption appears plainly enough, and it is that the hand of authority must be strengthened against the individual member of the community. It is a brutal assumption and the arguments in support of it will not be characterized by the patient marshalling of carefully scrutinized evidence. Perhaps, if fear and prejudice were restrained, and a careful search for evidence were undertaken a quite different proposal might have emerged, namely, that the privileges under discussion be extended to all members of the family unit.

Easier divorce indicates that the community may now consider it more important to convict the guilty than to preserve a small number of family units which the proposals may destroy

Again, no evidence is put forward in support of this argument, an argument which demonstrates the Project's bias in the direction of convicting the guilty. It seems reasonable to ask the Project whether they have any evidence that the present rules assist the acquittal of the guilty. If they have none, then the argument for change should fall. If the Project has evidence in support of its argument it is still far from clear that an informed public would agree that the conviction of the guilty should take precedence over the maintenance of family units. The pressures in our communities upon the maintenance of viable family units is very great, and the deliberate enforcement of these pressures by legislative decree could be an act of social folly.

So little is known of the nature of the family in our society that wisdom demands that legislation designed to influence individual members ought to be the product of careful study and wide public discussion. The Project has engaged neither in apparent study nor public discussion. The background, experience, and knowledge of the Project staff are little known, and until this situation is

corrected their arguments in support of their propositions are not likely to be treated with confidence.

One suspects but cannot prove without the benefit of actual experience, that if this proposal to abolish marital privilege to assist in the conviction of accused persons was made widely known to the Canadian public, and if that public were apprised of the significance of the proposal they would be vehement in their condemnation of it. Such a public outcry would, of course, raise the whole question of law reform initiated by Commissions created and responsible to governments. Perhaps law reform is such an integral part of the community's fabric that the community should be closely involved in the initiation of proposals for reform, and such initiatives should not be left to Commissions.

It is difficult to decide which crimes should be added to the list of those exceptional crimes which presently permit the compelling of one spouse to testify against another

To say that it is difficult to decide can hardly be accepted as an argument for eliminating the responsibility to decide. There may be compelling reasons to maintain distinctions, notwithstanding the difficulties involved in discriminating. The Project's argument here lacks any

discussion of the difficulties referred to, and without such a discussion how can the merits or otherwise of the argument be judged?

The present rules may cause the spouse a certain amount of discomfort in deciding whether or not to testify against the other spouse

If a spouse is competent to testify against the accused, then that spouse is also compellable. The witness spouse has no decision to make. The argument advanced by the Project here is thus misleading in that it suggests that the witnessing spouse chose to become a witness. In fact the choice does not belong to the witnessing spouse, but rather to the prosecution. A spouse is a competent witness for his or her accused spouse by virtue of s. 4(1) of the Canada Evidence Act. The subsection does not make such a witnessing spouse a compellable witness for the defence. In the case of those crimes enumerated in s. 4(2) of the Act, a spouse who is made a competent witness is also made compellable. The argument advanced addresses itself to a non-existing situation, namely, that the witness must make a decision. The decision has been made for him or her by the directions contained in the Canada Evidence Act.

There is no doubt that the witnessing spouse suffers from discomfort when called upon to testify.

However, this is a malady which the majority of witnesses probably suffer from. For the Project to argue that the spouse witness suffers from more discomfort than a non-spouse witness is probably of little consequence. However, when such an argument is used in an effort to justify a law that might destroy the therapeutic potential of conversations within the family unit, the Project is on slippery ground.

The present rules may cause animosity between the spouses as the accused spouse might consider the attendance as a witness as a voluntary act

This argument implies that attendance as a spouse witness for the prosecution is not voluntary which is, in fact, always the case. A non-compelled spouse witness for the prosecution is impossible, and compelled spouse witnesses in the sense of not volunteering for the defence is equally impossible. To argue, as the Project does, that the animosity which it seeks to avoid will be absent if marital privilege is abolished, does not follow from the evidence which it has chosen or not chosen to advance. The sources of animosity between members of a family unit are surely too diverse to be attributed to a single source as the Project implies.

The present rules do not apply in civil cases and provincial prosecutions, and there is no evidence of marriage breakdown resulting therefrom

To the extent that the provisions of the Canada Evidence Act do not apply to matters before various Canadian Courts, the argument advanced here cannot be objected to. Where the argument, however, goes on to state that there is no evidence of marriage breakdown as a result of the absence of marital privilege under the circumstances mentioned, it must be objected to. A hypothesis can only be proved or disproved by subjecting it to the test of evidence. No evidence has been put forward in support of the Project's hypothesis that marriage breakdown has not been caused by the abolition of marital privilege in certain areas of judicial proceedings under an adversary system.

It is not certain that the right of one spouse to confess a crime to another spouse is necessary for a viable marital relationship

The ambit of conduct constituting criminal behaviour is notoriously wide and it is difficult to imagine a spouse who from time to time does not engage in conduct which is forbidden. At the same time, it is difficult to imagine spouses who throughout the course of their marriage

never disclose to each other the details of such conduct. What can only be guessed at is the effect of potential forced disclosure of these communications upon the relationship of the parties to them. It would seem reasonable to assume that mutual trust would be diminished to some degree within the family unit, and mutual trust within the unit is an important value. Not only is it important to the family unit, but it is also important to the community that the family units making up that community not be deliberately damaged by the introduction of a degree of mistrust into them. There are, of course, limits to the social policies designed to support community values such as mutual trust, but there is no evidence that these limits have been even remotely approached under the present rules.

> The present rules probably have no effect on disclosures between husbands and wives because few husbands and wives are aware that such disclosures are privileged

This argument implies at least that such disclosures exist which is a welcome concession on the part of the Project. To go on to argue by implication that one should only be entitled to exercise such rights and privileges as one is aware exist, and if one is unaware of their existence they should be abolished, displays an attitude towards the

community which borders upon contempt. Contempt of the unearned ignorance of any group deserves to be returned in full measure, and certainly merits wide publicity.

The present rules probably have no effect on disclosures between husbands and wives because they might not apply after divorce

This is an argument both problematical and lacking full canvass. Doubtlessly, a good argument can be made that the privilege ought to continue after divorce as during the course of the marriage. Of course, it might be argued that the present ambiguous situation provides an additional incentive to remain married!

The present rule protecting marital communications does not make sense because it is given to the wrong person

The important consideration in such a rule is the provision of the privilege - a privilege which belongs to the accused. The argument advanced here by the Project implies the continuation of the privilege but the destruction of the means for its effective exercise. The lack of candor in the argument should be noted.

The present rule protecting marital communications does not cover private or confidential acts done in the presence of the spouse

This argument assumes that because the rule has not been extended to its logical and necessary limits it ought to be abandoned. Again we see the Project's eagerness to abolish the rule being supported by less than impressive argument.

The present rule protecting marital communications does not embrace the family unit

Again, the present possible imperfections of the rule are made by the Project a ground for its elimination. No doubt excellent arguments supported by adequate evidence can be made for the extension of the rule to protect the family unit. The very least that the Project ought to do is to gather the evidence which would support such an extension in order that the debate on the subject would be complete.

Hopefully, the preceding comments upon the proposals and arguments advanced in their support by the Project will draw attention to some of the issues involved, and the Project's inadequate approach to these issues. If the law is to be changed it ought first to be rendered into a readily intelligible form. This should be the primary task of the Law Reform Commission and the Evidence Project.

To carry this out a comprehensive codification of the law as it relates to marital privilege in those areas under Federal jurisdiction should be quickly brought about. When this has been accomplished, discussion of possible alteration in the rules could then be profitably carried on. The results of such behavior are more likely to produce changes which represent the contemporary needs of Canadian society. The issues raised by the Project's proposals touch upon the fundamental relationship of the individual to his government. That this relationship should be altered without the informed consent of the governed would be wrong, particularly when the proposals advanced by the Project weaken the integrity of the individual, and advance the potential of government to act in an oppressive manner.

The Evidence Project apparently is contemplating considering the abolishment of the accused's right to remain silent. This would be in keeping with its apparent penchant for grappling with large issues while ignoring the more workaday problems which the evidentiary rules present in their present form. One suspects that the level of experience with the actual working of the present rules on the part of the Project staff is minimal, and hence their predeliction for tackling more global issues. If this is the case we in Canada are likely to have a good

deal of policy change, and rather little law reform. The close knowledge gained from extensive experience in the court room would reveal to the Project staff a host of rules which need their attention, and surely this is what law reform is all about. Micro alteration as contrasted with macro change is, of course, less exciting but usually is far more beneficial to the community.

A summary of the arguments opposed to the Project's proposals as they relate to the privilege against self-crimination should include the following:

Firstly, the Ouimet Report recommends in Chapter 10 the extension of privilege rather than its restriction. The reasons advanced are attractive and ought to be carefully considered by the Project. Secondly, confidence in the privacy of communications to others is needed to promote trust in the community's social and therapeutic endeavours, not to mention the absolute need of the individual to have trust in those persons with whom he lives in an intimate relationship. Thirdly, the citizens of a potentially democratic country such as Canada must preserve a measure of ability to rebel individually, and collectively against their various governments. This ability can be advanced by the maintenance of the privilege against self-crimination. Certainly, the errosion of the privilege favours the freedom

of government and not the freedom of the individual for whom governments exist. Finally, the growth of a manipulative society will be checked in some measure by the right of an individual to maintain his secrets within the confines of an intimate group.

Fitzgerald

The one substantive recommendation which I find hard to accept relates indeed to the position of spouses. The rule may well be "simply a product of history" (Paper 1, p. 5) but this doesn't mean that it can't be justified. Nor do I find the final sentence on p. 5 wholly conclusive. Maybe we should extend the rule to cover the family unit. Or maybe there is a difference between the husband-wife relationship and all others.

Nor am I wholly convinced by the recommendation on marital communications. What about the person in a difficulty who wants and needs to talk about it (what has happened, what he has done, what he's thinking of doing) in privacy, without the fear of later disclosure? Surely this is as much the problem as the case of the man who wants to tell his wife he has committed a crime. The points made on p. 8 aren't conclusive. Why not give the privilege to the right person? And why not extend it to cover confidential acts?

Hurlburt

I find the matter of testimony by a spouse to be very difficult. It seems to me that the basis for the rule at this time, regardless of historical origins, would be a revulsion against requiring one spouse to injury another. There would also be a feeling against the spouse being not compellable but competent. This would leave the way open for the vengeful spouse, on the one hand, and on the other would create a crisis of conscience for the conscientious spouse. There is, of course, the problem which I expect your Commission has in mind, namely, that if evidence is available it should be heard so that the guilty may not escape. The case of the marriage by a convicted person on compassionate leave, to a principal witness, while the decision was under appear and a new trial possible, is a striking example. I think that on the whole I am with your recommendation but with some serious misgivings.

Stevenson

I would venture to suggest that the proposition that a wife can't testify against her husband is one of the best-known rules among laymen. I'm not quite sure why this should be: It may be attributable to the popular press, paperback novels, or television programs, but it is certainly much better known and understood by laymen than

any element of the hearsay rule. That being so, I suggest that there is, in the community now, the feeling that one can communicate with one's spouse, with impunity. Perhaps this is as it should be. I think this is the only rational reason for supporting the present rule. Also, while you say that the privilege of marital communications is given to the wrong person, the absence of compellability serves the effect of giving the privilege to both parties.

Bowker

Competence and compellability of spouses: I agree they should be competent in all cases but have had some misgivings about compellability. There is something distasteful about making a reluctant wife testify against her husband. However the arguments are fairly set out and on balance your recommendation may be preferable.

New Brunswick, Law Reform Division

The general feeling was that it would be a good move to make the wife a compellable witness. There was a feeling that the present law makes it very difficult to prosecute especially where family offences have been committed. There was a feeling, however, that if a wife is to be a compellable witness that there ought not to be a discretion in the court to exempt witnesses from civil or criminal consequences flowing from the failure to testify.

The discretion would be an extremely difficult one to exercise and would probably lead to different standards being adopted by different judges, rather than different standards being adopted in different cases. Although it is difficult in some cases to impose criminal consequences upon a person who fails to testify, this may very well be the price that one pays for a rule designed to elicit the truth.

Ontario Crown Attorney's Association

Husband or Wife: - the committee agreed in principle with the remarks by the Project on this area but felt, however, that with respect to marital communication (which we defined as verbal or written communications made by one spouse to the other, and received by that other spouse, during coverture) there must remain some confidentiality.

It was recommended that, with regard to this type of evidence only, it prima facie be privileged but that the trial judge may compel a spouse to testify taking into account the circumstances under which the communication was made, the state of the marriage and the circumstances and the seriousness of the offence charged. This privilege should attach to the accused and it should not cease upon divorce or annulment although this latter fact might be an item to be considered by the trial judge. It was felt that this privilege should apply to spouses only.

Sheenan

Competence and Compellability

It appears that in Section 1 Sub Section 1 that every person is competent and compellable as a witness for any party in a trial. This particularly I agree with completely, however, I am wondering whether the Commission has considered all aspects relating to the accused himself; while we know he is competent what about his compellability as far as the prosecution is concerned? The complexities of the old rules pertaining to communication between husband and wife has been well documented in the case of spouses. To this, I agree completely as outlined in the comment section. It will obviously create some minor problems, however, going back to the truth finding function of the Courts and the basic principle of the protection of the public, it would seem obvious to me that if by removing the marital communication privilege the ends of justice would be met with a greater certainty and the protection of society from persons who may be dangerous.

There was some suggestion that at least spouses be made competent witnesses for the prosecution and, if the above mentioned paragraph is to have any weight, they must also be made compellable. After all, the trial judge will still have the right particularly if it is a spouse to weigh the evidence given by the particular spouse, and

relate it to other evidence that may be adduced. In our modern society the question of morality, and morality especially in relation to marriage seems to have gone by the wayside and then there are a great number of common law arrangements now and probably more in the future. It seems ridiculous that in the present rules a common law spouse is competent and compellable and a legally binding marriage the spouses are not.

British Columbia Law Reform Commission

The report recommends in favour of competence and compellability of spouses as witnesses. This is the present B.C. position (Evidence Act, Sec. 8(1)) and we should support it. However I question the proposal that the matrimonial communication privilege should be abolished. The privilege presently resides with the witness. I suggest that as a foundation of our society the family relationship ought still to be fostered. One means of fostering it is to encourage the free exchange of information and advice upon matters affecting the family, and, public recognition of that freedom privileged from enquiry.

I propose that any spouse who communicates to his or her spouse, and any infant who communicates to his or her parent or person in loco parentis;

1. where that communication is made confidentially (that is, under circumstances where the communicator believed the communication to be made only to a spouse or parent(s) as the case may be, thus excluding unknown eavesdroppers)
2. and where the communication was solely for the purpose of seeking to promote the well-being or continuation of the marriage or to obtain familial advice for the legal protection or moral reform of the spouse or infant.

Should have a privilege of declaring incompetent the recepient of the communication from testifying as to what was said. The privilege should attach automatically and before the witness can testify the privilege should be specifically waived by the communicator whether or not the communicator is a party to the litigation. An exception might be considered where the communicator is charged with perjury and where the communication sought to be introduced in evidence goes to the proof of perjury.

(The preceding reference "to whether or not the communicator is a party to the action" may be necessary in view of the proposal to relax the laws excluding hearsay, to be dealt with in a further paper).

The foregoing proposal omits those cases where there is a common law relationship. Infants would be protected by the "loco parentis" rule but common law spouses would not be protected.

B.C. Law Reform Commission re Action

The Commissioners are divided on their initial reaction to whether or not the matrimonial privileged should be retained. Mr. Fulton favours the privilege while Mr. Bray is inclined to national position. The Commissioners are not sure whether the purpose of the communication should be the test, or whether the test should be the type of communication, i.e. was it of a "confidential" kind. For the time being the British Columbia Commission wishes to adopt the position set out in this paper if only as a means of precipitating extensive argument on the whole problem. The Commission is undecided whether or not common law marriages should be recognized by the privilege, and if so whether any restriction on the length of a common law should be applied. i.e. For one year or more. The problem seems to require an arbitrary solution.

Manitoba Law Reform Commission

The annexed memoranda of Mr. Bowman and Mr. Turner contain comments on this Study Paper which merit consideration. We are in agreement with the points argued by

Mr. D.E. Bowman from mid-page 10 to mid-page 12 of his memorandum as to spousal testimony (indeed all evidence which can be adduced from a spouse of an accused). In relation to this subject, Prof. Penner drew to our attention Rule 505 of the Proposed Rules for U.S. Courts and Magistrates:

> A person has a privilege to prevent any testimony of his spouse from being admitted in evidence in a criminal proceeding against him.

Under this proposed rule, which attracts our favourable attention, it is clear that the spouse may competently testify if the accused waives the privilege. It is also clear that the privilege is as to the spouse's being a witness or not; but if the spouse be a witness, then the spouse will be a witness for all purposes, and no privilege would operate as to marital communications.

In recent times, relative to spousal evidence, consideration of the "after-acquired" spouse has arisen. Then, if, under the above cited dispensation, an accused were to invoke the privilege in relation to the spouse married after the events from which the charge is laid, there could be a species of voir dire to determine whether the intervening nuptials were a kind of "marriage of convenience" or a "genuine" marriage contracted without

regard to the spouse's role as a potential witness. If it were determined that the marriage had been celebrated merely or principally to avoid spousal testimony the proposed privilege could be obviated by the Court. If not, the privilege would stand.

One comment made to us in relation to spousal compellability was: "Why work on getting a confession from the accused? Just work on the spouse!" And when one sees the lengths to which law enforcement ingenuity can go one might well ask these questions. At least, in our view the Pettipiece case shows a predeliction not only to ascertain the truth, but to do so at great cost to traditional and still needed safeguards against excessive state power. If crooks be getting smarter, the police will have to get smarter, too, but not crooked!

Needless to say, we would not in any event recommend the abolition of the kind of provisions which are expressed in section 4(2) of the Canada Evidence Act, although we should not wish to have them unduly expanded.

Bowan

It is interesting to note that the proposed legislation brushes over the question of competence and compellability of a spouse, by saying that the competence

and compellability of an accused must be considered elsewhere. The comment goes on to make clear that it is proposed that what has been termed "spousal immunity" be removed in its entirety. Trial counsel can only shudder. I am not concerned with the historical background or the alleged reasons put forward by the project for such immunity. The real and valid reason today for prohibiting the testimony of one spouse against another lies not in any attempt to protect the marital relationship but in the experience of the courts in dealing with conduct between the spouses.

Almost any experienced lawyer will agree that the perjury rate in the family court is probably higher than in almost any other tribunal. When the family situation has reached the state where a wife or a husband is prepared to give evidence against the other, it has also reached the state where the emotional climate of spite and hatred is so well developed that one spouse will do almost anything, say almost anything, swear almost anything, to injure the other, no matter how remotely or in how small a way.

Any tribunal, but particularly a jury, will say to itself, and quite properly, that the husband or the wife is the person who should know best what really happened, other than the accused himself or herself. He or she is the

person who really knows the accused and can really give us the low-down. If he or she testifies to a conversation, to an action, to anything pointing toward guilt, it would be given the greatest of weight, far more than that given to the evidence of a stranger. Yet how often have we seen husbands and wives desperately trying to see their spouse sent to gaol for some offence in order to facilitate their divorce or their liaison with someone else or to cut off their spouse's access to the children. Instances of such venom are too commonplace to even be noted by experienced counsel.

To permit a husband or wife to give evidence against the other and to compel it, is to come close to guaranteeing some degree of perjury. Where the marriage is good and subsisting, almost any spouse will lie to protect the other. Where the marriage has gone bad, almost any spouse will lie, with pleasure, to injure the other.

I can say, with pleasure, that I at last agree with one recommendation of the project, and that is the proposal to do away with the immunity from disclosing marital communications. In my submission, if and when a spouse takes the stand then his or her evidence must be evidence for all purposes and there should be no immunity for disclosure made within marriage. If counsel involved

deem this a problem he should not call the husband or wife in the first place.

Winnipeg Police Department

The proposed section makes every person competent and hence compellable for the prosecution - a definite step in the right direction.

The main contribution to future criminal cases is that a spouse will now be both competent and compellable for the prosecution. It was always the feeling of the police that the need for the truth was overlooked to the detriment of society when the mystical unity of the family was over-riding. Nor did the law offer the same protection for the parent or children of an accused where logically the same principle could have been advanced. In our modern day society the family institution can no longer be rationalized on the historic past. Also if the morality of a family is sufficient to protect, then in all probability there would be no evidence obtained in the first instance that would necessitate the calling of such a witness. The onus is falsely placed on the witness in the present law instead of the accused and if the proposed law is accepted then the witness will be, under law, ordered to give evidence, and hence relieve the spouse of any anxiety

in giving evidence or making a decision that could have been contrary to their moral belief in either regard.

Canadian Bar Association, Criminal Justice Subsection, Manitoba and British Columbia Branches

The Manitoba Subsection is of the opinion that the institution of marriage should have no special protection in the area of competence and compellability.

The British Columbia Subsection agrees with the proposals made by the Commission subject to the qualification that an absolute privilege against disclosure in evidence should be awarded to confidential communications between husband and wife and between parent and child. This Subsection agrees with the problems set out in the British Columbia Law Reform Commission's comments in this respect.

Manner of Questioning Witnesses

Section 58 Parties Responsibility; Control by Judge; Examination by Judge

Justice of Supreme Court of British Columbia

This section would, in my opinion, lead to a great deal of argument. The author says that the section attempts to codify the authority that the trial judge has under the present law to control the conduct of the trial. It might have the effect of limiting the authority of the trial judge to what is set out in subsection (2). The author says the section is necessary because in many instances trial judges appear to be in doubt about their discretionary powers. If that is so, and if the section codifies the existing law, why not send a copy of it to each judge and let him read it?

Subsection (2) appears to me to go beyond the purpose stated in subsection (1). Subsection (1) says that the judge shall exercise reasonable control... so as to ensure that the witness gives his evidence in a fair and expeditious manner, etc. Subsection (2) starts out, "For the purpose of exercising the control referred to in subsection (1)." Does that mean that the powers referred to in subsection (2) are limited by the purpose set out in subsection (1)? If so, it doesn't make much sense to me.

I think it would be unwise to encourage the judge to determine (2(a)) the order in which witnesses shall be called, or (2(b)) the number of witnesses that may be called on any relevant matter, or (2(c)) the number of counsel that may examine or cross-examine a witness. These provisions might be all right if some guidelines were laid down as to the manner in which the judge is to exercise the control, e.g., in the case of the number of witnesses, should there not be a suggestion of, say five only on one point, as is now the case in some statutes as to expert witnesses. The comment says that this provision applies to character witnesses and expert witnesses but it is not so limited.

The comment contains the statement on page 2 that "The trial judge's discretion to vary the order in which the parties introduce evidence in support of their case will, of course, be exercised only occasionally and then only in those situations in which one party has been unfairly surprised by the evidence introduced by the other or one party by inadvertance of some other excusable circumstance has failed to introduce evidence in its proper order." That provision, however, is not set out in the proposed legislation. I question whether that proposed legislation "makes it clear" that judges are only to use these powers "in exceptional cases".

I agree that the trial judge should have the right to point out to the jury the possible results of the accused not testifying first. (I think he should also have the right to comment on his failure to testify.) So far as "the number of counsel" is concerned, the proposed legislation would, I think, encourage people to seek to have more than one counsel for one party examine one witness. I would not like to see that happen.

So far as subsection (2)(d) is concerned, I think it would unduly limit cross-examination to require counsel to so cross-examine as to permit the witness to give his evidence in a continuous narrative. One way of catching a dishonest witness is to move about in time. Generally speaking, a competent counsel who has interviewed a witness knows better than the judge how best to get the story from the witness and should be permitted to follow his own course - at least at first. After both counsel have had their opportunity, it may be appropriate for the judge to intervene. The comment says at page 5, "In deciding whether to permit particular interrogation tactics the judge will have to consider the importance of the witness's testimony, the nature of the inquiry, its relevance to credibility and the vulnerability and disposition of the particular witness."

Again, is this to be the law? I do not see it in the section.

As to 2(e): I am quite opposed to models, photographs, plans, etc. being introduced "for the purpose of illustrating .... the argument of counsel", if this means using something that has not been entered as an exhibit. I rather suspect that the purpose here is to create a category of second class exhibits. I would want to think hard and long before agreeing to that.

In respect to both 2(e) and 2(f), it would be very dangerous to leave it open to a judge to determine these matters without laying down any guidelines as to how the discretion is to be exercised. In respect of both of these paragraphs the comment again tells us how the judge will determine the question - but even those vague directions do not appear in the proposed legislation.

A Justice of the Supreme Court of British Columbia

"Comment" (p.13). In the last sentence it is said that some members of the Project thought that the broad wording (of the paragraph relating to the power of a judge to call witnesses) might lead a judge to usurp the functions of coursel. This may well be a valid criticism of a number of the proposed

enactments. If a judge is so ignorant as to the law and his proper function as to require some of the enactments proposed, then he will be at least equally ignorant of the limitations and proper and improper uses of some of the proposed enactments. And if, as is implicit in the assumptions of ignorance underlying some of the proposed enactments, he does not look further than or have knowledge beyond the enactment itself, and have an innate sense of the reasons of justice underlying the rules, then codifying rules may do more harm than good. You cannot make a good lawyer, where he does not exist already, by giving him a "rule book" to follow as one gives a digested set of notes to a student to pass an examination.

Omer Côté

Le pouvoir discrétionnaire que vous accordez aux paragraphes 2(c) et 3(d) traitant du nombre d'avocats et le genre de questions devrait être étendu davantage et "le juge devrait avoir entière discrétion pour décider du genre d'interrogatoire le plus apte à établir les faits clairs et prompts", comme vous le dites si bien à la page 7.

Vous dites à cette fin, à la page 14, le juge doit combler par un supplément d'enquêtes les lacunes laissées par les parties touchant les faits manifestes. Ceci est à

l'encontre de la philosophie de tout notre droit, mais je reste sous l'impression que cette question devrait être étudiée davantage de façon à ce qu'une véritable justice soit rendue car, à ce moment, le juge en intervenant dans le débat deviendrait partie au procès, ce que constituerait un abus de ce nouveau pouvoir que vous semblez vouloir donner au magistrat.

Davey

Manner of questioning witnesses

The advantages and disadvantages of those proposals are fully discussed in the papers, and I have little to add, subject to my comments on specific aspects, except my objection to the wide discretion that is given to a judge. The limitations on the proposals should for the most part be spelt out in the Code, and not left to judicial discretion.

(a) Section 2(a). A judge should not have any right to interfere with the order in which counsel proposes to call his witnesses.

(b) Section 2(b). There should be no restriction on the number of ordinary witnesses that may be called on any point. The Code should restrict the number of expert witnesses that may be called on one point.

Schultz

The first paragraph of Comment under Section 1 in Sutdy Paper #2, entitled "Manner of Questioning Witnesses", contains this assertion:-

"The section is necessary because in many instances trial judges appear to be in doubt about their discretionary powers."

I question the accuracy of this statement and the basis upon which this bald generalization is made.

While at the Bar, I did not find "in many instances trial judges appear in doubt about their discretionary powers" in the conduct of trials in the Province of British Columbia. While on the Bench, I have no reason to believe that trial Judges in this Province require the assistance which is attempted to be delineated in the proposed legislation.

Section 1 (2)(f) of the proposed legislation provides that the judge may determine

"(f) the use of exhibits by a jury, or other persons whose duty it is to determine the facts, during their deliberation on the verdict."

This is a good illustration of an assinine provision. An exhibit does not become an exhibit unless it is admitted in evidence. If an exhibit, admitted in evidence, has a limited evidentiary value, the trial Judge is required, as a matter of law, to instruct the jury on the limited evidentiary use of the exhibit before the jury retires to consider its verdict. What, then, is the need for Section 1(2)(f)?

Millar

Proposed section 400(1), though novel, is deemed impractical for most purposes; a Judge who knows nothing of the case is the least qualified to dictate the order of testimony, and could only spread confusion by attempting to do so.

Judges: Committee of County and District Judges Association of Ontario.

There is no real objection to section 1(1) but it is considered it is unnecessary..

Reference is made to Rule 254 of the Ontario Rules of Practice with respect to civil cases.

Generally the present rule is that Counsel has the right to call witnesses in the order he considers necessary for presentation of his case in the best interests of his

client. This is subject to the discretion of the Trial Judge particularly when witnesses are excluded and a party is allowed to remain in Court. Some Judges consider such party ought to be called first; otherwise the exclusion of witnesses may not serve its purpose. Also when medical evidence is called with respect to an injury or condition it may be necessary that a party be called before his physician gives evidence. In respect of Civil actions in Ontario, reference is made to Rule 253 of the Ontario Rules of Practice.

If there be codification, section 2(a) does not give guidance to a Judge. Principles or rules ought to be enacted to guide a Judge so that there be uniformity, and also to acquaint counsel with proper principles of the order he should call witnesses.

The committee submits that the power to control the number of witnesses ought not to be expressly given to a Judge. The Judge thereby becomes partisan and he could determine and control the weight of evidence to be adduced by a party.

If there be one or more junior counsel, a Trial Judge ought not to dictate how senior counsel decides a witness ought to be examined or corss-examined.

It is submitted that this is already covered in Section 1.(1).

It is submitted that this cannot apply to cross-examination. Counsel has the right to present the evidence of a witness as he considers proper. If, for instance, a Trial Judge thinks in a particular case, that the evidence of a witness would be better presented as a chronological narrative he can tactfully suggest this to counsel.

It is submitted that this section is too indefinite. Is it intended that counsel may use models, plans, etc., which have not been adduced in evidence? Is it intended counsel may be permitted to use the "blackboard" system sometimes used in the United States particularly with a jury whereby Counsel has a blackboard and writes on it during his address to the jury or in argument?

The Committee had difficulty in understanding this. A jury will ordinarily have all exhibits introduced at the trial in the jury room for its deliberations. Is it intended there be limitations upon the jury's examination or consideration of the exhibits?

These sections are unobjectionable, if there be

codification.

Schiff

Subsection (2)(b) Number of Witnesses (page 5)

While the provision might most often be used to limit the number of character witnesses (who are rare in Can. practice anyway) and expert witnesses, it does not in its terms result his power in this way: he could use the power to limit the absolute number of witnesses on any point. Can the introductory statement of the rationale not be adapted to include "expeditious trial consistent with fairness" and then leave this open?

Dubinsky

As to Study Paper #2, I appreciate that occasionally there may arise a situation where it falls to the judge to determine the order in which witnesses shall be called and other evidence introduced. In my five years' experience, I have only done that with the approval of counsel. May I respectfully suggest that the following words be added to Section 1(1) after the word understood, "and so that the trial or proceeding may not be prolonged unduly." I go on to suggest the wording of Sub-section (2) as follows:

Without limiting the generality of Sub-section (1),

the judge or other person presiding at a proceeding may determine

(a) where the circumstances, in the discretion of the judge or other person presiding at a proceeding, warrant a departure from the usual course, the order in which witnesses shall be called and examined and other evidence introduced.

I question the right of a judge to determine the number of witnesses that may be called to testify on matters relevant to the issue. However, I do think he should have the right to determine the number of character and expert witnesses. Hence, I would change Section 1(2)(b) by inserting the words "character and expert" after the word of.

Justices of the Supreme Court of Ontario

Manner of Questioning witnesses

Again, your committee reiterate their views as stated in the general notes, but if there is to be a change, found no objection to section 1(1). Your committee felt that ss.(2) should end at the word "determine" in the third line.

Re subsection (2)(a). There was a difference of opinion amongst your committee. Some of the committee preferred to leave the matter as it is at the present time in the belief that the present law is, that the judge cannot

determine the order in which witnesses shall be called. It is the view of the majority of the committee that a judge does have a discretion, in certain cases, to dictate the order in which witnesses shall be called. If this section is to be introduced, your committee believes that it is too broad in its present form and should specify those cases in which a judge has the right to determine the order in which witnesses shall be called.

Re Section 1, ss. (2)(b). The committee was unanimous in feeling that this was unnecessary, and that this power should not be specifically granted under a code.

Re Section 1, ss. (2)(c). Your committee felt that this was unnecessary, and that the present law amply covered the situation.

Re Section 1, ss. (2)(d). Your committee felt that ss. (1) is satisfactory as it is a mere codification of the present law. Your committee unanimously opposed ss. (2)(d)(ii). Your committee felt that this section should be deleted as, in many cases, on cross-examination the witness has already given his evidence and is being attacked upon certain points. The section, therefore, does not make sense.

Re Section 1, ss. (3)(e). While your committee did not object to this section in so far as witnesses are concerned, we felt that the words "or the argument of counsel" should be deleted from this section. If counsel wishes to use models in his argument, they should be tendered as exhibits in the trial.

Re Section 1, ss. (2)(f). Your committee feels that this section goes too far. A jury will, of course, make such use of exhibits in a jury room as they deem proper.

If it is the intention of this section to deal with such matters as corroboration, credibility, etc., then they should be specified. It may be that this subsection is intended to direct the jury or other persons whose duty it is to determine the facts, as to just what use may be made of that evidence, i.e. for corroboration or credibility only, for evidence that a latter was received but not as to the truth of the contents therein. If this is the meaning, that being a mere codification of the present law, there is no objection. However, as it stands presently, it would appear to go too far.

Re Section 2. In general, your committee does not object to this section with the exception of ss.(3). It was

our belief that a counsel may, by calling the other party's witness, achieve an advantage without the disadvantage of allowing the other counsel to cross-examine that witness. This may be a question of phraseology, but concern is expressed by your committee from this point of view.

Re Section 3(a). Your committee has no objection to this subsection.

Re Section 3(b). Your committee feels that this subsection goes too far, as it exceeds the present custom and law. We feel that an appellate court should be allowed to determine whether the interrogation by the judge or other person presiding at the proceeding was excessive and, if so, direct a new trial.

Criminal Procedure Project

Section 1(1) of the proposed legislation confirms that the party producing a witness or evidence has control over the manner of the examination of that witness or presentation of that evidence, subject to the exercise of "reasonable control" by the trial judge to ensure the evidence is presented "in a fair and expeditious manner and in a form that can be readily understood." Section 1(2) then provides that in exercising such powers of "reasonable control"

the trial judge may determine "any matter" including six categories of matters set out in Section 1(2)(a) to (f).

The Procedure Project questions both the advisability and necessity of attempting to regulate techniques of practice and matters involving the exercise of professional judgment by means of the definition and expansion, in specific legislation, of the powers of control exercised by trial judges. The paper does not offer justification, either for the approach taken, or for the decision made to reject the apparent position taken in other major codifications of the law of evidence, that these matters should not be codified except perhaps by way of a broad statement of general principle.

The procedure Project also agrees with the comments of the B.C. Law Reform Commision with respect to the general powers given to the trial judge in the proposed legislation.

"... The B.C. Commission, while recognizing that the relative merits of opposing counsel may tend to be equalized by a judge taking a more active part in a trial, is of the opinion that it is undesirable to detract from the responsibility of counsel in ordering the conduct of his case. The Commission believes that by certifying the examples where

a trial judge may exercise control ... some trial judges may be led to exercise too much control over the case..."

"... It is submitted that the use of the illustrative subsection may tend to infer that the trial judge may be quick to exercise control over the matters dealt with in those subsections ... the illustration will be more productive of unnecessary interference in the conduct of the case than of fairness or expedition for the benefit of the litigant. The litigant can select his counsel ... but he cannot select the judge. A variation between judges in the degree of control (interference) exercised by them will make litigation more of a lottery than it now is."

It also would have been preferable, once the decision was made that it was necessary to specify the matters that could be controlled by trial judges, if the proposed legislation had somehow specified, as an overriding consideration, (as was done in the American Bar Association Standards relating to the function of the trial judge - at page 28)

"While the trial judge owes a duty to all persons whom he encounters in his official capacity to treat them with courtesy and fairness a special caution is given

concerning his treatment of counsel. This treatment of counsel can entail a most serious potentiality for a miscarriage of justice. It does not derogate from the duties and powers of the judge as the impartial presiding officer, nor from his powers of discipline for misconduct, to insist that he owes professional respect to the attorneys who appear before him, whether for the defence or for the prosecution. They have vital roles in the adversary process and in executing these roles they should not be harassed, demeaned or subjected to rude or capricious conduct."

The paper also fails to articulate specific reasons for the choice made to grant extensive powers of control to trial judges based on vague criteria, rather than a different approach, which many advocate, that the discretionary powers of trial judges ought, wherever possible, to be confined and subject to objectively reviewable criteria such as a finding of legal or ethical misconduct on the part of counsel.

The Procedure Project is also of the opinion that the relative merits of opposing counsel will be more effectively equalized, and the possibility of unreasonable activity by counsel reduced, by effective pre-trial procedure rather than by the control exercised by trial judges at the trial

itself. It may be that many of the matters listed in Section 1(2)(a) to (f) may be susceptible of pre-trial determination in a comprehensive discovery procedure, or that, at least, such a procedure may go far to eliminate the need for consideration at trial of the kinds of problems specified.

The following matters are specified in the proposed legislation as being matters subject to the determination of the trial judge in controlling the manner of examination of witnesses and presentation of evidence.

1. "The Order in which Witnesses shall be Called and Examined and Other Evidence shall be Introduced"

It is submitted that the order of calling and examination of witnesses, and introduction of other evidence, rather than being tested by criteria of fairness and expedition, should be left, in a properly functioning adversary system, totally to the discretion of counsel who has prepared the case and understands the overall significance to the case he is presenting, of the scheduling of witnesses and evidence. It may be that the factors which ought to be considered may differ in a joint trial where perhaps the trial judge should have the power, when more than one counsel representing co-accused are unable to agree, to prescribe the order of testimony, cross-examination, or speeches, etc. in

order to prevent or avoid confusion or unnecessary argument at trial. The situations calling for interference by the trial judge should be capable of definition and should be specifically set out. However, it might be that these kinds of problems arising in joint trials could also be dealt with and resolved, in most cases, in a pre-trial procedure.

At page 3 and 4 of the Evidence Project Commentary on the proposed legislation there is some concern expressed as to the appropriate rule that ought to govern the scheduling of the testimony of the accused, should he decide to testify. It is submitted that there should be no interference with counsel's decision as to the scheduling of his witnesses, including the accused, and that there are no valid reasons for distinguishing the accused from other witnesses in this respect. There should also be no right given to the trial judge to make any sort of adverse comment on the scheduling of the testimony of the accused. This should be specifically set out in the legislation if, as the Evidence Project suggests, there are variations in the practice in different parts of the country.

2. <u>"The Number of Witnesses that may be Called by any Party to Give Evidence on any Relevant Matter"</u>

The proposed legislation refers to "witnesses"

whereas the Commentary to the legislation, at page 5, refers to "expert witnesses and character witnesses". It is submitted, firstly, that the legislation should be amended to conform with the Commentary, and secondly, that some recognition should be given to the fact that some trial judges confuse cumulative evidence with repetitious evidence. If, in counsel's opinion, it is necessary to present numerous witnesses with respect to a relevant question of fact, counsel should be allowed to do so without complaint by the trial judge that time is being wasted or that the evidence is repetitious. The trial judge should not be unduly concerned with the length of the trial. If the accused has the right to adduce the evidence he should be unrestricted in the exercise of his right, because it is impossible to know objectively what weight of evidence on any particular point will be sufficient to raise a reasonable doubt in the mind of the particular trier of fact. Unless the trier of fact is given power to make findings of fact based on cumulative evidence prior to the conclusion of all of the evidence there should be no restriction on the right of counsel to adduce the volume of cumulative evidence that he, in preparing his case, has decided is necessary.

The Procedure Project agrees as well with the B.C. Commission that the trial judge should not, under any

circumstances, have the right to limit the number of witnesses to matters of fact since this will simply provide a new range of appeals on the ground that the judge or jury was not permitted to hear all of the evidence on an issue.

3. "The Number of Counsel for any Party that may Examine or Cross-Examine a Witness"

The Commentary to this matter, at page 5, indicates that the trial judge may limit the number of counsel that may examine or cross-examine a witness. The proposed legislation refers to the limiting of the number of counsel for any party that may examine or cross-examine a witness. The Commentary may be interpreted as allowing the trial judge, in some cases, to prevent the counsel for a particular party from examining or cross-examining. The Commentary should clearly indicate that this interpretation of the legislation is not contemplated.

4. "Restrictions upon Examination or Cross-Examination by Counsel"

With respect to Section 1(2)(d)(ii), reliance by trial judges upon this section in acting to restrict cross-examination would effectively prevent counsel from using classic techniques of cross-examination, which often involve attempts to elicit inconsistencies in testimony by the tech-

nique of preventing the witness from giving his evidence as a continuous narrative.

5. "Use of Real Evidence"

As the B.C. Commission has indicated, it might be considered that if an exhibit has been admitted into evidence at trial there ought to be no reason to prevent the exhibit from being in the jury room during the deliberations of the jury. If the evidence should not be in the jury room it should not be admitted at trial in the first place. Perhaps some consideration ought to be given to requiring examination by the trial judge and counsel of the notes made by jurors that they propose to take into the jury room, in order to ensure their accuracy; or even to the general question of the advisability of note-taking by jurors.

Goodwin

Control by Judge

Some Judges would handle this satisfactorily, many would bring in their own biases. I am not in favour of much relaxation here. It is not the function of a Judge to be an advocato. In fact there should be some restraint on Judges who meddle too much. Much however depends on the good sense of the Judge and in some situations where abuses are being perpetrated by counsel, his hands certainly should not be

tied. I am not for any dilution of the proper authority of a Judge properly exercised.

Stevenson

Rules Respecting the Course of Trial: I would ask what sanction you impose upon the judge who fails to act as you suggest. Some very serious consideration will have to be given to the power of appellate tribunals who, after all, do not ordinarily interfere in discretionary matters. The trier of fact is really not under any sanction at all. I would suggest that some consideration has to be given to giving appellate courts some effective power to review, failing which everything falls into the discretion of the trial judge. I think you will find from people who have had appeals on matters where there is discretion in the trier of fact, that the presence or absence of someone to look over the trier's shoulder is very important. The sanction of review where the discretion has been abused is a very hollow one in practice.

Sheenan

Manner of Questioning Witnesses

This whole section appears to clarify many points from the old rules of evidence. It would appear that it would give the Judge, or other person presiding at a proceeding, much more responsibility to see that the trial is

conducted fairly. It also would give him the right to limit the number of witnesses, which I agree to, and while the Adversary System would not be changed to any degree it does clarify the rights of the presiding Judge to ask any questions to clarify any points in his mind.

As one travels from one jurisdiction to another one realizes that the presiding Judges are very uncertain about the extent of their discretionary power and this would appear to clarify some particular points. From a police point of view we fully agree with the new English rules of evidence in which the trial Judge has the discretion to order the accused to testify, and as the first witness for the defence. However, the project envisages at least four ways to deal with this problem, and again from a police point of view I would certainly recommend a provision making it compulsory for the accused to testify as the first defence witness except in exceptional circumstances, and then at the discretion of the presiding Judge.

I am particularly pleased to see that the proposed legislation confers the broad discretion of the Judge permitting him to limit the number of witnesses and expert witnesses. This certainly will speed up the trial process in a good number of cases. The most important question seems to

be answered, and that is, that if the Judge feels that the ends of justice are not being met and that all the truth is not being brought out by the prosecution or the defence, then he can intervene. In relation to Section 3 I fully agree with the project in this particular section and fully recognize the fact that the basic principles of the Adversary System is correct, but the disclosure of the truth and the Administration of Justice, the trial Judge has the overall responsibility to reach the truth; it seems to make sense that the presiding Judge be allowed to examine each witness if he so deems it necessary and to call in any additional witnesses at his discretion. This would also, in my opinion, emphasize the fact that the Courts are there to dispense justice under the law, and that in the eyes of the public, if the Judge so required further witnesses, it would seem that it would not be the fact that the party with the best lawyer had a better chance of proving his case.

Turner

Frankly, I seriously doubt that the manner in which witnesses are now treated is really conducive to elicitation of the facts accurately - there is far too much gobbledy-gook, mystery, ecclessiastical trappings. We are still living in a Dickensian court room environment. Witnesses are made almost as uncomfortable as it is possible to imagine, both

physically and mentally.

I should think that if matters like these were remedied, the manner of questioning witnesses could proceed in a common sense, business-like manner.

Canadian Bar Association, Criminal Justice Subsection, Manitoba and British Columbia Branches

Manner of Questioning Witnesses

Section 1 - General Rule Respecting Course of Trial

Both Sub-sections agree with the proposals set forth in Section 1, (1).

Both Sub-sections disagree with the proposal set forth in Section 1 (2). The Sub-sections do not agree that there is an urgent problem in the adversary system requiring a transition of the responsibility for the conduct of an action from counsel to the trial judge by giving him greater control in respect to the order in which witnesses shall be called or a discretion with respect to the number of witnesses which may be called. They point out the danger of abuse when too many powers are vested in the judge, and also suggest that the proposals presuppose a knowledge on the part of the judge of either party's case which in fact he does not have. It is impractical to believe that a trial

judge, after hearing a few opening remarks and reading the pleadings in the case, is in a better position to dictate the conduct of the trial than counsel who has been involved in the case from the beginning. Further, in a trial involving technical evidence requiring professional witnesses, it is counsel who is best able to arrange for the convenience of the witnesses, especially when they may be required to attend from out of the jurisdiction. The British Columbia Sub-section in particular is especially critical of the suggestion that a trial judge should have the right to limit the number of witnesses with respect to questions of fact and points out that at present the court is able to communicate its feelings indirectly but effectively to counsel during the trial. Finally the proposed Rule would enable a party to "split" his case and it is urged that the present law restricting such practice should continue.

British Columbia Law Reform Commission

Manner of Questioning Witnesses

This National Paper is put forward in the form of proposed legislation followed by commentary on each section. The following discussion deals with the proposed sections in the legislation together with the National Report commentary thereon item by item. However as a general opening comment it should be observed that while most of the proposals are

re-statements of powers which the Courts already have to control the procedure before them, the proposal goes far towards usurping the responsibilities of counsel to ensure that his client's case is most advantageously presented and placing that responsibility in the hands of the trial judge.

The B.C. Commission, while recognizing that the relative merits of opposing Counsel may tend to be equalized by a Judge taking a more active part in a trial, is of the opinion that it is undesirable to detract from the responsibility of counsel in ordering the conduct of his case. The Commission believes that by certifying the examples where a trial judge may excercise control, as is done in sub-sections 400(1) to (7), some trial judges may be lead to exercise too much control over the case.

The B.C. Commission is prepared to consider, in the course of its present task, the proposal that some modification of present adversary system may be advantageous to the administration of justice.

Section 400 - Control by the Judge

The commentary shows this is intended as a general statement only to be followed by specific illustrations in sub-paragraphs (1) to (7). It is submitted that the use

of the illustrative sub-section may tend to infer that the trial judge should be quick to exercise control over the matters dealt with in those sub-sections. I submit it is preferable to give a general statement only of the judge's power and that in most cases the illustration will be more productive of unnecessary interference in the conduct of the case than of fairness or expedition for the benefit of the litigant. The litigant can select his counsel (albeit restricted by his pocket book) but he cannot select the judge. A variation between judges in the degree of control (interference) exercised by them will make litigation more of a lottery than it now is.

(1) Order of Testimony

The power envisaged here includes the power to enable a party to split his case. Unscrupulous counsel, by deliberately "forgetting" to lead evidence is enabled to lay a trap by committing the other side to a defence and then demolishing it by further evidence, not properly rebuttal. As to the sequence of witnesses, counsel is in the best position to know the logistical difficulties of scheduling witnesses and the most convenient way of doing so. If a judge insists on an altered sequence the trial may be delayed while tomorrow's witness is brought forward today. Incidents of unfair surprise are already dealt with under the rules relating

to the calling of rebuttal evidence and any consequent order for an adjournment.

The British Columbia Commission discussed the virtues of a provision enabling all the evidence pro and con a single issue to be dealt with before moving on to the next issue, for instance where the evidence on liability for negligence might be dealt with before the evidence of injury and quantum of damages. However the Commission is of the opinion that splitting the case in this manner creates more difficulties than it solves. In some members experience split trials have lead to split appeals. In addition the legistical problem of obtaining the same trial judge to deal with the second issue at a later date can be severe.

(2) Number of Witnesses

In B.C., Supreme Court Order 36 Rule 43(a), a judge may limit the number of expert witnesses where it is tried in conjunction with an assessor. There should be no power in the judge to limit non-expert witnesses who testify to matters of fact. The basis for limiting experts is that they give opinion only and that nothing is gained by piling conflicting opinion upon conflicting opinion. There is reason for extending the present B.C. Rule to trial by judges unassisted by assessors.

I submit that there should be no limit placed upon character witnesses since they testify not of their opinion of a man's character but of the fact of his reputation within the community. An exception might be made where character evidence is led on a matter of sentencing where a credible opinion of the convict's character may assist the judge in assessing a proper rehabilitative penalty.

The B.C. Commission is most adamant that a trial judge ought not to have the right to limit the number of witnesses to matters of fact since this will simply provide a new range of appeals on the ground that the judge or jury was not permitted to hear all the evidence on an issue. The general law as to relevance of testimony already gives the judge sufficient power to prevent needless witnesses from being hurt. It should be left to counsel to decide whether he will risk the adverse reaction of the trial judge or jury by overburdening them with several witnesses to one fact, or whether he will elect to call a few witnesses only and omit others.

(3) Number of Counsel and (4) Vexatious Questions

The B.C. Commission found the discussion at page 5 of the National Commentary to differ somewhat from the proposed legislation. The discussion implies that the trial judge should limit the number of counsel (not the number of counsel

for one party) that may examine or cross-examine a witness. The proposed legislation at 400(3), however, refers to "counsel for a party". Our Commission is of the view that while the number of counsel for a party who should examine or cross-examine a witness may be limited, there should be no limitation on the number of counsel representing different parties. That is to say that every party separately represented should have a full right of examination or cross-examination, subject only to the trial judge having a supervisory power to control questions to see that they are not ambiguous nor unintelligible nor unfair. That power is sufficiently given in Section 400 without the need for this subsection.

(5) Questions Calling for a Narrative Answer

It is submitted that this proposal and the commentary on it goes far to substituting the judge as counsel for the litigant. Counsel knows the case and the tendencies of the witnesses better than the judge and should be better able to tell what type of questioning at any given point in the case is best suited to get out the evidence that counsel wishes. If the evidence comes out unintelligibly counsel should be able to recognize that and most trial judges at present would pass a remark to that effect. The litigant should not be looking to the judge to organize his case

although certainly a litigant with poor counsel is at a disadvantage. If counsel is not to bear the ultimate responsibility then we should be considering a tribunal system for finding out the truth of the matter rather than the adversary system.

(6) Use of Demonstrative Evidence

A trial judge already has power to control this subject under the general rules of relevance and prejudice, i.e. will the photograph inflame the jury rather than simply illustrate the injury to them. I submit that a specific sub-section to remind the judge of this power is necessary.

(7) Use of Exhibits in the Jury Room

This proposal represents a change from the present practice under which all the proved exhibits accompany the jury while they deliberate. The commentary suggests that some exhibits may produce undue emphasis on certain evidence or may confuse the jury. It is true that some exhibits, for instance blood stained clothing in a murder case, may have little evidenciary value as to the killing but may disturb the jury by their sight with an inflammatory result. There is room for a greater exercise of discretion in a trial judge to exclude such exhibits on the basis that they are prejudicial from the point of view of inflaming a jury while they do

not have great probative value. A view of the deceased's blood stained clothing does not always contribute towards the finding of the facts of how he died and who killed him. This area and the use of demonstrative evidence is not dealt with in Section 400 (General Control) and there should be a specific section dealing with the leading of exhibits which have little relevance but great prejudicial effect.

It might be considered that if an exhibit ought not to go into the jury room it ought not to have been admitted in the trial in the first place.

Manitoba Law Reform Commission

Manner of Questioning Witnesses

In this Study Paper, we are favourably attracted to section 1 (2)(c), section 2 (2)(a) and (d) and, of course, as earlier stated section 4 (2) among the possible formulation of proposed legislation. We note that trust for that present and future slice of mortal humanity who sit upon the bench runs high in this Study Paper.

Mr. Lockwood said:

As I indicated at the outset I really haven't much to quarrel with generally with this proposed codification assuming that this is something that can be codified. Taking

section 1(1) it is obvious that the judge exercise reasonable control over the presentation of the evidence but moving to (2) the wording suggests that the judge, with the control referred to in subsection (1) may determine any matter, which seems all embracing, probably far too wide including clause (a) the order in which the witnesses shall be called. Again speaking of civil proceedings, I don't see why the judge should make that decision. The lawyers have lived with the case for a long time and it's usually completely fresh to the judge, and the lawyers presenting their respective cases are surely the people who should be charged with the decision as to the order in which witnesses should be called. I noticed the part in the Comments under the present English practice in criminal cases and I should probably leave that for the criminal lawyers to comment upon. I have no great quarrel with the rest of the section. In subsection (2), in section 2, there is a provision there whereby the judge may restrict or at least permit leading questions of any witness, "the examination of the witness would be unduly prolonged or protracted by any other form of questioning, because of his mental or physical condition." This probably brings us into the area of the questioning of children and that, it seems to me, might be a dangerous provision because if we're allowed to put leading questions to children, then it seems to me they might be inclined to answer any suggestion that is made to them. If he's

going to be a witness at all, I think he should be treated as any other witness is treated, that the judge exercise his discretion to control if the examination gets too ferocious. And I think it would be very dangerous to permit the judge to suggest to counsel that he ask leading questions of the child witness because the child witness, I think, might be inclined to go along with the whole thing - leading questions that the court put to him. Frankly, I'm puzzled by subsection (3). I just wonder - it says that in this subsection, presumably it means that the judge may permit leading - let me read it: "A party who is cross-examining a witness called by another party may put to him a question that is so framed as to suggest the desired answer, except where the judge or other person presiding at the proceeding finds that the witness desires to give only such answers as he believes will help the party asking the question or will harm another party." Frankly that puzzles me. I don't know how on earth the judge is going to make that finding.

We agree with Mr. Lockwood. We are especially opposed to permitting the judge to determine the order in which witnesses shall be called and examined and other evidence introduced, as described in section 1(2)(a).

The following clause, (b), should provide that the judge would not operate the guillotine without prior discussion with, and notice to, counsel to ensure that the magic number be not attained just before the most important witness is called to give evidence. The power should not be accorded unless subject to stringent statutory limitations.

Clause (c) following is reasonable if it implies that each party is entitled to have at least one counsel cross-examine on his behalf -- but that is not how the Comment describes it.

In regard to clause (d) of section 1(2), one certainly would not want to proclaim as a norm that witnesses may be intimidated and harassed. On the other hand, who better than counsel should know or sense that the rare witness is a plausible liar? It is possible that some judges just never see as a smooth liar the witness who seems, by social position and educational attainment, to be made in their own image. Historically, counsel's role, as much as the judge's, is that of the watchdog of liberty and justice: one must not put counsel on too short a leash. We ask, but without being able to answer: how serious is the danger of officious judges piously considering that which is merely a vigorous cross-examination of a highly uncomfortable liar to be intimidation

and harassment under the proposed codification. Certain principles ought not to be too easily subverted when oral testimony is being examined. See Hopper v. Dunsmuir (1903) 10 B.C.R. 23 and the remarks of Hunter, C.J. at page 28. And see Brown v. Dunn (1894) Vol. 6 of The Reports 67 and the remarks of Lord Herchellat at pages 70-1. In other words, what, if any, is the increase of danger in blatantly inviting judges in so many words to intervene in the same manner in which they formerly could in any event? Mr. Bowman expressed similar concerns in relation to section 1(2)(d)(ii) at page 14 of his memo.

Section 1(2)(f) is one of those which we cannot rightly understand. Unless the Project has an unusual meaning for the word "exhibit" (by which we understand a thing admitted or received in evidence) we cannot understand why the judge should determine the use of exhibits by the very persons whose duty it is to determine the facts. What is the point of introducing exhibits into the process in the first place, if they can later be withheld from contemplation by the triers of fact? Maybe the judge won't appreciate their full significance either, while wielding the power to save the poor jurors from over-emphasis, misunderstanding and confusion. The danger of ignorant, rampant, populism in juries is not a unique danger: it is merely a Scylla to

the Charybdis of excessive judicial power.

Section 2(1) acceptably states a properly supportable rule.

Bowman

As to Section 1, sub-sec. (2)(c) and (d), number of counsel and type of questioning; The Court must not be permitted to limit the right of cross-examination if it would involve requiring counsel for one of twenty parties to rely on the cross-examination of earlier counsel. The court can already govern, and frequently does so, the question of multiple counsel for one party dealing with a particular witness. Further, "questions that assume facts not in evidence" are not only useful but frequently essential. How else may an early witness be cross-examined and a proposed defence put to him but by assuming certain facts? The alternative would be that that witness be recalled after those facts have been proved in order to be further cross-examined. I am also somewhat aghast at the suggestion that a judge might prevent examination in the light of "the vulnerable disposition of the particular witness". If a witness is so shaky, whether from youth or emotion or intoxication or any one of a thousand other reasons, that cross-examination will produce tears or a breakdown, that witness should not be relied upon to the

detriment of the opposing party. I have had the unhappy experience of seeing fatuous judges protecting "vulnerable" witnesses. It is not a practise that should be encouraged by law.

Canadian Bar Association, Study Group, Edmonton

Paper 2 - Section 3

Our major criticism is that the wording is much too wide, and as a model code of evidence would invite unnecessary interference by the Court, in particular the phrases - "call any witness" and "as he deems expedient". The majority feel the Judge should not have the power to call any of the parties in a civil case or the accused in a criminal case. Gordon Wright would confine this limitation to the accused in a criminal case and would substitute the words "as may be proper" for the words "as he deems expedient". As a reform proposal we feel this section is unnecessary and (subject to the above) we feel the Judge has the power now and in our experience it is generally used sparingly and appropriately.

Brown

I am accepting the invitation to comment on Section 2 of the possible formulation of proposed legislation which reads as follows:

(a) with or without a request from one of the parties that he do so, call any witness, but each of the parties may examine such a witness; and

(b) question any witness, in such manner and to such extent as he deems expedient.

I quite agree that there may be a very small number of cases in which neither party wishes to call a witness who might give relevant evidence and, accordingly, the judge calling the witness could serve a useful purpose.

It is my view that this section poses a very real and extreme danger to the adversary system. The largest single complaint that I have in my appearance before judges is that they do not, at the present time, maintain an air of impartiality and, in fact, regularly participate in the trial as advocates. Although this may be subject to some censure by the Court of Appeal, it is very rarely, if ever, the subject of reversible error.

As you are no doubt aware, the entire thrust of the judge's comments fails to appear in a transcript. Tone of voice, attitude, general demeanour towards a witness are all matters which do not appear on the transcript which Courts of Appeal in reviewing any particular matter tend to view in the

most favourable light possible.

It is made a subject of comment that the section will ensure that the judge will not be imprisoned within the case as made by the parties. To me it is completely desirable that the judge be precisely imprisoned within the case as made by the parties. While it is true that no case should be won or lost merely because of the adroitness of a particular counsel, I feel that the situations where such a result would arise are so limited that they should not have any bearing on the situation.

However, the situation where the result could very probably be determined by the trial judge calling his own witness and thus varying the result would seem to be statistically far greater.

A second objection to the type of procedure is, of course, that the trial judge has no opportunity to discuss the case with witnesses prior to trial and probably has no prior knowledge of the evidence which they will give. He may suspect certain evidence will come forth and, in fact, in calling a witness and subjecting him to cross-examination, presumably by both parties, the trial judge could un-

wittingly interject a very unfair element into a particular case resulting in a mistrial.

It appears to me that there is a constant difficulty with a judge crossing the line between judging and advocacy and thus abusing his discretion. This difficulty can usually be met by competent counsel respectfully reminding the court of its position of impartiality and insisting on the court not crossing the line. It is my respectful submission to you that the implementation of Section 3 would result in an even greater burden on counsel and a further blurring of an already too blurred line.

Judges: Provincial Judges' Association of the Province of British Columbia

Section 3

Gives power to the Judge or presiding officer to call witnesses with or without a request from either party. In the judicial process of searching for the truth, there will be occasions when this is desirable. But there should be rules to govern the procedure to be followed after the Judge has questioned the witness, to regulate the order of additional interrogation and to define the type of questioning allowed, whether direct questions, or questions of a cross-examining and/or leading nature. We would assume that

since the initial examination by the Judge would be in the nature of a direct examination (although not necessarily so confoned or restricted) the litigants or their counsel would have the right to cross-examine.

A Justice of the Supreme Court of British Columbia

Section 3 is all right insofar as it says that the judge may call a witness and that he may question a witness, but I am afraid that the words "in such manner and to such extent as he deems expedient" could lead to trouble. These words might be used to justify a judge taking what has been decided in earlier cases to be an improper role in the proceedings, e.g., too forceful cross-examination or something of that kind. On the whole, I think the matter is better left alone.

The comment says "The members regard the adversary system as only a means to an end: the disclosing of truth in the administration; and the trial judge has the over all responsibility for reaching this end." Later it says, "Therefore, if the parties do not elicit all the obvious facts, the judge has a duty to supply the omission by further investigation." If those propositions are correct, judges will have to be supplied with a staff of investigators and counsel. If the parties have only "primary responsibility

for finding and presenting the evidence" the judges will have to be given the means for finding and presenting the evidence. They are not equipped to do that now.

The comment says ".... the judge's power to call his own witness or to call one at the request of a party will be exercised infrequently." But there is nothing in the proposed legislation to indicate that that will be so. There is nothing there to indicate under what circumstances a judge will exercise the powers given him. If this is to be a complete code of the Rules of Evidence, presumably all the previous law on this subject has gone out the window. The comment says ".... cases may arise in which neither party wishes to call a witness who might give relevant evidence." That is true and there may be good reason for them not calling the witness of which reasons the judge is ignorant. Surely some rules must be laid down as to the circumstances in which the judge will - at the request of a party - call a witness. Most parties would like a judge to call all the witnesses so as to get round the leading question rule. Section 3 might be helpful but not if it is a complete statement of the law on the subject.

Judges and Justices of the Courts of Manitoba

You see, very frequently you get solicitors today

who are not actively engaged in the litigation process, but occasionally come to court with a case. Therefore, they are not versed in the advocacy system and their preparation leaves something to be desired. They may omit some relevant evidence in the case. Well, the judge sometimes feels compelled to point that out to them, and to invite him to fill in the vacuum. If he doesn't then the judge may feel he would want to do it himself. I think it is a desirable rule.

Well, sometimes the medical witness in a damage action will allude to some document, or some X-ray and he wants to have that document there, so the Court will say "Well, let's get the radiologist, let's get him to bring down the X-ray and tell us about it". The lawyers will actually do that by agreement, but if they won't then the Judge could impose that.

The objection that I would have to this section is that the criminal law process and to some extent the civil law process, is an adversary system and if a judge sees a void in the case for the Crown or the Plaintiff, for example, under this section he can fill that void by calling a witness, and the defence lawyer would say "My Gosh, I had this case won, until the Judge called this witness".

Sometimes, if we didn't have that power, I think it might be disastrous on occasion, when a young lawyer who doesn't know it, has got to prove this or prove that. The Police may even know it and have the witness standing by, but for some reason or another the brand new Crown Attorney might not know. This is something I have to put in.

I'm always a little reluctant to get into the adversary process. At the present time it is a pretty dicey situation. You are getting down in there.

It shouldn't be done anymore.

Well, of course the whole tender of this document is to lessen the undesirable aspects of the adversary system and to make it more than an inquisitorial.

It seems to me we are still retaining the adversary system but saying to the Judge, as you say "You have got to get in there". I don't see anything wrong with that.

I like it, now, the section as it stands.

So do I.

The point that might be a good one to make, might we not add the words in "A" there at the bottom - 3"A", "and may examine or cross-examine such a witness." What does the word examine mean?

You mean it might have a technical meaning.

Yes, they use that phrase...

"Not including cross-examination". When I read it I assumed it meant, cross-examination, as well.

Small point.

But a very important point.

Section 4.

I agree with Section 4.

Really, is it not covered by "V" - I'm sorry - it says: "A, examining such a witness and B, questioning the witness in such manner and to such extent as he gains expediency".

That is the Judge and not the Prosecutor.

The power to the Judge and not the power to the prosecutor..

"With or without a request from one of the party, calling ... "Oh, I see, that the judge.

Yes.

Well, maybe it should be, "And may examine....

Or cross-examine.

Or cross-examine.

Leaving it to the discretion of the judge to decide which kind of examination they had.

Oh, leave it to the discretion of the counsel, because, you know, there's another point. If you put a leading question to the witness, and you get an answer that you want, the judge or the jury give that question and answer the weight that it deserves. If it's put in the form of a leading question, it receives less consideration than if it comes out of the mouth of the witness.

Bruce Smith

I observe that the provision has been suggested that the judge or other person presiding at a proceeding may, with or without a request from one of the parties that he do so, call any witness, but each of the parties may examine such witness and question any witness in such manner and to such extent that he deems expedient. This is, in my opinion, a wise provision. It has always seemed anomalous to me that the presiding judge in a criminal trial automatically has the power to call a witness on his own volition even over the opposition of the parties, but that he does not have that power in a civil action. I have presided in at least one civil trial in which I considered that it would have been wise and good, in the interests of the administration of justice, for me to have called a witness not called by the parties had I had the power to do so.

Should the power given to the judge or other person presiding at a proceeding to call any witness not be subject to the condition that no one shall be compelled to incriminate himself? I do not understand that it is intended that the maxim numo tenetur seipsum accusare be wiped out.

With respect to section 3 under this subheading,

may I suggest that the proposed right to be given to each of the parties to "examine such witness" perhaps should read "examine or cross-examine such witness at the discretion of the judge or other person presiding at the proceeding."

Judges: Committee of County and District Judges Association of Ontario

The Committee opposes any notion or suggestion that a Trial Judge divest himself of impartiality of the appearance of impartiality. The calling of a witness by a Trial Judge may place the Judge in a position of favoritism, or the appearance of favoritism, to one of the parties.

This gives the Judge the right to act as counsel and ought not to be allowed. The restrictions in the reported cases ought to be observed.

Schiff

In civil trials in England, only the obiter dictum in two English C.A. cases of vintage, and in Canada only the unconsidered opinion of the Ont C.A. (the assertion at 11B not quite correct) and in criminal trials in England - contrary to the assertion (11A) - judge can call witness ONLY in the rarest circumstance

- however rule in U.S.A. quite the contrary: rule

discretionary power in civil and criminal judge whether or not to call a witness.

Your reasoning: that you wish to wipe out the distinction in practice and doctrine is therefore wrong (12A)

Moreover, your reasoning that the goal of the process is "truth" omits a vital reference to truth <u>that is consistent</u> felt fairness to the parties", and the judge's power to call a witness neither party wants to call can well interfere with their sense of fairness, even assuming that their failure to call him resulted from their sure knowledge that he was unreliable.

- thus, the issue is not just truth vs, lack of truth but possible truth as against possible sense of unfairness

- I personally apt for possible truth - if the judge somehow restrains himself - and perhaps the restriction suggested at 14A is a good one.

This reasoning of yours is buttressed by the reference to the trial as "a game between contestants rather than a controlled search for truth "(13 A); and this omits

the rationale of the "game" - the adversary trial - as one designed to accommodate the search for truth with the felt sense of fairness.

- if a judge can, via your analysis, call a witness during a parties case, do you not give him power to disrupt a party's presentation of his case? - and, more, obviate perhaps the opponent's necessity to call the witness?

- unless some restriction put, the judge could do exactly what you say without any hindrance?

- your s.3(a) does not permit a party to ask the judge's witness leading questions, or at least is unclear whether or not he may.

- while you say (on page 3) that the "legislation makes it clear that (the judges) have retained this power for use in exceptional case" in fact the proposed provision does not clearly limit the judge's exercise of the power to "exceptional cases", i.e., cases where counsel's wisdom based on his knowledge of the case and his client's needs may be overborne.

Criminal Procedure Project

Section 3: Power of Trial Judge to Call and Cross-examine Witnesses

Section 3 of the proposed legislation gives the trial judge extensive powers to call any witness with or without a request from any party, and to question any witness in such manner and to such extent that he deems expedient. This is subject to the condition that each of the parties may examine a witness called by the trial judge.

In the first place it is submitted that if the trial judge is to be given such power, the parties should be entitled to cross-examine such witnesses. In the second place, while there is nothing wrong with allowing trial judges to ask questions of witnesses in order to clear up ambiguities, inadequate guidelines are set out in the proposed legislation to assist the judge in determining when a witness should be called or questioned by him.

It is further submitted that Section 3 goes too far in encouraging the trial judge to become an advocate in the criminal trial. The Evidence Project Commentary, at page 13, is instructive with respect to the purposes of Section 3 from their point of view;

"... This section will ensure that the judge will not be imprisoned within the case as made by the parties. Second, the qualified power of the judge to call, and in particular to question, witnesses might in some cases equalize the legal representation of the parties. The very concept of dispensing justice under law requires that the party with the better case, not the party with the more adroit lawyer, should prevail."

It is submitted that this kind of statement implies a serious dissatisfaction with the operation of the adversary system. If the trial judge must evaluate, at some point during the trial, who has the "better case" and then ensure that the "better case" prevails by calling witnesses when he is of the opinion that this is necessary, or by interfering with the presentation of the case by counsel, then the trial judge is being invited to apply his subjective biases and values in the criminal trial. The technical purpose of the criminal trial is not necessarily the revelation of the entire truth, but rather, to determine whether or not there is a doubt about the truth, and the truth as manifested in Canadian Criminal Trials is merely a re-construction by the opposing parties of certain views as to what the truth is. It is submitted that this purpose has nothing to do with which party has the "better case". Why is the trial judge somehow able to evaluate and give

weight to an objective "better case"? When does he decide who has the better case? How is he to decide, without advance preparation, the specific witnesses who ought to be called in order to establish the "better case"; and the nature of the questions the witnesses are to be asked?

It is the duty of crown counsel to ensure that all significant relevant evidence is presented because the Crown has the duty to prove its case beyond a reasonable doubt and theoretically is not interested merely in obtaining convictions. If a trial judge feels the Crown is not properly carrying out his functions, how can his intervention to assist the Crown to establish the "better case" be reconciled with the overriding necessity to apply the presumption of innocence? The power given to the trial judge under Section 3 may also encourage failures to call crucial witnesses in the anticipation that the trial judge will call the witness himself. The trial judge has the right under the proposed legislation to cross-examine such a witness. This would take place and then the party who ought to have called the witness will have an opportunity for even further questioning. It is submitted that reliance upon this kind of rationale by the Evidence Project, as set out at p. 12 and 13 of the Commentary, as a factor <u>justifying</u> the proposed legislation, must be seriously questioned.

Section 3(b) can be interpreted as allowing the trial judge to cross-examine any witness, even one called by one of the parties, and even while that witness is being questioned by the party calling him. It is submitted that this power is too broad and ought to be restricted. Effective cross-examination requires a kind of preparation and investigation of the facts that may be incompatible with the posture we would like our judges to take in our criminal justice system. The trial judge should not be entitled to interfere in the presentation of the case for the defence because the desire of the trial judge to assist the "better case" through cross-examination of defence witnesses may, to some extent, be at cross purposes with the obligations of the defence under our present system; that is, not to bring out the truth but to establish a reasonable doubt as to the truth, and to cross-examine crown witnesses and ask questions of defence witnesses for that purpose. These are different functions and these functions require different questioning techniques if they are to be carried out effectively. It may be that in most cases trial judges can never be satisfied with the questioning conducted by defence counsel but perhaps in our system the trial judge's dissatisfaction ought to be suppressed.

If the Evidence Project feels that there ought to be major fundamental changes in the function of defence counsel

and in the nature of the criminal trial it would be preferable if they said so directly and a new system were structured around the new values and assumptions it wishes to adopt.

Macdonald

Section 3 - Calling and Questioning of Witnesses by the Judge

Section 3 constitutes a major attack on the adversary system in civil cases. It removes any limitation there has heretofore been, on the power of a trial judge to call witnesses without the consent of the parties. Similarly, Sub. (b) gives him a full discretion as to the extent to which he may question a witness.

The justification by the Project for removing any limitation on the power of a judge to call witnesses requires close scrutiny. The essence of the reasons is stated as follows:

"The members regard the adversary system as only a means to an end: the disclosing of truth in the administration of justice; and the trial judge has the overall responsibility for reaching this end. It makes sense to give the parties the primary responsibility for finding and

presenting the evidence. However, in most cases it is desirable that every witness who can throw light on the issues be brought before the court, and, if need be, the accuracy and reliability of his evidence should be thoroughly probed. Therefore, if the parties do not elicit all the obvious facts, the judge has a duty to supply the omission by further investigation.

"Although the judge's power to call his own witness, or to call one at the request of a party, will be exercised infrequently, cases may arise in which neither party wishes to call a witness who might give relevant evidence....

"Allowing the judge to call and question witnesses might also meet two frequent criticisms of our present system. First, ... this section will ensure that the judge will not be imprisoned within the case as made by the parties. Second, the qualified power of the judge to call, and in particular to question, witnesses might in some cases equalize the legal representation of the parties. The very concept of dispensing justice under law requires that the party with the better case, not the party with the more adroit lawyer, should prevail....

"Although the limits of the trial judge's discretion

to question witnesses is not susceptible to formulation in a rule... If, in questioning witnesses, the judge crosses the line between judging and advocacy, he is obviously abusing his discretion."

My comments are as follows:

1. We do not know whether the Project has any inventory of cases which have arisen in the past, in which neither party has wished to call a witness who might give relevant evidence. If there is such an inventory of cases, it would be helpful to know what the circumstances were, and why the witness was not called. It would also be helpful to know enough about the cases to be able to judge what the consequence would have been, if the judge had been permitted to call the witness without the consent of the parties.

2. The Project suggests that "in a criminal case there might be instances in which the defence would prefer the judge to call a witness so that the defence's case would not be tainted by the character of the witness or by parts of his testimony..." Does the Project have an inventory of such cases?

3. The Project suggests that the proposed section "will ensure that the judge will not be imprisoned within

the cases made by the parties". The Project identifies a "criticism that our legal system tends to resemble a game between contestants rather than a controlled search for truth." What kind of Pandora's Box does this solution open? Is the criticism valid? If it is not a valid criticism, why find an answer for it? If it is a valid criticism, then the consequences will flow far beyond this particular problem. Thus, for example, if we wish to ensure that a trial in no way resembles "a game between contestants", why not allow the judge to redraw the pleadings without application or consent by the parties, or redraw the indictment similarly? Under the present law, it is generally thought that at least in some civil cases the trial judge has no right to reject evidence if it is not objected to for some reason by the party against whom it is tendered. Why not give a judge the full power to hold evidence inadmissible, even when it is not objected to? Perhaps all these changes would be desirable. But if the gate is to be opened, we should first look to see what flood may be let in.

4. It is surely a revolutionary concept that the trial judge should take the side of the party which has a less experienced or able counsel. What will the party with the more adroit lawyer think, when he observes the judge entering the ranks against him? In other parts of its study

papers, the Project refuses to countenance the use of the Law of Evidence for purposes which it considers extraneous to the Law of Evidence, for example the encouragement of the preservation of marital union. In this instance, the Project seeks to use the Law of Evidence to encourage the equalization of representation by counsel as between the parties, which surely ought not to be the role of the trial judge, but rather the role of legal education and continuing legal training.

5. I am concerned about the formulation of Section 3(b), which leaves the extent of the judge questioning a witness to his discretion. In its notes, the Project recognizes that the judge may "obviously abuse his discretion", which presumably would be a ground of appeal. At present, the law relating to the extent to which the trial judge may intervene by questioning is susceptible of statement by rules of law, although they are necessarily so imprecise as to contain a high inherent discretionary content. Therefore Section 3(b) probably is not much different than the present law, but I would be concerned to know just what the code elsewhere might say as to the scope of an appellate court's jurisdiction to intervene in the case of the exercise of a discretion by a trial judge.

Wilson

These comments are meant as a supplement to the Comments of the Criminal Procedure Project on the Evidence Project's Paper on Manner of Questioning Witnesses. They are directed toward the narrow issue of the power of the trial judge on his own motion to call witnesses over the objections of both parties to the trial in a criminal proceeding. Such a power is incompatible with the accusatorial system, both in theory and in practice. It is not the purpose of these comments to argue the merits or defects of the accusatorial system. Nor does the Evidence Project itself attempt such an effort. The problem here is rather that the power of the trial judge to call witnesses on his own motion over the objections of both sides to the case is basically disruptive of the accusatorial, adversary system - a system which the paper leaves basically unaltered. If a trial has proceeded on the traditional lines with the Crown and the defence bearing the responsibility for the work of preparing the case to be presented to the court, the intervention of the judge will produce an alteration in the course of the case which could have unknown and unknowable results. The judge comes to the case without knowledge of the facts of the case. He will not have seen the witnesses before and will know only what comes out in the trial. If he then insists on calling some persons whose names have come up in the trial, he will launch the trial on an

unchartered sea. He will neither have interviewed the persons before hand, nor have depositions from them so as to have any real idea as to what to expect from them either in terms of personality or testimonial ability. Furthermore, there may be valid reasons why the parties have chosen not to call certain persons and the trial judge coming fresh to the case as he does is not in a position to evaluate the situation. In most cases the haphazard intervention of the judge into the trial will probably unnecessarily prolong the trial. At worst it may confuse the issues by introducing the testimony of inadequately examined and unanticipated witnesses.

The desire of the Evidence Project to codify such power in the trial judge is no doubt motivated by the reasonable desire to bring out the true facts at the trial. Unfortunately, it is not practical in an adversary system to graft on haphazard judicial intervention of this type. If the Evidence Project wishes to alter the theory and practice of our criminal trial into a judicial search for truth it is necessary to make more extensive alterations than simply to breath life into some obscure and unused common law discretion to call witnesses on the judge's motion. Nor does the proposed codification and accompanying commentary adequately explain when or how often the judge should exercise this power. It therefore opens the possibility that

practice will vary from one judge to the next: judge A may decide to take over the trial and judge B may continue to follow the existing practice of leaving the conduct of the case and the summoning of the witnesses entirely to the parties. The fact that some cases say he has the power now is not very helpful since there is no indication that it is often used: it is desirable given the present system that it should not be used. The philosophy and structure of our judicial system is against it and by temperament many of our judges are against it. It would seem better to deny the power to the criminal judge to call witnesses on his own motion without a request from one of the parties.

Hurlburt

It should indeed be clear that the judge can call a witness either on application or of his own motion. It should be clear that he can ask questions. There are two different dangers. One is that the judge may get into the forum, but I do not know how one legislates about that and I think it has to be left to the Appellate Court. The other is that the judge may go strictly by the game theory and not put a question which obviously should be put. I have heard at least one judge indicate that he thought that the proper position. Again, I do not see how one can legislate except to make it clear that he is entitled to ask questions. I

really do not see much danger that a specific provision allowing the judge to call witnesses is likely to cause him to abuse the power.

Stevenson

Judge's Power to Call Witnesses:

The recommendation seems to be based, to some extent at least, on the proposition that the judge's power to call witnesses will be exercised "infrequently". I wonder how this assumption can be justified. I would hope it was right, and in a well prepared case it shouldn't be necessary for him to use his power, but how can one assume that it will be used infrequently? One must, I think, also recognize the fact that broad powers in the tribunal to call witnesses raises three additional problems. One is that there is, of course, the danger of a judge going off on an ill-informed "goose chase", because he does not have at his disposal the information (some of it privileged) which the parties have. Secondly, there is a real danger of a trier becoming identified with the witness that he calls, and of failing to maintain the impartiality of his position. The third problem is the administrative one of compelling the attendance of witnesses before a court, and the related question of the costs of this procedure. Any significant use of this procedure would also add considerably to the time involved.

Ontario Crown Attorney's Association

Section 3. The judge or other person presiding at a proceeding may,

(a) with or without a request from one of the parties that he do so, call any witness, but each of the parties may examine such a witness; and

(b) question any witness, in such manner and to such extent as he deems expedient.

We agree with the Project's comments at p. 12 to the effect that the power of the trial judge to call a witness is not inconsistent with the purpose of a criminal trial however it was felt that there must be some restriction. It was felt that such discretion should not exist until after the conclusion of the case for the defence and not over the objection of both counsel.

Also, in our opinion, paragraph (a) should be redrafted to add, after the words in line 2, "that he do so" the phrase "after due inquiry having been made prior to the calling of such witness" (this will hence cover jury and non-jury trials).

It was felt also that each party should have the right to "cross-examine" not merely "examine" such witness.

Additionally the ending of the paragraph should be "such a witness and, with leave, call additional evidence."

This would seem to answer all fears engendered by not calling a witness for reason, or having the trial judge do it for opposing counsel.

Comment was also made of the position where a witness to be called by the trial judge is not available or has not been subpoenaed in a jury trial - does the trial await - can it afford to in practice?

As to paragraph (b) it was felt that the words "as he deems expedient" should be replaced by "as the interests of justice require" - to more closely represent the proposed intent of the section.

British Columbia Law Reform Commission

Section 402 - Calling and Questioning of Witnesses by the Judge

(1) The Judge May Call Witnesses

There is at present a distinction between civil and criminal cases, in civil cases the judge having no power to call a witness of his own motion. This distinction ought to be removed. The trial is basically to determine the fact

and while counsel has an obligation to his client to serve his best interest and therefore may choose not to call certain witnesses, the trial judge should be free to call any witnesses who appear to him to be able to shed light upon the truth of the matter. However, those witnesses ought to be available for cross-examination by both counsel thereafter. The proposed Section 402(1) only deals with examination by counsel.

(2) Judges' Right to Question Witnesses

This sub-section reflects the present law but perhaps expresses it too widely. Some agressive judges dealing with junior counsel may well usurp the function of the advocate to the detriment of counsel's case. Some reasonable limitation might be expressed in this sub-section rather than giving the trial judge carte blanche as is proposed.

Canadian Bar Association, Criminal Justice Subsection, Manitoba and British Columbia Branches

The Manitoba Sub-section disagrees with Section 3 (a) of the proposal and suggests that the right conferred by Section 3 (b) should be restricted to questions for the purpose of clarifying evidence already adduced.

Bowman

The comment in the second paragraph on page 13, respecting the judge's power to call and question witnesses deserves some attention. It is summed up in the sentence "The very concept of dispensing justice under law requires that the party with the better case, not the party with the more adroit lawyer, should prevail". Many decisions of the higher courts have pointed out how well our system works when all those concerned play their proper roles but how ill it works when the judge descends from the seat of impartiality to become a combatant in the arena. As it has been so well put, he is then "blinded by the dust of conflict". Only too often do we see in the courts a judge, moved by sympathy for a party whose counsel seems less than outstanding, interrupting, questioning witnesses, attempting to "clear up" that which is not really unclear. The usual result is that before long the judge finds himself with an interest in the success of the party he is protecting, he has become an advocate and his impartial function is gone. I have lost more than one perfectly good case because of this type of misplace sympathy. Certainly the judge is entitled to ask questions if there is unnecessary ambiguity or obscurity. He should not

attempt to be the back-up quarterback for even the most incompetent of counsel.

Section 59: Leading Questions

Ontario Crown Attorney's Association

We agree in the Project's comments (p. 8) to the effect that a question may be leading not only from the way it is framed but through the vocal inflection or the conduct of the examiner. We would suggest that the phrase "in such a manner" replace the phrase "that is so framed".

Basically it is felt that it is impossible for counsel to cross-examine without the use of leading questions, especially as tending to credibility. It is felt that the exception beginning at line 3 would cause more mischief than it could cure. It should be deleted. Putting the exception into effect -- the cross-examiner is stopped when he begins eliciting favourable answers and must thereafter not lead -- what is the position when subsequently the answers become unfavourable -- can counsel now lead?

Additionally we would again suggest that the phrase "that is so framed" be replaced by "in such a manner".

Canadian Bar Association, Criminal Justice Subsection, Manitoba and British Columbia Branches

Section 2 -- Leading Questions

The Manitoba Sub-section agrees with the proposal set out in Section 2 on the general premise that the judicial officer should have the discretion to prevent or to allow, as he feels necessary, any and all questions.

A Justice of the Supreme Court of British Columbia

Section 2

This heading is, I think, for the most part unnecessary. There is a good deal of ignorance among counsel as to the circumstances under which they may put leading questions to their own witnesses, but I think this uncertainty could be cleared up by having the Bar Association send each member a short memorandum setting out the rules and cases. The proposed section should be amended to make it clear that it is proper to direct the witness's attention to something overlooked once his recollection has been exhausted. I do not think it does so now, and I do not think it is wise or necessary to provide that leading questions may be asked in respect of such matters. There is a distinction between directing a witness's mind to some fact or circumstance overlooked and putting a leading question to him in respect of that fact or circumstance.

I agree that the present rules as to hostile witnesses should be amended.

The comment says (page 10) "Presumably leading questions will be permitted almost as a matter of course in civil cases if a party calls an adverse party or a witness identified with him." If that is to be the rule, and I think it probably should be, the proposed legislation should so state. Again, at page 11, the comment says "Under subsection (2)(e) the trial judge is free to exercise his discretion in all the situations where he feels that leading questions will expedite the examination and will do no harm to the adversary." If that is what paragraph (e) of subsection (2) means, the paragraph is awkwardly worded. I am afraid someone might use the paragraph as presently worded, or try to do so, in order to introduce opinion.

I am not happy with the words "or will harm another party" in section 2(3). The other party might be identified in interest with the party represented by cross-examining counsel.

British Columbia Law Reform Commission

Section 401 -- Leading Questions

This section contains some valuable re-statement of the law. Section 401 (1)(b) seems to override the specific examples where a leading question may be put of one's own witness as set out in 401(1)(a).

Section 401(1)(a)(ii) permits a leading question in the very instance where the witness is most susceptible to suggestion. If the rationale against leading questions is that the party being examined having been previously interviewed by the party's counsel or being associated in interest with the party is more likely to seek to give the answer he thinks counsel wants, it might be logical to leave the putting of leading questions to a witness in an adverse physical or mental condition to the trial judge himself. For instance where a witness is unable to respond to questions, a list of questions might be submitted to the judge who could then put them together with other questions that suggest themselves either to the judge or to counsel hearing the examination. In that manner the witness would be answering to a neutral enquirer and would be less likely to accept suggestion.

Section 401(1)(a)(1) and (iii) are already the law. (iii) deals with hostile witnesses but gets away from the

present requirement that the witness be declared to be hostile based upon Section 9(1) of the Canada Evidence Act or Section 19 of the B.C. Evidence Act. The law at present seems to be that the witness must demonstrate hostility by his demeanour and overlooks the fact that a man may smile and smile and be a villain. In addition the present law as to cross-examining hostile witnesses only permits them to be cross-examined as to previous inconsistent statements for the purpose of rebutting their credibility from the evidence now given by them. It is submitted that once a witness is declared hostile the party examining him should be permitted to cross-examine for the purpose of using the answers on cross-examination as evidence of the truth of the fact testified to.

The B.C. Evidence Act Section 19 might profitably be reworded in the terms of the Ontario Evidence Act which does not require a finding of "hostility" before a party is permitted to lead evidence contradicting one of his own witnesses. Strictly speaking the B.C. Section 19 might be interpreted to prevent a party from leading evidence to contradict his witness without a finding that the first witness is adverse. In many cases this interpretation is overlooked

and it is a frequent occurrence that a party calls a witness to testify as to some events and calls another witness who may contradict part of the first witness' testimony. Our present section should be amended to ensure that this is perfectly permissible, e.g. where the first witness testifies that the Plaintiff's injuries was thus and so and that the Plaintiff should have no residual disability but two subsequent medical witnesses are called who cannot describe the injuries as they first existed but saw the Plaintiff subsequently in the course of treatment and testify that the Plaintiff will suffer from a permanent disability. The Plaintiff should be permitted to call all three witnesses and to argue the weight of the combined portions of evidence to the judge so that the judge may choose some portions from one witness' testimony and other portions from the other witnesses' testimony. The Ontario equivalent section reads as follows:

> "Section 24. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his present testimony, but ..."

The suggestion in Section 401(2) seems to be a reasonable corollary of Section 401(1)(a)(iii) and is a valuable suggestion.

Manitoba Law Reform Commission

Section 2(2)(a) also appears to be quite acceptable and beneficial.

Section 2(2)(b) surely means to say, does it not: "... the examination of the witness would be unduly prolonged or protracted by such form of questioning ..."? ("ladite façon d'interroger le temoin ..."?) Some comments with which we are sympathetic and which we heard about this provision were: "Which is more important? To save the Court's time (what has it got to do that is more important?) -- or -- lead a probably susceptible witness into putting on the record testimony which the Court of Appeal or the Supreme Court of Canada may regard as Gospel?" While we recognize that there comes a point at which the Court's time is, after all, abused, the apparent spirit of this provision: (e.g. "All right, let's get on with it! Lead the witness!) ought to be moderated somewhat.

As to section 2(2)(c) to (e) we agree with Mr. Bowman's views expressed on pages 14 and 15 of

his attached memo.

Section 2(3) not only accords great trust to any judge, but it also imputes clairvoyance in that judge. How the judge will be enabled to find that the witness desires to give only such answers as will help the cross-examining party, so that he may stop the cross-examination is not readily appreciated. Would this ruling be appealable?

Section 3(a) did not attract favourable comment although instances of judges calling witnesses on their own are not entirely unknown. These lawyers representing the Civil Justice Section of the Bar seemed particularly averse to this. The judge is likely to invest his chosen witness with inordinate credibility and take a jaded view of counsel's cross-examination of that witness. Once again, the suggested provisions of section 3(b) are not entirely unfamiliar, but except for the purpose of clarification of the judge's own appreciation of the testimony offered, we think it undesirable for the judge to be questioning witnesses -- especially if he does not do it well. Again answers elicited by the judge tend to be accorded inordinate significance.

Bowman

Sec. 2, sub-sec. (2)(c) to (e) inclusive; Circumstances where the judge may permit leading questions to "one's own witness"; Surely the present power to declare a witness adverse and then permit cross-examination is sufficient. It also properly requires an application for that purpose and a finding of adversity rather than some vague conclusion on the party of the judge, as suggested in this sub-section, whose foundation may be totally subjective and not expressed on the record so that it may be challenged.

Sec. 2, sub-sec (3), concerning cross-examination of a witness who "desires to give only such answers as he believes will help the party ---" I might enquire how the judge discovers this. Surely the attitude of the witness should continue to go to the weight of the evidence. This is one of the many instances in the proposals which, if enacted, would totally emasculate the power of cross-examination.

Sec. 2, sub-sec. (3)(b), concerning the judge questioning any witness "in such a manner and to such extent as he deems expedient"; This proposal would, again, destroy the usefulness of counsel, by interrupting

a planned and careful sequence, and to be useful would require that the judge, instead of being an impartial arbiter, would have advance knowledge from God knows what source and would function instead in the pattern of the French "juge d'instruction".

Criminal Procedure Project

Section 2: Leading Questions

Section 2 of the proposed legislation contains a general prohibition against the use of leading questions by the party calling a witness, subject to certain listed exceptions. The exception stated in Section 2(1)(b) seems to allow leading questions to be put to the kinds of witnesses who are particularly susceptible to suggestion. The advisability of such a provision should be questioned.

Section 2(3) permits leading questions to be put to a witness on cross-examination except "where the judge or other person presiding at the proceeding finds that the witness desires to give only such answers as he believes will help the party asking the question or will harm another party".

Subsection 3 fails to provide specific guidelines to be used as the basis for the judge's findings resulting

in restrictions on leading questions. The subsection is also not compatible with subsections (c) and (d) of Section 2(1). It seems, under Section 2(1)(c) and (d), that a party producing a witness who turns out to be hostile can, without more, then present leading questions to that witness; however, the hostility of the witness to the party producing him, according to subsection 3, would in most cases result in a prohibition against the putting to the same witness of leading questions by the opposite party. It will probably be the rare case where a witness who is "deliberately suppressing evidence on matters that are known to him" or "is reluctant to give evidence or being evasive in his answers", will not seem to be a witness who desires, when subjected to questioning by the other party, to give only such answers as he believes will help the party asking the question or will harm another party. The result is that the party calling the witness could cross-examine that witness, but the party not calling the witness could be prohibited from cross-examining even upon those issues with respect to which the witness seems neutral to either party.

Subsection 3 of Section 2 also seems to prohibit cross-examining counsel from being effective

in the classic sense. One of the legitimate ultimate aims of effective cross-examination is to elicit helpful answers from a witness, particularly one who is initially unfriendly. Any witness who agreed with a suggestion made in cross-examination may appear to fall within subsection 3. It is submitted that the possibility of prosecution for perjury ought to be sufficient deterrent to any witness who might be tempted to tailor his evidence for the sole purpose of helping a party rather than for the purpose of disclosing the truth or what he believes to be the truth.

Macdonald

Section 2 -- Leading Questions

In Section 2(1) an attempt is made to define leading questions. This definition undoubtedly covers most questions ordinarily regarded as "leading questions", but the definition may not exhaustively cover all questions now objected to on this ground. For example, objection may at present be taken to a question which assumes the existence of facts which are disputed: e.g., "what did you do after the defendant hit you?"

In Section 2(2)(c) and (d) there is a broad interpretation of the word "adverse". At present one

view interprets "adverse", as found in s.9 of the Canada Evidence Act and s.27(2) of The Alberta Evidence Act, strictly, in the sense of "hostile", so that a party is severely limited as to the circumstances in which he may cross-examine his own witness on the basis of a previous inconsistent statement. The equation of "adverse" with "hostile" is made by Roach J. A., dissenting in the Ontario Court of Appeal in Wawanesa Mutual Insurance Company v. Hanes (1961) 28 D.L.R. (2d) 386, with whom Cartwright, J., agreed in (1963) S.C.R. 154. He was the only Supreme Court of Canada judge to deal with the point. The opposite point of view, namely that "adverse" means "unfavourable", was expressed by the majority in the Ontario Court of Appeal.

Section 2(2) (e) appears to be a residual clause giving the judge broad discretion as to when leading questions may be permitted.

Section 60 Refreshing Memory

Canadian Bar Association, Study Group, Edmonton

Section 4, Paragraph 2

The majority agree with this paragraph as it is but Philip Ketchum dissents on the basis that this provision would inhibit witnesses from making spontaneous notes or 'proofs' for their employers or solicitors and that the general effect of such a provision would be an inducement to prospective witnesses to make self-serving proofs, or to find that their memory didn't need any stimulation by reference to prior statements.

Outhouse

Section 29 (1) would permit counsel to put leading questions to his own witness where "necessary to elicit the testimony of the witness". I am inclined to think the language used goes further than necessary to accomplish the limited objective set out in the comment which follows the section.

Sections 20 (1) and 20 (2) do not employ the term "adverse". However, given the general wording of these sections, it seems likely that the courts will quickly fall back on this concept in determining whether one could put leading questions to one's own witness.

Section 21 (1) would appear to encourage the practice of reducing testimony to writing before trial for the purpose of enabling the witness to use the writing to refresh his memony when giving evidence. The growth of such a practice would in my opinion be undesirable.

A Justice of the Supreme Court of British Columbia

Section 4 - Refreshing Memory

The term "refreshing memory" is used in two senses by lawyers, i.e., it is applied by them to two different situations. In one - present recollection revived - the witness looks at the document and as a result of doing so his memory is stimulated and he presently, that is to say, when giving his evidence, recalls the facts to which he then testifies. In the other - past recorded recollection - the witness looks at the document but his memory is not then stimulated to the point where he can recall the events, but he knows from looking at the document that the facts then recorded were true, e.g., a solicitor looks at a will which he witnessed thirty years before, or a policeman reads a licence number from his notebook. In the case of present recollection revived, there is logically no justification for limiting the witness to notes made or verified by himself while the facts were fresh in his memory, because he could very easily, the night before or at some other time, look at a newspaper, for instance, refresh his memory and then testify to that in court. The fact that he did or did not make or

verify the notes himself at the appropriate time is therefore logically unimportant here.

The situation is different if his memory is not, in fact, stimulated and he uses a memorandum or other document as a past recorded recollection. There, logically, he should be limited to documents or memoranda made or verified by himself when the facts were fresh in his memory. Most text writers refer to this logical difference and suggest that the courts should permit a man to use any document to refresh his memory if it does revive his present recollection - present recollection revived. The proposed section tries to put that into effect. In my opinion, however, the authors and the text writers overlook an important practical fact. That practical fact is that all witnesses are not completely honest. It is very difficult to determine whether a witness is using a document which actually refreshes his memory (present recollection revived) or whether he is using it as a past recorded recollection. If he looks at it before he goes on the stand and is then able to give his testimony without looking at the document when he is on the stand, then perhaps his present recollection has been revived. If he has to look at it when he is on the stand to give his testimony, then it may very well be that he is using it as a past recorded recollection. Therefore, it is my opinion

that the rule that the courts have applied these many years requiring any document used on the stand to refresh a witness's memory to have been made or verified by him when the facts were fresh in his memory is the only practical, sensible rule.

I am not overlooking the fact that in the case of some memoranda such as depositions and that sort of thing the above rules are not adhered to, but that question is not material to the issue I am now discussing.

The comment says "Under the present practice, in which most witnesses are interviewed by counsel before taking the stand, situations in which a witness' memory may need refreshing are infrequent". Unless I misunderstand this statement, I do not think it is correct. The comment says on page 16, "The circumstances and the timing of the making of the memorandum are factors the trial judge will consider in deciding if the witness is legitimately refreshing his memory"; and on page 18, "In exercising his discretion to disallow it he will consider the nature of the writing, the witness' testimony, the danger of undue suggestion, whether the witness is too dependent on the notes and any other signs indicating that the witness is reporting what the writing says rather than his present memory of a past event". This proposal would require a very high standard of judicial

competence. Also, again, there is nothing in the proposed legislation saying what matters the judge will consider. Later the comment says, "Thus, in a particular case, if it is an impossible task for the trial judge to determine whether the witness' memory is, in fact, refreshed, intelligent cross-examination should be able to disclose whether the witness is relying on his present memory or upon the writing itself". It seems to me that by that stage the witness would have already looked at the document and the damage, if any, would be done.

Section 4(2) seems to give a man the right to cross-examine the witness on a document and then to elect whether or not to put it in evidence. It seems to me if counsel cross-examines on a document, the other side should have the right to have it put into evidence. I am not quite sure what is meant by the words "contains material not related to the evidence given by the witness". If that simply means that material totally unrelated to the events testified to may, upon the judge's so ruling, be protected from disclosure, such as other pages in a policeman's note-book relating to other parties, the subsection seems unobjectionable though not altogether clear. I am afraid, however, that this subsection could lead to a great deal of argument in the case of documents which contain material relating to the parties and perhaps to the subject matter

of the action as a whole, yet not directly related to the evidence given by the witness. Is it proposed that under those circumstances the rest of the document could not be used for cross-examination or could not be put in evidence?

Section 4 (2) paragraph (d)

Is delivery the right word here? Is "production" intended?

Davey

Section 4

In my opinion this goes too far by permitting a witness to refresh or stimulate his memory by memoranda or writings made long after the event, subject to the power of the judge to exclude them. The use of such documents, which may be quite untrustworthy, will give the witness' evidence an apparent weight that it is not entitled to, and which cross-examination may not be able to fully dislodge.

Judges: Committee of County and District Judges' Association

The Committee submits this is objectionable, and that the present rules and principles are operating satisfactorily. It is submitted it would be error to give a witness an unrestricted right to refresh his memory from any writing. The words "other means" are unsatisfactory and do not give proper guidance to a Judge or to counsel. It is submitted "other means" should be better defined or restricted.

Schiff

Subsection (1) contemplates a previous voir dire as a condition of the judge's ruling that the object may be used: but how can a judge tell in advance of the witness saying that his memory is renewed that the object etc. "will tend to refresh..."etc.?

Why not have a reverse provision, that anything may be used to stimulate, subject to the judges power to stop the use if (a) the judge rules the witness is sufficiently able without the object to recall fully; or (b) the alleged means of stimulating would not tend to revive memory ... but would rather then tend to lead him into..."

Cowan

With regard to s. 4 under this heading, I raise a question as to the necessity of the limitation on the right of a party examining a witness, to put to the witness any question or use any writing, object or other means of stimulating the memory of a witness. As provided in s. 4(1) the draft section requires the judge or other person presiding at the proceeding to find that the witness is unable to recall fully the matter on which he is being examined and that the question or other means of stimulating his memory will tend to refresh his memory of the matter, rather than lead him into mistake or falsehood.

While this limitation appears to be a reasonable safeguard it does, in my view, raise certain difficulties in cases of criminal trials before a judge and jury. Section 9(2) of the Canada Evidence Act permits the party producing the witness to cross-examine the witness with leave of the court, if the party alleges that the witness made, at other times, a statement in writing or reduced to writing, inconsistent with his present testimony. In Regina v. Polley (1971), 5 C.C.C. (2d) 94; 2 N.S.R. (2d) 810, the Appeal Division of the Nova Scotia Supreme Court, following a decision of Chief Justice Culliton in Regina v. Milgaard (1971), 2 C.C.C. (2d) 206 at pp. 221-222, approved a procedure requiring a voir dire to determine, in the absence of the jury whether, in fact, there is an inconsistency between the statement or writing and the evidence the witness has given in court and, if there is an inconsistency, to require counsel to prove the statement or writing, in the absence of the jury.

Such procedure can cause serious delays in the trial of criminal cases with a jury. Such delays may be necessary but, in my opinion, they should be avoided wherever that is practical. It seems to me that, if the limitation in the draft s. 4(1) remains, the judge must have a voir dire and hear evidence on the question whether the witness is unable to recall fully the matter, and as to whether the

question or other means of stimulating his memory will tend to refresh his memory of the matter, rather than lead him into mistake or falsehood.

In some cases, a Crown attorney may call as a Crown witness a relative of the accused or an accomplice, or some other person who has given a statement to the Crown or who has given evidence on the preliminary hearing. Recently, I had such a case where it would have been very difficult to rule that the witness was adverse and it became necessary to have a voir dire as to certain portions of the transcript of evidence on the preliminary hearing. Unless the Crown attorney takes the witness through the entire evidence-in-chief before attempting to introduce any of the evidence given on the preliminary hearing, it would be necessary to have a voir dire with regard to each separate statement in the voir dire, in order to permit the presiding judge to rule on the question of inconsistency.

My suggestion with regard to s. 4(1) of the darft under this heading, is that the limitation indicated above should be eliminated. It seems to me that this would leave a discretion in the presiding judge to exclude objectionable or irrelevant writings or other objects or means.

Justices of Supreme Court of Ontario

Re Section 4(1)

It was felt that the present law dealing with refreshing memory is satisfactory with some minor complaints. It is felt that this section goes much too far as, under this section, any writing might be placed before the witness, such as a memo of the counsel prepared before the trial to stimulate the witness' memory. It was felt that the present law, while substantially satisfactory, might be spelled out rather than left to the jurors in terms of this section.

Re Section 4(2)

Your committee, subject to its objections to subsection (1), had no objection to this subsection.

Criminal Procedure Project

Section 4: Stimulation of Memory

Section 4 deals with the manner of stimulation of the memory of a witness. The Section goes far toward eliminating the former confusion in the law with respect to the distinction between refreshing memory and use of recording of past recollection. The Commentary, at page 19, suggests that cross-examination can determine if the witnesses' memory has in fact been refreshed or whether he is using the writing itself without relying on his present memory. Perhaps there should be some provision that once the witness indicates he

has refreshed his memory after examining the "stimulating" material he should not be allowed to further refer to the material he has used. His memory having been refreshed, further reference to the material should not be necessary.

Macdonald

The conditions as to the use of a document for the purpose of "stimulating memory" are set out in Section 4(1)(a) & (b). These conditions appear to narrow the extent to which writing may be used to "refresh memory", compared with present practice. They impose upon the judge a duty of finding that the document will in fact "tend to refresh his memory". At the present time I am not aware of any practice which requires the trial judge to make such an inquiry before the document is used to "refresh the memory of the witness", provided that the document was made by the witness substantially contemporaneously with the events. It is true, as the Project says at p. 18, that "there is...a clear danger that...the witness will simply proceed to parrot or paraphrase the written words". This does surely happen every day, for example when police officers give testimony. Does this mean that if a police officer testifies that without his notes he is unable to testify to any of the details of his investigation of an accident or a crime, he will be prohibited from using those notes

unless he can actually say that the use of the notes will in fact "stimulate his memory"? If so, a great deal of relevant, helpful and reliable evidence will be excluded.

It is to be noted that the wording of Section 4(1) does not limit the documents which may be used for the purpose of "stimulating the memory of the witness", to documents which have been prepared by the witness himself. Thus, if a person has seen the licence of an automobile involved in an accident, which has left the scene, and gives the number to an investigating constable, and at the trial is unable to remember the number, the note made by the investigating constable at the time can be used for the purpose of stimulating the memory of the witness, whereas under the present law it could not. This is surely a welcome reform.

It is also to be noted that the wording of Section 4(1) does not limit the documents which may be used for the purpose of "stimulating the memory of the witness" to documents made at the time of the occurrence or even shortly thereafter. At common law this was a requirement, although in the Coffin Reference, (1956) 114 Can. C.C. 1, the Supreme Court of Canada approved of a witness having her memory refreshed by reading to herself her testimony at the preliminary hearing a year before. The wording of the subsection obviously permits that practice to continue.

Section 4(2) provides that an adverse party is entitled to cross-examine the witness on a writing used to stimulate the memory of the witness, and to introduce in evidence those portions that relate to the evidence given by the witness. It appears that those parts of the statement that do not relate to the evidence given by the witness may not be so used. This limitation does not appear in the present law; today cross-examination may extend to other parts of the document, although there is Australian authority that the cross-examiner may be required to put those parts in as evidence. It is hard to see why cross-examining counsel should be restricted in his cross-examination, to those parts of the writing which the witness has expressly used to refresh his memory, provided that the entire writing came into existence at the same time and refers to acts and occurrences substantially contemporaneous with it. It should also be noted that there is some English authority (Stroud v. Stroud (1963) 3 All E. R. 539 and earlier cases cited therein) that a party calling for the production of a document in court by the opposite party may be required by that opposite party to put the document in as his evidence. There does not seem to be any Canadian authority on point. If the rule is valid, then it would follow logically that a document used to refresh the memory of a witness might have to be put in as part of the opposite party's case if

counsel for the opposite party asks to see it! Cross doubts that the authorities are in accord with that logical extension. I have never understood the reason for such a rule, and do not think it is justified. If it is a rule at present, it is not incorporated in Sub. (2), and is therefore presumably to be allowed to die.

Sub. (2) also provides that the adverse party is entitled to see any writing used for the purpose of stimulating the memory of the witness, whether the witness has used the writing before or during the giving of his evidence. Thus, if he has recorded an occurrence in writing substantially contemporaneously with the occurrence, but he does not use the writing in the witness box, he may be asked in cross-examination whether there is any writing which he has, before testifying, looked at, relating to the matters to which he is testifying. If he admits that there is some such document, that document must be produced. This appears to be inspired by the decision of Levey, P.M., in Reg. v. Musterer (1967) 61 W.W.R. 63. His Worship held that the trial judge has a discretion in such circumstances to require the witness to produce his notes. There the witness was a constable, and the notebook contained details of an interview with the accused at the time of his arrest.

The Project, in discussing this point, does not specifically refer to the possibility that this provision may

in some cases permit the violation of a privilege. The provision does appear to permit infringement upon the privilege which exists for statements which have come into existence for the purpose of informing solicitors for the purpose of enabling them to conduct litigation. Many such statements come into existence long after the events, in which case they could not be used to refresh the memory of a witness in any event, under the present law. But the wording of Sub. (2) appears to contemplate that, if the witness in fact does, before the trial, look at a statement which he has at some time previously given, that statement may have to be produced to the opposite party, though that statement could not be used by him to "refresh his memory" under the present law. This suggested reform surely runs the danger of discouraging the taking of written statements from prospective witnesses. The Project appears, on p. 20, to have weighed this disadvantage, but I would be interested in knowing what the reaction of the profession would be to this proposed change. Not only is this a matter of interest in civil cases, but in criminal cases it would appear to open the door to examination by the Crown of statements made by defence witnesses. Whereas the result may be that the trial judge might, in the absence of counsel, excise any portions not related to the evidence given by the witness, nevertheless those portions which do relate to the evidence given by the witness could still be dynamite in the hands

of the Crown. Again, as in civil cases, surely it is probable that the only net result in many cases will be that written statements will not be taken from defence witnesses.

Ontario Crown Attorney's Association

Subsection (2)

If a witness, either before or during the giving of his evidence, uses any writing, object or other means of stimulating his memory of any matter on which he gives evidence, any adverse party is entitled to have that writing, object or other means produced at the hearing, to inspect it, to cross-examine the witness thereon and to introduce in evidence those portions that relate to the evidence given by the witness, except that, if it is claimed that any such writing, object or other means contains material not related to the evidence given by the witness, the judge or other person presiding at the proceeding shall:

(a) examine the material in the absence of the jury or other persons whose duty it is to determine the facts;

(b) excise any portions not related to the evidence given by the witness;

(c) preserve any portion excised over an objection so that it can be made available at any appeal that may be taken from the decision in the matter being tried; and

(d) order delivery of the remainder of the

material to the party entitled hereunder to use it.

We wish to begin with the Project's statement (p. 20) that: "Although there is a danger that this will lead to prying into the opponent's file, the public interest in full disclosure of the source of a witness' testimony seems to outweigh that consideration." As experienced trial prosecutors we ask - how can a judgement like this be made and upon what grounds?

The phrase "either before or during the giving of his evidence" in the opening part of the subsection causes difficulty in interpretation. To what point of time does "before" apply - all the way back to the initial investigative stages (in the case of a police officer) - or does it refer to the trial?

The Project, at p. 19, states: "Note that the subsection provides that the adverse party can only inspect those portions of the document that were in fact used to refresh memory. Thus no question of privilege should arise." The subsection does <u>not</u> say so. After objection has been made the proposal is silent as to whether the cross-examiner may still read it before handing it to the judge - how can the cross-examiner make submissions if he doesn't know the <u>entire</u> contents? <u>May</u> the judge let him

read it all? Thus the danger becomes apparent especially in the case of an investigating officer. Without discussing the meaning of "stimulating" the memory, the officer may have "before" his testimony read many documents, including the Crown brief. Many of these may contain confidential information - names of informants, sources, tips, etc.; security material; hearsay etc. Where is the line drawn? Surely this will develop into many collateral matters.

It is our opinion that, as drafted, more evils are created than it was designed to prevent - especially since the right to inspect is absolute and not discretionary to the judge.

Additionally paragraph (a) in a judge alone trial may prejudice a fair trial if the judge is required to read a lengthy police report.

Also noted is the fact that the effect of paragraphs (b) to (d) is to destroy the original document which could raise interesting problems on a new trial. There is no provision for the editing of a true copy (although no doubt it was intended) and, in fact, the part preceding paragraph (a) speaks of "that writing" etc.

As to edited out portions paragraph (c) requires their preservation "over an objection" - and objection to

what? - the excision? - and by whom? Then paragraph (d) requires the "remainder of the material" to be delivered to "the party entitled hereunder to use it" - this often will be the accused - what does he obtain? - the unobjected to excised portions in addition to the edited writing or object? If not entered into evidence - may he keep it? Is this paragraph really necessary?

Finally the opinion was expressed that just how much of, say a writing, is to be put into evidence. Just that part confirming the testimony - if so, why would the cross-examiner want it filed? If this is an issue of credibility how does it jibe with Study Paper # 3 on that subject, especially section 5 thereof?

Also, how, in a jury trial, is it to be explained to them what the cut-out areas are doing in a document or the bleeped out part of a tape-recording - should they guess - to whose detriment? At present the editing power is used with reference to statements of an accused - fortunately it is not that necessary in practice.

Sheenan

In regard to Section 4, I thought that when I first read this that it seemed to be an ideal way to spell out a means of refreshing the memory of a witness. However, I would like to point out that the project, or the

Commission, should be aware that this will probably create many more problems than were outlined in the comment section of the paper. I can see the problem involving trials within trials to determine whether the writings to refresh the witness' memory is in fact being used for that purpose. I can see many problems also arising in allowing the inspection of these writings to refresh the witness' memory, prior to trial, of all documents that might be used. This is so especially in the eyes of police officers and police forces. We must consider the whole filing system of a Force as being writings and documents that can be used to refresh the memory of a witness. It is obvious that an officer uses a portion of these files to refresh his own memory especially when we consider the weight and numbers of all cases that each officer has at any one time. This then concerns me as to just what should be shown to the defence from a Police Force's files. This should be clarified to a greater degree. Also, the question of the use of documents obtained from microfilming processes and other duplicating means apparently has not been considered. This should be clarified in my estimation.

Some Forces, and some individuals in the law profession, quite often use tape recorders and other electronic devices for storage of information, and possibly the refreshing of one's memory; this should be clarified as well.

Section 5, I agree completely with the exclusion as laid out in this section, and have no further comments to make on this particular section.

Bowan

At page 18, it is suggested that the problem of refreshing memory from notes or material made by someone other than the witness will be dealt with later. How then can the project authors have the audacity to seek opinions from the Provincial Law Reform Commissions and other groups at the present time?

Also at page 18, after reviewing the obvious and real dangers of permitting a witness to refresh his memory from other sources, the statement is made "it still seems better to permit the use of any memorandum or object as a stimulus to present memory..." Why? If this is to be the rule we can perhaps dispense with witnesses altogether. We can have one representative from every party refresh his memory from any sources he likes and give the evidence that might have been given by the twenty-seven witnesses he no longer needs to call. It may be simple but will it be justice?

At the top of page 19, the comment refers to the judge being "entitled to allow the adverse party to examine the writing and to make objections before it is used". This

should not be the right of the judge. It should be a right in the party. Further on that page it is said that the adverse party can only "inspect" those portions of the document that were in fact used. This is surely erroneous. One should only be entitled to use that which has been referred to but one can only determine this if one can inspect the entire document.

Canadian Bar Association, Criminal Justice Subsection, Manitoba and British Columbia Branches

Section 4 - Refreshing the Memory of a Witness

The Manitoba Subsection agrees with the proposal set forth in Section 4(1). It also agrees with that portion of Section 4(2) down to the word "thereon" in the seventh line, but feels that in no circumstances should the "writing, object or other means" itself be allowed in evidence.

British Columbia Law Reform Commission

Section 403 - Refreshing Memory

(1) Refreshing Memory Generally

The law at present as set out in R. v. Coffin (1956) S.C.R. 191 is that a party may, where his own witness' memory has been exhausted, in the discretion of the Trial Judge put leading questions for the purpose of refreshing the witness' memory. In that case it was done by putting previous inconsistent testimony at the Preliminary Hearing to the witness, the witness having first said that his memory at the Preliminary was better than it was at the Trial. Code

Section 403 (1) clarifies this rather obscure portion of the law of evidence while setting up the safeguards of sub-paragraph (a) and (b). For greater clarity, however, I suggest that sub-paragraph (b) ought to be amended by inserting the words "writing, object" after the word "question" in line 1. Failure to do so may lead to the suggestion that the test set out in (b) is only to be applied where the question itself or some means other than writing or an object is sought to be put to the witness.

The means of refreshing a witness' memory include notes made subsequently and not at the approximate time of the event recalled. The intent is that the writing may be writing made at any time and not simply contemporaneously with the event. Since this represents a major change in the law as presently understood in practice it would be better, if the change is to be made, to spell out in the Code by particular reference the fact that the writing may be writing made at any time. The practice at present has tended to obscure the distinction between writing used to refresh memory and writing used to record past recollection. Almost inevitably where writing is to be relied upon, such as a witness' notes, the question is put to the witness, "when were the notes made?" Phipson, 10th edition, page 587, paragraph 1528, reflects this requirement that the document must have been made contemporaneously with the event recalled and certainly not after the litigation has provided a motive for creating the notes. At page 16 of

the National Commentary it is asserted that the early English cases distinguished between the need for a contemporary note for past recollection recorded as opposed to a note made at any time for memory refreshed. Notes are often made after the motive for litigation has arisen but when the witness' memory is fresh and accurate. An example is the driver who jots down details of the accident and identity of the other car and driver at the scene. Those notes should be admitted to refresh a witness' memory and the existence of a motive for litigation when the notes were made ought to be a matter for the trial judge in deciding what weight to give to the witness whose memory is thus refreshed.

(2) The Use of a Writing

The new Code proposes that writing used by a witness prior to testifying, to refresh his memory, should be available to the adverse party for inspection and if he wishes cross-examination. This is a welcomed statement in the Code since in some instances there has been confusion about whether a police officer is compelled to produce the notes he looked at before entering the Court Room. Exception is taken, however, to the statement in the National Commentary at page 18, line 3, that the adverse party may examine the writing and make objections before it is used. This may be the intent but it is not sufficiently clear from the proposed Section 403 (1) and (2) that it is the result. If Section

403 (1) (b) is to have any real meaning then there should be a specific revision in 403 (1) permitting the adverse party to inspect the document before it is looked at by the witness. Cross-examination at that stage in a "voire dire" is not necessary nor useful since the witness cannot be expected to have knowledge of the document or the facts until he has refreshed his memory from it. Inspection, however, will give adverse Counsel the opportunity to smoke out any unfair suggestion which the document may contain or any of its contents which may indicate that it was prepared after the motive for litigation arose, or with a view to creating biased record for some other reason.

With respect to 403 (2) there is a possibility that if the whole of the document is not revealed to adverse Counsel at the Trial, Counsel may be lead to Appeal from the decision only to find that there was or was not some other portion of the document he should have seen when he gets into the Court of Appeal. That seems to lead to needless Appeals and the time and expense involved in them.

Manitoba Law Reform Commission

The proposal expressed in Section 4 (2) of the possible formulation of legislation in the paper on Manner of Questioning Witnesses is lauded to the extent that it would overcome the remarkable proposition propounded by the Manitoba Court of Appeal in R. v. Kerenko, Cohen & Stewart

(1965) 49 D.L.R. (2d) 760. The rule that a witness may be obliged to produce for inspection and comment any material by means of which he has refreshed his memory, or reconstructed his recollections, or simply adopted what is written there, is a salutary one: it is all the more so if it applies to material viewed, heard or read just before testifying and just outside the courtroom as well as within it. We think the right to demand production of such material ought to be that of a party to the proceedings, and not that of the judge, but we shall comment on these proposals later on.

Section 4 generally is regarded as one of the better recommendations in this Study Paper because it would avoid some of the present anomalies to which we have already referred on page 2 above.

Section 4(1) does refer to "any writing" and some of the lawyers who appeared before us thought the expression wide enough to have, for example, a civilian witness for the prosecution furnished with a policeman's notes or a brief prepared by counsel or the like. Of course, subsection (1) operates subject to the provisions of subsection (2).

Perhaps we misread the Possible Formulation of Proposed Legislation, or the Comments which follow it, or both, but we note considerable conflict - especially as to

4(2) - between them. Mr. Bowman's memo at the bottom of page 19 thereof highlights those conflicts. For example, the Comment which follows the Proposed Legislation says the adverse party can inspect only those portions of the document which were in fact used to refresh memory, but section 4(2)(c) requires the judge to preserve any portion excused over an objection. How one could formulate a rational objection without first inspecting to determine what, if anything, might be objectionable, we cannot fathom.

Section 61. Exclusion of Witnesses

Canadian Bar Association, Study Group, Edmonton Section 5(3)

We feel the Judge has this power inherently and that formulating it in this manner may imply that counsel are at liberty to do so where no Order is expressly made, whereas our view is that the traditions of advocacy would in almost all cases preclude counsel entering into such a discussion. The exception would be to review facts related by previous witnesses with an expert (such as a medical doctor or an accountant) who was unable to be present when that testimony was being given.

Judges: Provincial Judges Association of the Province of British Columbia

Codifies the present rule as to exclusion of witnesses, and as to warning witnesses about discussing their evidence. This Association agrees with this recommendation. We would recommend, however, that it would be appropriate to include in this section some expression of view as to the results that will follow if, as sometimes happens, a witness does remain in the court room after an order for exclusion has been made by the Judge. Is the witness debarred from testifying or will he be allowed to testify on the basis that a

Judge should instruct himself or the Jury that the weight of his evidence has been affected? Can both sides consent to the reception of this evidence? Should there be sanctions imposed upon such a witness if he deliberately ignored the court's order, or is he automatically in contempt? The point is that in a Code of Evidence, it is going to be important to deal with every contingency that can be reasonably foreseen, otherwise, as we said earlier in this Brief, the Code may cause more problems than it solves.

A Justice of the Supreme Court of British Columbia

Section 5 Exclusion of Witnesses

I do not think that the judge should be required to "exclude". The judge may make an order excluding but he should not be required to exclude since he does not know who the witnesses are. Again, the statement in the comment, "although the judge makes the order for exclusion the parties and their lawyers are chargeable with the duty of seeing that the witnesses comply with the court's order" may be true under the present law but is not included in the proposed legislation. The parties or their counsel should be responsible for policing any such order. I think that the word should be "may" rather than "shall.". I think that the proposed section is badly worded in that it would exclude witnesses from the courtroom who have given their evidence. Such witnesses are often better

kept in the courtoom so that they cannot confer with other witnesses in the witness room. This is a matter which cannot always be determined in advance.

Judges and Justices of the Courts of Manitoba

Well, another question I had, is an officer an employee of a person other than a natural person? Couldn't there be an employee of a natural person? You know, a sole proprietorship? It says, "An officer" obviously an employee of a person other than the natural person. Well, why shouldn't an employee of a natural person be in the same position as an employee of a corporation?

Well, presumably the natural person would be the party.

Well, but it may be a sole proprietorship, and he employs somebody.

Well, but then you wouldn't want to restrict the right to exclude the employee.

That's right. It says "other than the natural person". Why does it say he's an officer, an employee

of any person, including the corporation?

No, because you can't exclude the party. He must be employed. This says, "shall not exclude any person who is an officer of an employee".

Even that -- even in the face of that, what if the prosecution deals with a firm that has 100 employees, and they pack the courtroom, and say, "we are all officers of the company, and you can't exclude us?"

Right. Another possibility.

The Code section has to be looked after by the project again.

I think all these, as I point out to you, can have a -- partnership. And what about partners? Are they entitled to be present?

Maybe both partners?

Or, supposing it's a partnership, and there's a General Manager in the partnership. Is he entitled to be there?

No.

It's really very desirable that the General Manager should be there, because he's charged with the particular responsibility with respect to the administration of which the party would have no idea.

It could be a large operation, operating under a partnership rather than a limited company.

Well, most desire to incorporate, but ...

No, but I think the answer to that question that you've said, Magistrate Enns, about a number of employees, who have been designated by counsel for that person. That is, an officer, who shall remain in Court, representing the party, so you wouldn't even get faced with several officers.

That's right. I didn't read the last sentence carefully. "It's the duty of counsel to designate the representative officer".

No, but that still wouldn't get around the question of a partnership.

Or a sole proprietorship.

Where you have a General Manager, or somebody like that.

Yes, of course.

This can particularly happen in large implement operations, where they have not incorporated, and there are several of these floating around now.

Well, "B" might take care of it.

Yes, that's right.

There's a general power in "B", yes.

Yes, I think that covers it now.

Macdonald, H. J.

Re: Order of Presentation of Evidence

If the accused is to testify himself, I would favor a rule requiring him to testify before the defence witnesses excepting in cases where leave is granted on the opening of the defence permitting the accused to be called following other

defence testimony.

It seems to me that one of the reasons for the exception requiring the accused to testify first is to maintain as much as possible the practice that a material witness is not allowed to unnecessarily hear the examination of other witnesses before he testifies himself. Because he is the accused, the accused is present in the courtroom at all times, which of course permits him to hear the whole of the case for the Crown before the defence is called upon.

If defence testimony is to be offered, the accused is generally the most competent witness on any defence involving alibi or intent and, if he was present at the scene of the alleged offence, is best able to explain his own actions. In most cases where the accused is called upon I should guess that the issue would likely concern identity or intent. The latter may involve drunkenness, insanity, provocation, lack of criminal intent or other defences which are usually best advanced through the accused. In all such cases the evidence of the accused will likely carry its own merit or lack of merit whereas if it is given following other defence witnesses it is more apt to lose its individual colour. Where the

defence has good reason to pursue some other order, leave can be sought and granted.

It must be realized that a substantial volume of criminal trials are being conducted under legal aid programs and that the proportion may very well increase. The defence is often not conducted by well experienced and competent criminal counsel. It is suggested that a general rule establishing what, in most cases, would be good practice deserves merit. In special cases on application the Court may waive the rule. The application should, of course, be made in the absence of the jury.

I am hesitant about adopting any general rule permitting the prosecution or the judge to comment on the failure of the accused to testify. The fact that he does not testify is well apparent to the judge and to the jury and, without any comment, the evidence that has been heard will likely be given its proper weight. It is still the duty of the Crown before conviction to satisfy the Court on the evidence presented that the accused is beyond a reasonable doubt guilty of the offence charged.

In Alberta practically all criminal trials are non-jury trials. For this reason I would not favor a rule

requiring a judge to be faced with the necessity in every case of ruling when the accused might testify -- it should be sufficient to require him to rule after an application is made to waive the general rule requiring the accused, if he testifies, to testify as the first defence witness.

British Columbia Civil Liberties Association

Manner of Questioning Witnesses

Generally, the proposals in this section are sensible and do not infringe upon the civil liberties of any of the participants at a trial. We object strongly, however, to the suggestions that the discretion given to the trial judge in section 5(3) to permit witnesses to remain in the courtroom would often be used to permit an investigating officer to remain. In almost all criminal cases involving more than one prosecution witness, the prosecution could allege that the presence of the officer was required, and there is great danger that the discretion would, in practice, become a rule that the investigator will not be excluded. If the discretion in section 5(3) would often be used in this manner, as suggested in the comment to the section, we urge that the section be modified. The exclusion of the investigating officer will seldom be unfair to the prosecution,

for his presence can be secured by calling him as the first witness.

Criminal Procedure Project

Section 5: Exclusion of Witnesses

Section 5 of the proposed legislation deals with the question of exclusion of witnesses at trial. Codification should serve to standardize present practice and should be helpful because it will remind counsel of the availability of an order for exclusion. Perhaps there should be some comment in the legislation with respect to the right of counsel to discuss proposed evidence with his witnesses, from the point of view of preparation, even though those witnesses have been excluded. This might be particularly important in a lengthy or complex trial. There is also a question as to whether or not counsel may carry on discussions with his own witnesses during the giving of their evidence, for example, at recesses, etc.

It might also be appropriate in this Section to somehow provide for the ability of the accused to sit in the body of the court during the presentation of identification evidence. Perhaps there could be a provision making the accused's presence in the body of the court mandatory during the presentation of identification evidence with some sort

of requirement upon the Crown Attorney to indicate, prior to the presentation of such evidence, that it will be directed towards the question of identification.

New Brunswick, Law Reform Division

Subsection (3) of section 5 was objected to on the basis that it seemed to limit considerably the freedom of counsel to conduct his case. It is recognized that there is no purpose in excluding witnesses if the content of the witness's testimony is going to be simply transmitted outside the courtroom. And, for this reason, it is recognized that the judge should be in a position to order witnesses not to converse with other witnesses. But to impose this restriction on counsel seems to be rather severe. For example, an expert may have been excluded from the courtroom and yet his testimony would depend upon having at least some knowledge of what the other testimony in the case was. Or, a lawyer may wish to discuss with a witness a discrepancy between the testimony of two other witnesses, not from the standpoint of coaching the witness but simply from the standpoint of clarifying the issue. On the other hand, I can see the point that the author of the working paper was probably deriving at, that if counsel is not included in the judge's order, the spirit of the

provision may very well be abused.

British Columbia Law Reform Commission

Section 404 -- Exclusion of Witnesses

The provisions of Subsection (1) and (2) of this Section simply reflects the present state of the law with the exception that (2) probably expresses much more clearly than do any cases the obligation of past witnesses and of counsel not to tell future witnesses what has already been said, thus circumventing the rule for exclusion. It might perhaps be wise however in (2) to preserve the right of counsel to discuss the future witness' own evidence during the trial provided that counsel does not, in that discussion, reveal the evidence already given.

The wording of Subsection (1)(c) might be improved by deleting the mysterious words "given the purpose of this section". No comment seems to be necessary on this whole Section.

Manitoba Law Reform Commission

We thought that section 5(1) ought to end with the following expression or words to the like effect:

> "... and if any person who has heard such evidence be later called as a witness, the judge may, if satisfied that the person's hearing of the evidence would create a specified miscarriage of justice, either prohibit him from testifying or comment upon his having earlier heard such evidence."

We also thought that section 5(2)(a) should make some provision similar to that of section 577(2)(a) of the Criminal Code to deal with disruptions resorted to by accused persons or parties to civil actions, apparently to obstruct or stave off their trials altogether.

Ontario Crown Attorney's Association

The mandatory requirement that an accused cannot be excluded from the courtroom appears to conflict with sec. 577(2) of the Criminal Code. Sec. 577(2)(a) confers the power to remove the accused from the courtroom not so that he cannot hear the evidence of other witnesses but because he is unruly while sec. 577(2)(c) permits his removal apparently because his mental health would be affected if he did hear the evidence of certain witnesses. This of course has no connection with the rationale of the exclusion aimed at by section 5. (1) of the proposed legislation -- namely to, in effect, compare notes. Accordingly we

would suggest that the draftsman make the purpose of the exclusion quite clear. By doing this then no conflict with sec. 577 would arise.

Should not the informant have a right to remain -- especially in the so-called private-complaint cases?

Section 5. (2)(b) is an officer or employee of a person, other than a natural person, that is the accused in a criminal proceeding or a party in a civil proceeding or other matter, who has been designated by counsel for that person;

:- This is acceptable.

Section 5. (2)(c) is a person, such as an expert witness, whose presence is shown by a party to be essential to the presentation of his case;

:- It is felt that this paragraph should be redrafted to provide that the investigating police officer (or officers) shall remain if counsel so requests. Also the use of the word "essential" makes this too restrictive -- it is not uncommon for one or both parties to have an expert (especially a psychiatrist) present not only so he may testify

on the evidence but to assist counsel in his examination of other witnesses (to lay groundwork for expert testimony) and/or to cross-examine the expert of the opposite party. We do not feel that counsel should be placed in a position of establishing essentiality especially before the trial has even started.

We would recommend that counsel need only establish the fact that the witness "may be helpful" in the conduct of the case. We are also of the opinion that the phrase "such as an expert witness" be deleted.

Section 5. (2)(d) in the opinion of the judge or other person presiding at the proceeding, can remain without prejudicing any of the parties.

:- Acceptable.

Section 5. (3) The judge may, whether or not he has excluded any witness under subsection (1), order the witnesses or counsel not to discuss the evidence that has been given in a proceeding with a witness who has not testified.

:- It is felt that this should not apply to counsel, the stated purpose of the Project (p. 21) is that the sub-section prevents circumvention of the rationale of section 5. If the sole purpose in counsel's speaking to a witness is, in effect, to tip him off so he can tailor his testimony that is one thing and can easily be dealt with by available means but such an absolute prohibition as is proposed causes more evil than it could possibly cure. Thus, for example, counsel would be unable to discuss with an uncalled witness unexpected, but truthful, testimony that has been given to see whether or not he is in agreement -- a problem which, in practice, arises quite frequently.

General

1. It is noted that no penalty is provided for disobeying either the exclusion order or the requirements of subsection (3).

2. Once a witness has testified should he remain in the courtroom or the courthouse? Under s. 628(2) of the Criminal Code, if subpoenaed, he must "remain in attendance" until excused by the presiding judge. If he remains in the courtroom (where an exclusionary order was made) can he be recalled?

Credibility

Section 62- Impeaching Credibility General

British Columbia Law Reform Commission

Section 100 - General Thesis

This Section, though subject to the following Sections 101-104 gives a more general ground of admissability of evidence to prove the credibility of a witness, whether yours or your opponent's. The field of evidence is "extrinsic evidence concerning any conduct by him and any other matter relevant ...". That seems to include opinion evidence of his truthfulness on a specific occasion. Opinion evidence is specifically provided in Section 102. I urge against the use of opinion evidence because it may be based upon specific instances of untruthfulness, each of which may be matched by counter-instances of truthfulness, leading to a multiplicity of evidence. General reputation is a broader base and better guide than opinion.

At present, opinion of credibility is excluded. See R. vs. Baugh (1916) 31 D.L.R. 66 (Ontario C.A.) where a prior Judge's Reasons for Judgement dealing with the accused's credibility in the prior case were held inadmissible as hearsay, and opinion based upon a single incident.

The proposed Code dealing with the swearing of witnesses may well exclude a religious oath upon the ground that it compels a witness to reveal whether or not he has a religious belief. If that philosophy prevails, then similarly no witness should be examined or cross-examined as to his religious beliefs to test his credibility.

Perhaps some restrictions may be necessary in Section 100 to exclude opinion evidence and evidence of religious belief in case a Court may deem them to be "relevant" to credibility.

Bowman

The entire concept of all of the proposed sections is bad. Without dealing in detail with each item, I can readily envisage a trial descending to a head-count of the friends of each party. If one is entitled to buttress or attack credibility in this fashion we will be searching the highways and byways for persons to state that Mr. Gibson is or is not a more honest witness than Mr. Werier. It seems to me that one of the things our system of justice does not need is trials prolonged by a week, or two, or three, by an endless array of witnesses' friends. The present situation is reasonably adequate.

A Justice of the Supreme Court of British Columbia

Sections 1 and 2 are referred to in the comment as "General Rules Respecting Credibility". They would eliminate the present rules excluding evidence of collateral matters and give the individual trial judge a discretion to exclude. This would throw out all the present rules and, in my opinion, lead to argument on each item of evidence that was offered and to argument that could not be settled readily since a great many matters could be gone into as affecting discretion. In most cases it would be necessary to hear the evidence first in order to decide the point. Since there would be no guide lines for the judges to follow, there would be inconsistency between the application of the rule in different courts. If the present "inflexible rule" is wrong, wherein is it wrong? I do not say it is right but let's not throw it out simply because someone says it is "inflexible". Too much flexibility means no law at all. In time, of course, perhaps fifty years, we would have enough decisions as to how the judge should exercise his discretion to have built up another body of law. I see no point in going back to the jungle unless we have to.

Davey

( ) Section 1. I consider that this proposal to

permit evidence to contradict a witness on a collateral matter going only to credibility is a mistake that will unduly protract trials.

Canadian Bar Association, Criminal Justice Sub-section Manitoba and British Columbia Branches.

3. Credibility

Sections 1 and 2 - General Rules Respecting Credibility

The British Columbia Sub-section is of the opinion that the present law with respect to collateral issues and facts places well-defined limits on the admissibility of evidence with respect to the issue of credibility. The Sub-section was of divided opinion as to whether or not it is in favour of the proposed changes which appear to give the trial judge a wide discretion with respect to allowing evidence as to the reputation of the witness or party for truth and honesty. Is there a present problem with respect to this issue?

The Manitoba Sub-section agreed with the proposals set forth in Sections 1 and 2.

Canadian Bar Association, Criminal Justice Sub-section, B.C.

Credibility

Section 1 This appears to do away with the present

rule concerning the introduction of collateral facts. Certainly the present situation imposes stringent limits: but if the matter is left too open there is a grave risk of lengthening trials unnecessarily which would be especially bad in trials by judge and jury. It would appear that under the proposed legislation a trial could go on almost forever through the pursuit of side issues. He was against the proposal.

Manitoba Law Reform Commission

3. Credibility

At our meeting Prof. Penner had the following to say about this paper:

This is another example, as I mentioned earlier, that distresses me about what purports to be the beginning of an evidence code: the introduction of such a wide discretion makes me wonder whether this is fish, fowl or flesh. It may be a cover-up for an imprecision in other parts. They say, well we've got a general statement here and a general statement there, but we're not too sure that we haven't left something out so just as a safety measure we're going to give the judge a virtually complete discretion -- because you're always faced with the problem (and I think properly so) that we do give discretion, but then it is exercised on sort of a non-judicial basis. It's not

appealable and I'm a little bit worried about this kind of discretion. It seems to me that if a very simple approach were taken to evidence concerning credibility -- that we want to be able, if there is cogent evidence logically probative of the issue, to attack the credibility of the witness on the key question of veracity, and on that question alone. I think such evidence ought to be heard without allowing it to go so far as to unduly prolong the proceedings. And that's always been the controlling feature of the evidence on the collateral issue of credibility. That's why it is said that you are fixed with the answer that you get when you ask a witness a question going to credibility. You can't now call extensive evidence. You ask a person about his or her eyesight and they tell you that they had their eyes tested by Dr. So and So; you're not going to call somebody to attack the expertise of Dr. So and So; you can't do that. You must draw a limit. But that could be codified.

The provision of section 1 here, that you can introduce extrinsic evidence concerning any matter relevant to his credibility, begs the question of what kind of matter is relevant to credibility. It seems far too sweeping. I would rather see it keyed into the specific question of veracity. Section 3 "evidence of the reputation of a witness for veracity and honesty", "among those who know him or would

know about him and opinion evidence respecting the veracity and honesty of the witness are admissible" and so on. What does honesty have to do with it unless they mean veracity? If they do, then veracity is sufficient. My client might be as dishonest as Hell but truthful. Really what we want to know is whether what he says is the truth.

Judges: Provincial Judges Association of the Province of British Columbia

Sections 1 and 2

Not only codifies the present right of the adverse party to cross-examine the other party's witness, and to introduce other evidence to attack his credibility, but also provides that the party calling the witness may call other evidence to support or bolster the credibility of his own witness. The section does not say whether this right to support the credibility of the witness is permitted as part of the party's case in chief or by way of rebuttal, or both. The law at present (see R. vs. Lalonde (1972) 5 C.C.C. 168 (Ont. High Ct.) is that if a party calls a witness, and the credibility of that witness is attacked on cross-examination, the doctrine of rehabilitation of a witness allows the party calling the witness, also to call other testimony (hearsay) as to statements made by that witness on an earlier occasion to show consistency with

the testimony given at trial. In that case, evidence of what the witness had said to her mother and a police officer immediately after she saw the incident related by her, in chief, was held admissible, under the doctrine of rehabilitation, and as an exception to the hearsay rule. But according to R. vs. St. Lawrence (1949) 93 C.C.C. 374, such evidence is not admissible on direct examination, or on re-examination to confirm his own testimony, but only where the witness is attacked as having fabricated his story, may he be rehabilitated by other evidence, and even by statements he made to other persons.

Therefore, simply to say, as in Section 1 that a party can call evidence to inter alia, support the credibility of his own witness, ("oath helpers") is not precise enough, unless the Law Reform Commission so intends. Perhaps the right given to the Judge in Section 2 to exclude such evidence in his discretion is sufficient to meet the situation, but again, I suggest that if the law dealing with credibility is to be codified, why not deal with each situation in detail so as to avoid misunderstanding? (Section 5 of the Draft Code also deals with this).

Macdonald

Some comments on the Study Paper of the Evidence Project of the Law Reform Commission relating to Credibility

Section 1 - Impeaching Witnesses

This Section applies to attacking or supporting the credibility of one's own witness as well as that of an opposing witness. The significant feature of the Section is that it would permit a party to impeach his own witness without first having him declared "adverse". This Section should be read together with the proposed Section 2(2) of the Draft Legislation concerned with the manner of questioning witnesses, which broadens the present interpretation of "adverse" witnesses.

It may also be noted that Section 1 would permit a party to introduce evidence as to the veracity and truthfulness of his own witness, even though the opposite party has not as yet called any evidence attacking his veracity and truthfulness. This would be a change in the present law. It does not appear to be discussed in the Project's notes. It would open the door to this form of evidence being used in many cases where it has not previously been used; presumably the Project considers that the trial judge's discretion contained in Section 2 would

be used to discourage its indiscriminate use. But would one not always have to try to have a witness available who would be able to say what a fine truthful lad one's principal witness is?

A Justice of the Supreme Court of British Columbia

Impeaching one's own Witness

I see no objection to amending the evidence act to permit someone to impeach his own witness by general evidence of bad character. I do not favour permitting a person to introduce a previous statement by his own witness, other than exceptionally. The authors of the report apparently believe that this would only be used when the witness gives evidence which is not expected by the party calling him. That may not be so. The rule proposed would permit a party to call a witness who he knows is going to give evidence against him, ir order to get in a previous inconsistent statement made by that witness. As a result of the proposed section 5, we are not dealing here solely with credibility. No one who has practised in the courts for any length of time can be unaware of the value of cross-examination in testing the truth of evidence. If a plaintiff calls a witness and through him puts in a prior inconsistent statement which is favourable to the plaintiff, how can

defendant's counsel cross-examine on that statement? If such a change is made in the law it should be strictly limited to cases where the party calling the witness is clearly taken by surprise in the sense that he had reason to expect that different evidence would be given by the witness.

I have doubt about impeaching any witness, on a collateral matter, let alone one's own. Are you not at risk, especially in a trial with a jury, of having the real issues so confused that the trial becomes unmanageable? And if you are to leave it, again, to "the judge's discretion", then on what recognizable basis does he exercise the discretion and where does he stop if he starts?

Judges: Committee of County and District Judges Association of Ontario

The Committee submits generally that a party should not be permitted to impeach the credibility of a witness whom he calls in support of his case. This would be in opposition to established principles.

Criminal Procedure Project

1. The first main feature of this paper is the

proposal to admit all evidence relevant to the credibility of a witness (where permissible) and to base exclusion not on the collateral evidence rule, but on the exercise of discretion of the trial judge. In effect the "Collateral Facts" rule or "Collateral Evidence" rule is eliminated and in my view that is the right approach to take. (See Section 1 and Section 2 of the Proposed Legislation and pages 1-2 of the Study).

2. The second feature of the paper, which again I think is the right one to propose, is the proposal that evidence as to a witnesses credibility be received irrespective of whether the witness was called by an opposite party or by the party seeking to adduce the evidence of credibility. (See Section 1 of the Proposed Legislation and pages 2-4 of the Study). The only limitation on attacking the credibility of one's own witness would be the power of the trial judge to interfere in the cross-examination process, as in Section 1(1)(d) and Section 2(2)(c) and (d) of the Proposed Legislation for Questioning Witnesses. Of course if evidence of credibility were led, not by cross-examination of the subject witness but through another witness, Sections 1 and 2 of the Credibility legislation would apply and the trial judge would have the discretion to limit or restrict it.

The effect of this proposal is to remove Section 9 of the Canada Evidence Act and all the confusion that it has attracted. Furthermore it recognizes that there is no property in a witness, that in many cases there is no sound reason for making a "unity" of a party and of a witness called by him, and that even where some closeness may exist it can readily be exposed on cross-examination. Thus there is no valid reason for assuming, as a matter of law, that there is such a special relationship between a party and a witness called by him so as to limit that party in calling relevant evidence respecting the credibility of that witness.

Bowker

Impeaching ones own witness

I am probably one of those who have thought that it would be "unseemly" to permit a party to impeach his own witness. However I appreciate the reasons for changing the rules.

Sheenan

It is a well known fact that the existing rules are that one cannot impeach ones own witness. Therefore, I am in complete agreement to the proposed theory that one may be allowed to impeach ones own witness on credibility.

As far as the police officer is concerned this should not happen very often, and in the past when the Defence has tried to impeach through cross-examination a police officer as a witness, it usually has a reverse effect. However, the police officer, through the Prosecution normally has to call a number of other witnesses and from experience in the past their stories have varied from the first instance and for the reasons outlined in the first paragraph, I would therefore agree, generally, to the whole section relating to credibility.

Canadian Bar Association, Criminal Justice Subsection, Manitoba and British Columbia Branches

Section 5 - Prior Statements

The British Columbia Sub-section does not agree with the provisions of the proposal set forth in Section 5. It feels that the present law is satisfactory particularly in view of a recent decision of the Court of Appeal of British Columbia in Regina v. Wannebo, which confirmed the admissibility of a previous consistent statement when sworn testimony was attacked as recent invention.

The Manitoba Sub-section also disagrees with the proposal in Section 5(1), but on the grounds that the provision would be difficult to apply in practice.

The Manitoba Sub-section agrees with the proposals set forth in Section 5(2) and Section 5(3).

Stevenson

I have some difficulty with section 5, proposed. It appears to be designed to admit all manner of self-serving evidence. Should a witness be allowed to produce 22 memoranda which he made contemporaneous with the event, supporting the story which he has just now given? Does it have any value and, if so, doesn't the danger far outweigh the benefit?

Davey

(d) Section 5. In my opinion the right to lead evidence of prior consistent statements should be limited to re-examination when they become pertinent because of cross-examination on the witness' veracity.

A Justice of The Supreme Court of British Columbia

Section 5, Prior Statements

The comment on this section contains the following statement "The proposed legislation contains no bar to the reception of previous consistent statements except for the overriding discretion of the trial judge to exclude evidence in a particular case which would be needlessly cumulative

and wasteful of time". I presume that reference is here made to sections 1 and 2. I think there could be argument as to whether sections 1 and 2 clearly make it possible for a person to introduce a prior consistent statement made by a witness he has called. We would first have to see the proposed sections on hearsay before deciding that. I have already pointed out that throwing out the present rules and leaving the judge to make a decision under section 2 would result in a great deal more work for the courts and the trial judges, and this is an instance. When I read the comment on this section on page 10, I can only conclude that the authors of the report have no understanding whatsoever of the amount of work the courts have to get through.

The comment says that sections 1 and 2 "continue the present law with respect to the technique of proof of previous statements relevant to credibility". If that is so, why change the language in which that law is presently expressed and thereby start a whole new round of arguments as to what that language means? I do not agree with the removal of the words "relative to the subject matter of the case". When it uses those words, the present statute is referring to proving the prior inconsistent statement and is applying the collateral facts rule to the proof of such statements, i.e., if you cross-examine a witness as

to a prior statement and he denies it and you want to prove it, you may only do so if it is relevant. I think it is a sensible rule and should be maintained. Simply saying "This seems an unduly narrow requirement" does not justify its removal. Why leave it to the trial judge's discretion to exclude. Surely it is better to have some law on the subject which applies on all occasions.

Section 63 Character for Truthfulness

Bowman

At page 6 of the comments, reference is made to prohibiting any evidence of prior instances of conduct including evidence brought out in cross-examination. It is suggested that "this type of questioning was of such little value and could be so unfair that it would deter witnesses from coming forward ---". I must challenge the suggestion of "little value". Perhaps the most striking instance I can think of is one in which an inmate of Stoney Mountain was charged with attempted murder, the victim being another inmate. Without instances of conduct and record the jury would have been left simply on the footing that each was an inmate and there was little to choose between them. Cross-examination on the record of the complaint developed bit by bit his record for violence, commencing with ordinary assaults, graduating to knives, then to pistols and finally, to the use of a sub-machine gun in the armed robbery for which he was serving a life-sentence when his capital sentence for murder was commuted. This made his pious claim that he was unarmed and totally innocent seem much less credible to the jury who acquitted on the charge of attempted murder.

British Columbia Law Reform Commission

Section 102(2) -- Use of Specific Conduct of a Witness

This Subsection is difficult and obscure. In the "character evidence" Paper, the national proposal is to exclude evidence of a relevant trait of character in cases involving sex offences. This Subsection seems to let it in under the guise of credibility. As worded, this Subsection means that providing you lead evidence of previous acts of unchastity by the complainant as extrinsic evidence of her lack of credibility and not to prove a propensity from which to infer consent, the evidence is receivable. For instance, I cross-examined a rape complainant as to ten previous affairs with ten different men. I may ask the questions under R. vs. La Liberte (1878) 1 S.C.R. 117. The witness may be instructed by the trial judge that she need not answer, or he may leave her uninstructed or he may compel her to answer. Her denials cannot be challenged because they are collateral matters. This Subsection, taken with Section 100, now means that I may call the ten different men to prove her a liar and argue to the Jury that her evidence of non-consent cannot be believed.

I agree it is most cogent evidence of untruthfulness to catch a witness in a lie while on oath in front of the Court.

However, this provision does away with the Collateral Facts Rule. The consequences, especially the multiplication of time and issues involved in a trial should be carefully considered. Section 101, giving discretion to exclude, would not, in my opinion, justify a judge in refusing me leave to prove the complainant ten times a liar to the jury.

If the above result is not desired, then contradiction of a witness' evidence of specific occasions should not be permitted as not relevant to the main issue.

Sheenan

I am in full agreement to Subsection 2 of Section 3 with respect to specific instances of a witness' past conduct being inadmissible to either attack or support his credibility. It would seem that if this was allowed that not only would it lengthen the trial and confuse the issue, but be extremely unfair and prejudicial to a witness, and as you know, it is very difficult and sometimes impossible to get persons to volunteer as witnesses if they know they are going to be subjected to particular specific instances, and most people have some sort of "skeleton in their closet". It

would be next to impossible to obtain volunteer witnesses. Therefore, I recommend the absolute rule of exclusion.

Criminal Procedure Project

The third feature of the paper concerns the nature of the evidence respecting credibility of witnesses that should be received. Here, like the proposal for character evidence of parties, the Evidence Project suggest that such evidence be limited to reputation and opinion evidence, but of course here the focus is on veracity and honesty whereas the focus of character evidence is on disposition. In particular the Evidence Project argues that specific instances of a witness' conduct relevant to the issue of credibility should not be received except where the witness has been previously convicted of an offence involving veracity or dishonesty -- provided further that the witness is not also the accused in the subject trial.

There are two aspects of this proposal that warrant some comment.

(a) First, the proposal to limit the kind of evidence on the credibility of witnesses to reputation or opinion evidence is really no change at all from the existing law. In fact that is

acknowledged at page 5 of the paper. But even so, one might wonder if it is justified to exclude -- as a general rule -- all particular instances upon which the opinion or reputation has been formed. (This is essentially the same comment that was argued in the paper on character evidence). Evidence of a witness' reputation or an opinion of a witness' veracity or honesty will generally be based upon particular instances or particular events and so as a logical process the latter ought to be received. In fact to put the focus on particular instances as a <u>necessary basis</u> for any reputation or opinion evidence on credibility could well have the effect of minimizing that kind of evidence. As well, it is doubtful if the exception for particular instances which the Evidence Project would permit i.e., previous convictions of relevant offences, is justifiable. If, as a matter of logic, particular instances should be excluded because "of the dangers of unfair surprise, undue consumption of time, and confusion of issues outweigh (ing)... probative value ..." then the case for admissibility is not improved

because the particular instances are crimes. (Again the same comment was made in connection with the Evidence paper on Character Evidence). If such particular instances may be received, albeit where involving matters of honesty and veracity, then there is no sound reason to exclude all particular instances that may be relevant to the credibility issue. In my view the more reasonable approach would be to only receive an opinion (reputation evidence is simply an opinion) as to a witness' credibility where it is supported by some detailed basis, i.e., a specific past relationship or past conduct etc. but that the whole of it should be subject to the discretion of the trial judge. And in exercising that discretion the fact that the credibility evidence is based upon a previous conviction would be more a reason for excluding the evidence than for receiving it.

(b) The second comment follows the thought just expressed in regard to the Evidence proposal to not permit cross-examination of a witness on the issue of his credibility by the use of previous convictions where that witness is the accused.

> This proviso (Section 4 2) is an acknowledgement of the testimonial prejudice created by evidence of previous convictions, and although I think their proposal is the right one, I would have gone the further distance for all witnesses as expressed in my earlier comment in paragraph 4(a).

The fourth feature of the Evidence paper on Credibility concerns the examination of witnesses on prior statements.

First, the Evidence Project proposes to permit a Court to receive a <u>previous consistent statement</u> in the exercise of its discretion. I think this is sound it would replace the existing rule of inadmissibility which is subject to a variety of exceptions. The concern to protect against manufactured evidence can be well accommodated in the exercise of discretion.

Second, the proposal continues the present techniques of proof of previous inconsistent statements. I think they are right to leave those practice rules unchanged.

Third, the proposal makes a major contribution in Section 5(3) by permitting previous statements to be used not only on the issue of credibility (which is the existing law) but for the truth of the matter stated. In effect the hearsay rule is set aside in this instance, and the image of the law improved by removing the necessity of instructing juries about the difference between previous statements being receivable on the credibility of the witness and not for the truth of the matter stated therein.

A Justice of the Supreme Court of British Columbia

Section 3 Character of a Witness

The statement in the comment that "by the present law independent evidence of the witness' reputation for untruthfulness and a witness' individual opinion with respect to the same may be received as relevant to credibility", I think, goes too far. The admissibility of individual opinions as to another witness' "honesty" is very limited. I am afraid the use of the word "honesty" in the proposed section would open the door to innumerable side issues.

Section 64 Previous Convictions

Procureurs de la Couronne du Québec - Rencontre du 15 septembre 1973

Entier désaccord. Pourquoi enlever la preuve d'une condamnation antérieure pour attaquer la crédibilité. On pourra en faire mention s'il témoigne et s'il allègue sa crédibilité. S'il a un casier judiciaire, il ne mettra pas en cause sa crédibilité.

Danger de mettre en preuve le casier judiciaire, en faisant faire le saut final au jury qui a un doute.

Canadian Bar Association, Study Group, Edmonton

With respect to cross-examining the accused and witnesses other than the accused as to previous convictions we sould like to re-state our position that generally speaking such a cross-examination has nothing to do with credibility unless the convictions relate to perjury or mendacity and that such cross-examination should not be allowed unless the witness (or the accused) has put his credibility in issue either: (1) by attacking the credibility of the opposite party's witnesses, or (2) by giving evidence as to his lack of previous convictions. Gordon Wright dissents on this paragraph alone.

McLellan

Credibility

(i) Section 4(1)(c) refers to proof of the record of a previous conviction. The comment on page 7 refers to crimes for which a pardon has been granted. In view of the subsequent enactment of s. 662.1 of the code providing for absolute and conditional discharges, may I suggest that the comment for any further editions of the paper include a reference to the absolute and conditional discharge provisions.
(ii) Section 5(2) - the commas in lines two and three ought to be deleted.

A Justice of the Supreme Court of British Columbia

Section 4 - Prior Convictions

I agree that the present law under which an accused person may be cross-examined as to previous convictions and have them proved against him if he denies them, whether those convictions do in fact go to credibility or not, is wrong and should be changed. I think that only previous convictions which do go to credibility should be admissible in respect of an accused person. Again, in the case of an accused person, I think he should only be cross-examined as to previous convictions that do go to credibility. In the case of a witness other than an accused person, I see no reason why he should not be cross-examined as to previous convictions generally (and other specific instances of

misconduct) but proof of such previous convictions should be limited to those which do, in fact, go to credibility.

The proposed section uses the term "sole discretion". I do not know what is added by the word "sole". I think the phrase "too remote" in paragraph (b) of subsection (1) is too vague. Why not fix the time? I see no reason why the cross-examining counsel should have the record of the previous conviction before he cross-examines. After all, he doesn't know precisely what witnesses are going to be called. I see no reason why the fact of a pardon should exclude the proof of a conviction. If we are interested in credibility, pardon surely doesn't enter into the picture, unless, of course, the pardon indicates some fact that affects credibility.

A Justice of the Supreme Court of British Columbia

Do away with the present method of permitting the Crown to cross-examine an accused person in respect of his record, subject to the qualification that the trial judge be permitted to comment on the failure of the accused to give evidence at his trial.

Davey

Section 4

I think evidence of previous convictions of any witnesses, including the accused in a criminal trial, on a

question of credibility, should be admissible, and a witness should be open to cross-examination thereon. It is most important to know what kind of person the witness is. I think the danger is exaggerated of a jury using a criminal record of a prisoner to determine whether he was likely to have committed the crime because of his bad character.

On the other hand I would allow the accused to lead evidence of general good character, as is frequently done without objection from the Crown. I have frequently taken such evidence into account in determining whether it is safe to uphold a conviction on a weak case. I think a person is entitled to have his general good reputation brought into account in such circumstances. I realize that this comment introduces an element foreigh to section 4, and is more closely linked to section 3(1)(a) under heading "Character".

Schultz

Section 4(2)

The editorial comment includes the following:

> "It is impossible for the jury to apply the trial judge's instructions and relate the accused's previous convictions elicited in cross-examination only to the credibility of his evidence and not to the probability of his guilt."

> "If we are truly interested in fully investigating the particular incident out of which the defendant has been charged, and in determining culpability on the basis of the facts therein rather than on the basis of defendant's previously exhibited disposition, the existing inquiry into past convictions, under the guise of determining credibility, must be forbidden. The presumption of innocence demands no less."

(The underlining in the above two extracts is mine.)

The assertion that it is "impossible" for a jury to apply the instructions of a trial Judge on the evidentiary value of a previous conviction of convictions to the issue only of credibility is, merely, opinion. I question the accuracy of the assertion and the basis upon which this bald generalization is made.

"The presumption of innocence" is a principle of the criminal law which means that, at trial, an accused is presumed to be innocent of the crime alleged against him, until proven guilty. It is mere rhetoric to advocate the principle of the presumption of innocence to support the argument for the inadmissiblility of evidence of a prior conviction or convictions.

When a witness testifies on oath in the witness box, it is helpful to a Judge or jury on the issue of the credibility of the witness and the weight to be attached to the evidence of this witness to know if the witness has been convicted, previously, of crime and, if so, what crime or crimes the witness has committed.

For example, in a criminal trial recently concluded where the accused was charged with trafficking in heroin, the accused testified in defence. Is truth ascertained better if justice is blind and cross-examination could not reveal that this accused had been convicted 25 times previously of fraud, forgery, false pretences, and other crimes of dishonesty?

Schultz

In Study Paper # 3, entitled "Credibility", on page 8 relating to previous convictions of an accused, reference is made to section 12 of the "Canada Evidence Act".

Any proposed legislation affecting section 12 of the "Canada Evidence Act" should be considered in conjunction with section 4 (5) of this Act.

In England, there are statutory provisions restricting the admissibility of evidence of a previous conviction of an

accused, but the trial Judge is not prohibited from commenting on the failure of the accused to testify at trial.

It is suggested that section 4(5) of the "Canada Evidence Act" be amended by deleting the words "the judge, or" from this subsection.

A Justice of the Supreme Court of British Columbia

I have dealt indirectly with subsection (2) above. I feel I should add that I can see no reason for giving the accused the right to decide whether or not his credibility will be attacked or supported. By going into the witness stand, he puts his credibility in issue. Why have a rule which would permit an accused person to start an inquiry into his credibility if he thinks the results will be favourable and yet enable him to prevent that enquiry from taking place if he thinks or knows the results will be unfavourable? Suppose he has attacked the credibility of some of the Crown's witnesses but has carefully avoided supporting his own.

Ontario Crown Attorney's Association

With regard to subsection 2 it was felt that as drafted it was difficult to interpret. Is it meant to

apply to a case where the defence has called a witness whose sole evidence related to credit of the accused or does it refer to the introduction of certain evidence in cross-examination of a Crown witness or from a defence witness which evidence (although the witness testifies to other matters) can only go to credit, or both? What if after the accused testifies, credit witnesses are then called - how are his convictions to be established? In any event the committee disagreed with the proposal.

While it was agreed that counsel should be in a position to prove a prior conviction, if denied, it was felt that paragraph (c) of subsection (1) should be redrafted to reflect this - as presently worded it requires the questioner to have a copy of the record plus identification evidence in all cases - this, we submit, is entirely impractical and unrealistic, especially when one realizes that generally convictions are admitted.

Also, whether it be a witness or the accused, we feel that it should be clarified that examination on prior convictions excludes pardons.

New Brunswick Law Reform Division

There was a difference of opinion in our meeting whether the present right to question an accused about his

previous convictions should be taken away. While it may be damaging to an accused to answer the question in the affirmative, the feeling was that it may also establish his credibility. And even if this is not true, in many instances the record of an accused is the only basis for establishing his credibility. This would be especially true where the accused was a transient. On the other hand, there was some support for the recommendation and I simply draw to your attention the fact that it was not met with universal acclaim.

Maywood

On page 7 of study paper #3 a more liberal philosophy is embraced by the study group. The study group feels that too great a distinction is made between defendants with and without a criminal record and any mention of a criminal record to a jury can not be divorced from the minds of the jurors.

While I can not quarrel with their reasoning I do feel that we must take the problem one step further by asking ourselves "Whom should the law protect?" The obvious answer, that all who stand before a court of law are entitled to equal protection must stand. But in light of modern problems of organized crime and persons with lengthy criminal records living a continued life of crime, I simply feel that we are over-protecting this group.

The rule as it stands is more than adequate to protect the first and second offender who comes before the court. I do not feel that professional criminals need any more protection than they presently have.

Winnipeg Police Department

Credibility

Basically the proposed sections under credibility are excellent. However, sub-section 2 of section 4, not allowing cross-examination of a criminal defendant in regard to previous convictions, unless he has brought forth evidence purporting good character for the sole purpose of credibility, may be a dangerous precedent. Police, generally are of the opinion that a defendant charged with a criminal offence infers good character in taking the stand, and surely the average member of a jury would assume the same. If a defendant is not prepared to admit his record for the purpose of credibility on his own behalf, then surely the jury has the right to have such knowledge. Further to this, evidence in the case of previous possession or similar act charges, must be of importance to the triers, as the defendant then ought to have had the knowledge that a reasonable explanation could have been given at the time of his arrest and this must attack his credibility.

British Columbia Law Reform Commission

Section 103(1) - Evidence of Previous Convictions

The philosophy behind this, that only certain convictions bear on credibility, is excellent. However, I suggest we rethink some aspects of the Section.

First, if Section 102(2) is retained, then its reference, "subject to Section 103(2)", brings two negative Sections into juxtaposition. The result between the two Sections is as follows:

> "Subject to Section 103, evidence...is inadmissible... (Section 103(1) Evidence ...is inadmissible...unless..."

It would be more happily worded if 103(1) read:

> "Evidence...is admissible...if the judge decides..."

Secondly, there may be question as to what is and is not a crime. Is an offence under a Provincial Securities Act a crime? (B.N.A. see 91). I suggest the word should be replaced by:

> "an offence whether under Federal or Provincial law..."

Some Provincial offences are cogent evidence of deceitfulness, i.e. making a false statement in a prospectus required to be filed under a Securities Act.

Thirdly, with respect to 103(1)(a), it is difficult to know what offence (crime) does not involve dishonesty since that word bears several meanings including "shame" (I would be ashamed of punching an old lady in a drunken fit) through "unchastity" (not necessarily inconsistent with truthfulness) to "disposition to deceive, defraud or steal".

If we include theft because it is "dishonest", there may be thefts where the essential elements were not dishonest because a man is driven to steal to provide for his children. We must avoid any suggestion that the trial judge must examine the circumstances of a conviction and be involved in rejudging the former case. The only solution is an arbitrary one to categorize the types of offences, as for instance "an essential element of the offence (crime) is deceit, fraud or theft".

Fourthly, in 103(1)(c), why should I not be entitled to cross-examine the witness as to the existence of prior convictions without first satisfying the judge that I can prove them? I may not know of a conviction, but if the witness will admit one which fairly shakes his credibility, I should be entitled to rely upon that chance. Perhaps where a jury is present, the initial question should be put in their absence and then the judge should satisfy himself

as to (a) and (b). If the offence is admitted, why should I be prepared to prove it extrinsically? If the offence is denied, then I must leave it or prove it extrinsically.

British Columbia Law Reform Commission

Section 103(2) - Putting Prior Convictions to an Accused

The philosophy behind this Subsection is to avoid a jury using the fact of a prior conviction for the wrong purpose, that is, not as to the accused's credibility, but as to whether he deserves to be convicted anyway. Two contrary points of view present themselves as follows:

1. The present law lends itself to the wrong use of prior convictions and deters some accused persons from testifying;
2. An accused, like any other witness, is assumed to be trustworthy unless the contrary is proved, and by refraining from giving evidence directly in support of his credibility, and thus avoiding the putting of convictions to him, he manages to mislead the jury as to his character when he may have ten convictions of theft, perjury and false pretences.

Based on my own experience, I arbitrarily opt for the proposed change having heard jurors often say "had we known he had previous convictions, we would have found him guilty".

Manitoba Law Reform Commission

The paramount and most sorely needed reform recommended in the Study Papers appears to us to be that expressed in section 4(2) of the Credibility paper. How often - how almost invariably - accused persons (who ought either to be exposed before the Court to be guilty as charged, or ought to be able to demonstrate that they are not guilty this time, for once) sit silently throughout their trials not daring to testify lest they be crucified by a criminal record. And the fear exists not only for jury trials, but all manner of criminal proceedings. This suggested reform cannot be too highly lauded.

Criminal Procedure Project

What is a Conviction?

In connection with proof of character of a person by evidence of previous convictions, members of the Project felt some attention might be given to these questions:

(a) What is a previous conviction? Does it include only Code offences or does it include, where relevant, other Federal offences? Also what about relevant provincial offences? Finally how would absolute and conditional discharges under the new Code provision be accommodated in the proposal?

(b) Should the accused or the Crown be given the opportunity to bring out or explain any particular conviction for theft where an accused has pleaded guilty but yet where the offence arose as a result of a marital property dispute, should not the accused be permitted to bring out those facts? Or, on the other hand, suppose a previous conviction is being offered by the Crown, where permitted, and the circumstances of it were identical to the offence charged, should the Crown be entitled to ask questions to bring out those circumstances?

Macdonald

Section 4 - Previous Convictions Related to Credibility

The Study Project proposes that a trial judge shall have a discretion as to whether or not to permit evidence that a witness has previously been convicted of an offence, for the purpose of attacking his credibility. The Study Project sets out three situations in which the discretion might be exercised so as to permit such evidence to be given. These situations are described as "guidelines" for the exercise of the discretion. The situations refer to the type of crime, remoteness in time, and the ease of proof of the previous conviction. I wonder whether the wording of the proposed legislation sufficiently indicates

that, even if one or more of these guidelines is satisfied on the facts of the case, the trial judge still has a discretion? Or perhaps it is not intended by the Study Project that the trial judge should retain a discretion to exclude the evidence, if one or more of these guidelines is satisfied. It seems to me that the disadvantage of leaving this matter to the discretion of the trial judge is that a witness does not know in advance whether or not he will be attacked on his record. Perhaps this is not a real disadvantage, since we are talking here about witnesses other than the accused, and such witnesses are compellable and really have no choice as to whether or not they will testify.

Sub. (2) constitutes an abandonment of Canada's equation of the accused-witness with the "ordinary witness". The Study Project proposes that the accused-witness ought not to be subject to cross-examination on the basis of his having previously been convicted, "unless he has first introduced evidence for the sole purpose of supporting his credibility". It is to be noted that, while the Project's proposal does constitute a move toward the position which has existed in England since the Criminal Evidence Act 1898, the Project still does not accept the English position, which is that, where the accused has made imputations against prosecution witnesses, his character may be attacked, including by the method of

introducing evidence of his previous convictions, in order to attack his credibility. The Criminal Law Revision Committee of England, in its 1971 Report, and specifically in Clause 6(4) of the English Draft Bill, suggests that the accused may be asked a question as to his previous offences, or as to his bad disposition or reputation, if he has caused a prosecution witness to be asked a question as to whether that witness has been charged with or convicted or acquitted of any offence, in order to cast doubt on the credibility of the witness.

As a matter of drafting, I am concerned as to whether Sub. (1) applies to the accused as witness. In other words, if the accused introduces evidence for the sole purpose of supporting his credibility, so that the Crown may lead evidence of his previous convictions, does the draftsmanship clearly indicate that the three "guidelines" set out in Sub. (1) are to apply before the evidence of a particular previous conviction is held admissible?

If Sub. (1) does apply to the accused as witness once he has introduced evidence supporting his credibility, then one of the "guidelines" which the judge will apply is whether or not the previous conviction "involved a false statement or an element of dishonesty." There are some who

have criticised Section 12 of the Canada Evidence Act, whether as applied to an accused-witness, or to any witness, on the ground that to expose the witness to cross-examination on his record for offences not involving mendacity is to permit evidence to be heard by the jury which does not logically negative the credibility of the witness. The proposed Section 4(1)(a) does not introduce a rule that only offences involving mendacity or dishonesty may be the subject of cross-examination, but does require the judge to consider that question in the exercise of his discretion. Why not simply formulate a hard rule limiting the kind of offences referred to, to those involving mendacity or dishonesty? Presumably because the Project feels that, in the words of the Commission Chairman, Mr. Justice E.P. Hartt,

"The primary reason for giving discretion in any situation is the recognition that a uniform rule cannot be formulated to cover all the variables; the prospect of lack of uniformity in result is therefore no objection to discretion once the need for discretion has been demonstrated."

("Studies in Canadian Criminal Evidence", by Salhany and Carter (eds.) (1972), ch. 8, p. 289)

Canadian Bar Association, Criminal Justice Subsection, Manitoba and British Columbia Branches

Section 4 - Prior Convictions

The British Columbia Sub-section was divided on this issue. Some favoured retention of the present practice; others presented the view that if there is to be any restriction on the kind of offence of which proof of previous convictions may be made as contemplated in 4(a), then those offences of which proof of prior conviction may be made should be clearly defined e.g. theft, robbery, etc. They suggest that Section 4(1)(a) appears to incorporate the law in force in England on this issue and again the Sub-section had divided views on this matter. The provision clearly appears to favour an accused in a criminal proceeding with no correlative rights for the Crown.

On the other hand, the Manitoba Sub-section disagrees with the proposal set forth in Section 4(1) on the grounds that the proposal would tend to favour the Crown since the defence has no means of obtaining the record, if any, of a Crown witness.

The Manitoba Sub-section also disagrees with the proposal set forth in Section 4(2). It suggests as an

alternative proposal that:

"If an accused or his witness gives positive evidence as to his credibility and if the accused takes the stand, only then may he be cross-examined, provided that the cross-examination may deal only with:

(a) a previous offence which involved false statement or an element of dishonesty;

(b) a previous conviction which is not too remote in time from the proceedings and proved by a record."

Bowman

The proposal to limit the use of cross-examination on prior convictions would take away a perfectly useful and helpful tool. Surely any tribunal of fact is entitled to know that the witness before it has a long history of criminality. I have never found any judge or jury to be overly biased against a witness because of the occasional conviction for a driving offence or some trivial petty theft committed some ten or twenty years before. A witness is in a vastly different position from an accused person in this regard.

With respect to a witness, he or she is not on trial

and cannot be harmed in the conclusion by the jury's misuse of a record. An accused person can be seriously damaged. Cross-examination of an accused on his record should not be permitted save in limited circumstances but cross-examination of a witness should.

Section 65 and 66: Examination Re Prior Statement

Opportunity to Explain Prior Extrinsic Evidence or Prior Statement. (For comments see section 62 and section 28).

Section 67: Opinions and Inferences

Williams and Brett

We believe that the draft of the proposed section upon this matter may lead to considerable difficulties in practice and also makes some undesirable changes in hitherto accepted principle. We do not offer any alternative draft ourselves but merely record our views for the consideration of the Commission.

As appears from the commentary which accompanies them, the draft sections are based upon a view (set out at pages 28 and 29) that there is no distinction which can properly be drawn between a statement of opinion and a statement of fact. Indeed, it is specifically stated that all statements that describe things, conditions or events are statements of opinion. This plainly does not accord with the usage of ordinary speech or the common understanding of ordinary people. It is in truth a statement of a particular philosophy of perception. That philosophy distinguishes between the

sensory stimuli received, say, by the retina of the eye, and the operations performed by the brain once those stimuli are transmitted to it. There are other schools of philosophical thought, however, which do not make this sharp distinction, and at present science cannot offer any basis for determining which is the correct view.

It is surely undesirable for the law to adopt a particular philosophy on a matter of this kind, especially as there is no need for it to do so. Moreover, there is one very good reason why it should not adopt this particular philosophy. That reason is that no human being is capable of consciously disentangling his mental processes from any physical sensory stimuli which may have evoked them, and any attempt to force him to do so will simply confuse him and be quite unsuccessful. So far as he (the observer) is concerned, the result of the mental process is for him a "fact". To say this in no way disregards the further point that he may be able consciously to separate "facts" of the kind just described and the inferences which he has drawn from them, and thereby to distinguish between those facts and the opinion or conclusion they support. It is this second process with which the rules relating to opinion evidence are concerned.

Furthermore, we are unable to agree with the view of the

present law which is implied by what is said on page 28 of the commentary. To take the illustration given at the bottom of that page, we agree that a witness who says he saw a car approaching may be asked to describe in detail the object which he claims to have seen. He may, we agree, be asked to describe whether it had four wheels, a roof, a windshield and so on. We further agree that his statement "I saw a car" can properly be described, in light of the further description just mentioned, as an opinion. But we strongly disagree with the statement which immediately follows that point, namely, "Under the present rule a valid objection could be made forcing him to recite in even more detail the makeup of the objects he concluded were wheels". In truth, he cannot be forced to describe the objects in that degree of detail. He can simply say "I know it was a wheel because I know what a wheel looks like" and he need not say anything more than that. Our understanding of the Canadian practice is that he is not forced to make the attempt, but we note that in some jurisdictions in the United States he may be required to try to do so. In those jurisdictions the particular philosophy which we have mentioned has been adopted (perhaps without realization that it is in truth a philosophy), and the results have been most undesirable. What happens if the attempt is

made, is that either the witness' statement "I saw a wheel" is held to be inadmissible on the ground that it is a conclusion, even though it is not possible for a witness to put the jury into a position whereby they could form their own conclusion on the matter; or else the witness is unduly badgered in cross-examination and made to look foolish.

For this reason, we believe that section 1, and all that follows from the basic proposition contained therein, should be couched, not in terms of what a witness has "perceived with his own senses", but in terms of "matters which are within the personal knowledge or belief of the witness". This would accord with ordinary understanding and usage, and with the present practice of the Canadian courts. On the other hand, we believe that the drafting proposed by the Project is likely to encourage the Canadian courts to adopt a different view and one which ought not to be adopted.

It follows from what we have just suggested that section 2 of the proposed draft should similarly be couched in terms which refer to "matters within the personal knowledge or belief of the witness" and which are helpful to a clearer understanding of his testimony or to the determination of a matter in issue. We do not think that the further requirement

should be made, as it is made in the present draft, that the opinion should be "rationally" based on such matters of personal knowledge or belief. The question of rationality, should it arise, is one for the jury to determine as a matter of the weight which they will give to the witness' testimony. To make it a condition precedent to the stating of the opinion, as the present draft does, is simply an encouragement for the judge to rule on matters which belong to the province of the jury.

Schiff

The assertion in the sentence spanning pages 3 and 4 that the existing law excludes (not "includes" as the text mistakenly reads) the witness' testimony setting out his inferences or conclusions from perceived data unless "it is absolutely necessary to the witness' narration" either states confusedly or ignores some of the reasons for permitting testimony in the form of inferences and conclusions. Some of these reasons are associated with the interests of witnesses themselves: (a) the inability of a particular witness practicably to communicate the perceived data to the trier of fact through words or gestures as fully and exactly as the witness perceived them when he drew his own inference and formed his own conclusions; (b) the inability of

the witness (and many witnesses share this inability) practicably to analyze or articulate his own psychological processes to permit him to testify concerning small units of his own perception; and (c) the danger of confusing the witness and lessening the coherence of his testimony if he is not permitted to tell his own story in language familiar to him. Other reasons are associated with the interests of the trier of fact: (a) to maximize the trier's ability to comprehend the import of the witness' testimony by maximizing the coherence of the testimony; and (b) to assist the trier to reach conclusions about issues in situations where, because of the nature of the data and the very issues themselves, the trier cannot as easily as the witness draw inferences or reach conclusions on the basis of data observed by the witness and reported by him to the trier. Still other reasons relate to the parties' interests or those of society itself: (a) to shorten the trial, thereby reducing expense and supporting efficiency of the state's adjudicative process; and (b) to heighten respect for that process by avoiding the unseemly spectacle of confused witnesses' attempting to articulate "facts" contrary to their own psychological processes and of triers attempting to follow witnesses' incoherent efforts.

The second sentence in the first full paragraph

on page 6 of the Comment asserts that section 2, paragraph (b), "will permit witnesses to describe facts ... in a manner in which they are accustomed to speaking". As I read the proposed provision it does not make that matter clear. In my view, simply because the witness may testify in such a form that is "helpful to a clear understanding ..." does not necessarily mean that he is permitted to use his ordinary form of articulating descriptions of perceived events.

Common with Uniform Rule 56 and Federal Rule 701 (but unlike the Model Code, rules 401 and 409) the proposed draft of section 2 contains the word "opinions", which is nowhere defined, and counterposes that word to "inferences". I think that the use of the word "opinions" here is a mistake. The proposed legislation should clarify the existing law and should use precise language to do it. Continuing the confusedly imprecise language of the past cannot contribute to future clarity. In addition, I think that the witness' inferential or conclusory testimony should be admitted, not only if helpful to the trier's determination of "a fact in issue", but also if helpful to the trier's reaching the conclusion he reaches by applying the pertinent legal doctrine to the facts as found.

See, e.g., Rex v. German, 1946 O.R. 395 (Ont. C.A.), and compare it to Regina v. Davies, 1962 3 All E.R. 97 (Courts-Martial App. Ct.).

Based on my comments set out in paragraphs 12, 16 and 18 above, I suggest that section 2 should be redrafted to read as follows:

> If the witness is not testifying as an expert, his testimony in the form of inferences or conclusions is limited to those inferences or conclusions which are:
>
> (a) rationally based on the perception of the witness, and
> (b) helpful to the witness' narration of his testimony, or helpful to clear understanding by the trier of fact of the testimony, or helpful to determination of matters in issue by the trier of fact.

B.C. Law Reform Commission

Section 2(a)

This section deal with opinion evidence to be given by a lay person. I am in agreement with the purpose of this section which is to permit any person to give evidence of his opinion or inference based upon his own observation of the actual facts relevant to the case. Thus a witness may testify that the Plaintiff "was going much too fast for the road conditions". I have considered whether

or not there should be a qualifying provision in the section to direct the judge and more particularly a jury to give due weight in considering the witness' expression of opinion to the witness' own experience with relationship to the matters he testifies to. i.e., the evidence of someone who drives himself would be of more weight than the evidence of a non-driver in the example cited above. However I have concluded that it is preferable to leave it to counsel to test by cross-examination and point up in argument the strengths or weaknesses of such an opinion, rather than to include a specific provision in the proposed code at the risk of cluttering up the code unnecessarily.

Canadian Bar Association, Civil Justice Subsection, Manitoba Branch

It is the opinion of your Committee that this part of the Law Reform Commission formulation of proposed legislation is particularly well-done. While there was one particular section (Section2) where a slim majority of those persons involved in the study felt that it ought to be replaced, it was recognized that a great deal of thought and effort had been spent in preparing the proposed legislation and the entire approach of attempting to remove certain historical anachronisms respecting

reception of expert evidence and to provide for a full disclosure to the opposing party of the contents of an expert's testimony was very whorthwhile.

Section Two

The Civil Justice Subsection was in favour of the section as proposed, keeping in mind that most persons in day to day conversations tend to describe things by way of giving an opinion. For example, when describing the path of a speeding vehicle -- "he was driving far too fast for the slippery road condition". It was felt by the Committee that if a witness was to attempt to overstep these ordinary circumstances, then proper cross-examination would soon demonstrate the real purpose for which the witness was called. However, at the full meeting of the three Subsections it was decided that the section was not acceptable. In particular, those members of the Criminal Justice Subsection felt it placed too much of a burden on a trial judge and that the evidence ought to be restricted as in the past. While it was recognized that the present rules of evidence with respect to the giving of opinion evidence by non-experts left something to be desired, it was felt that the danger in permitting or encouraging widespread giving of opinion evidence by non-experts far outweighted the disadvantage of continuing with the present system.

Outhouse

Section 28 contains a qualified prohibition against the giving of opinion evidence by lay witnesses. The comment which follows this section acknowledges the difficulty in distinguishing factual evidence from opinion evidence. The comment also recognizes the necessity for lay witnesses giving certain types of opinion evidence. In my opinion the prohibition against opinion evidence should be dropped altogether as an exclusionary rule and the matter left to the trial judge's discretion under section 5.

Section 68: Basis of Opinions

Williams and Brett

Our next comment related to section 6(1). We agree with the general point that a witness who gives an opinion may be required to state the premise on which the opinion is based, whether that premise be the testimony of other witnesses, personal observation, or the opinions of others. However, cross-examination has traditionally provided the opportunity for testing the strength of that premise and for ascertaining exactly what that premise is. And we believe that it is desirable that it should continue to provide that opportunity. Under the draft, however, it is said that

the judge may require the opinion. We do not think that such a requirement should be made. It might be very difficult for the witness to proceed in this way, and there is no inherent virtue in requiring him to do so. Furthermore, the proposal in the draft appears to be an inroad upon the well-established principle that the manner in which witnesses testify and the order in which they present their material is a matter to be determined by the counsel calling the witness.

Section 69: Opinion On Ultimate Issue

B.C. Law Reform Commission

Section 4 -- The Ultimate Issue Rule

This section seems to represent a substantial change from the state of the law as it is commonly understood to be. However the majority of judges in the Lupience case (1970) S.C.R. 263, comprising Ritchie, Spence and Hall, J.J. (although Hall, J. disagreed with Ritchie and Spence, J.J. in the result) is that a witness' opinion may be given if relevant, notwithstanding that it touches upon the ultimate issue. The trend of the recent cases noted in the addendum to N.L.R.C. study paper Number 7 is away from what the law is generally understood to be and in favour of permitting expert evidence on the ultimate issue. I suggest, however, that this section might profitably include a proviso, particularly for the benefit of juries, for a direction or self direction to bear in mind that

although the trier of fact may be assisted by the expression of an opinion on the ultimate issue, the finding on that issue must in the end be made by the trier of fact for himself.

Section 70: Testimony By Experts

Schiff

Focusing now on the wording of section 3, I recommend, first, that the term "fact in issue" should be simply "issue": the expert's testimony should also be admissible when it will assist the trier's job in applying legal doctrine to adjudicative facts as determined. Secondly, I recommend that the provision should not contain the undefined word "opinion". In the context of a discussion of expert testimony, the word "opinion" can (and does) mean, first, testimony not based on the witness' personal observation (i.e., "opinion" in the sense of the word in the old opinion rule), or second, testimony in the form of inferences or conclusions based on the witness' observation ("opinion" in the sense of the word in the new opinion rule), or third, a combination of both. The common law has been clear for two hundred years that it does not matter if the expert witness did not personally observe the event concerning which he testified so long as he is

otherwise supplied with information about the event upon which he bases his conclusion or draws an inference. However, to avoid confusion between the two different meanings of "opinion" and to state clearly what the Project means, I recommend that the formula "inference or conclusion" should be used instead of "opinion". Finally, since I assume that the Project intends that the word "otherwise", the last word of the provision, encompass what the Advisory Committee's Note to Federal Rule 702 says about the matter, I suggest replacing the word "otherwise" with the words "a dissertation or exposition of principles relevant to the issues concerning which he is an expert".

Williams and Brett

We have only one comment to make on section 3 of the proposed draft. We note that lines 2 and 3 of the draft refer to "special knowledge, skill, experience, training or education", whereas lines 6 and 7 refer to "scientific, technical or other specialized knowledge". The two phrases appear to be designed to refer to the same matter, although the first of them is couched in terms which are far wider than those of the second. We do not think that the language in the two phrases should be changed unless it is desired to produce a change of meaning. And as we do not believe that a change of meaning is intended, we think that the language of the first quotation

should be used in both places, if this is not done, difficult problems of statutory interpretation may well arise.

Section 71: Basis of Expert Opinion

Williams and Brett

Our next comment relates to proposed section 5(2). The intention of this, which is set out in the accompanying memorandum to the draft, is wholly admirable; but again we think the draft is too narrowly stated. Commonly, experts rely on treatisses, scientific papers and information of similar kind. This encounters great difficulties in the courts under the present practice, and the subsection is designed to remove those difficulties, but we doubt whether in truth it will do so. It refers specifically to opinion evidence being based "upon facts" but this is an unnecessarily narrow restriction. We believe that it will be much better if the word "material" were substituted for the word "fact" so that it would be quite clear that there is no objection to the expert basing his opinion on material of the kind to which we have referred.

Schiff

Section 5 is modelled closely on Federal Rule 703, but the change in wording from Rule 703 creates an inferior provision. I assume that the Project's intention was to permit expert opinion testimony based on out-of-court information so long as the information is of the kind experts in the particular discipline rely on in the exercise of the discipline. (As I have said in paragraph 29 above, I believe that this is the present Canadian law). If that was the Project's intention, why does the wording of the provision give the judge a discretion (double-barrelled at that: "in its discretion" and "may") to admit such testimony and presumably, the converse discretion to exclude it? And why does the second sentence of the paragraph of the Comment spanning pages 11 and 12 assert that the trial judge may reject the expert opinion, when both the present wording of section 5(2) (and, I think, the present Canadian common law) require the judge to reject the testimony "when in his view the material forming the basis of the opinion was not of a kind reasonably relied upon by experts in that field"?

I suggest that the words "opinion or inference" in section 5(1) should be replaced with the words "inferences or conclusions". And in order to accomplish what the Project appears to want in section 5(2), the provision might be

reworded as follows:

> Notwithstanding that evidence of the information or data upon which an expert witness bases his opinion testimony is not admissible as evidence of the truth of any assertions contained therein, the trial judge shall admit the testimony if experts in the particular field reasonably rely on information or data of that kind to form conclusions or draw inferences upon the subject.

Canadian Bar Association, Study Group, Edmonton

With respect to Section 4 and Section 7 we have a difference of opinion on whether an expert witness must show the facts on which he bases his opinion. Messrs. Weir and Rubin are of the view that an expert must show the facts on which he bases his opinion and the trier of fact would have to accept those facts in order to have the opinion accepted. Pierre Mousseau would amend Section 6(1) to read "A judge may 'and if it be requested by him or either party, shall,' require ..." We all have difficulties with the problem of psychiatrists testifying as to a man's sanity or doctors testifying on matters of medical history as to whether they should be allowed to state their opinion without the secondary evidence on which they base their opinion being proved as facts in the case. The majority were cautiously of the opinion

that this should be allowed but would object to universalizing it and elevating it into a rule, particularly where it touches on ultimate issues -- for instance allowing engineers to base their opinion on facts not proved in the case.

Section 72: Notification of Intent to Call Expert

Williams and Brett

We have the strongest objections to the proposed section 7. It will be observed that it makes no distinction at all between civil trials and criminal prosecutions. It may well be that what the section is designed to do is a desirable innovation so far as civil trials are concerned, but for criminal prosecutions, it is a complete innovation and, in our opinion, a thoroughly undesirable one. What in fact it would do is require the defence to disclose part of its testimony to the prosecution before the hearing. That would be an entirely new departure, and until such time as some provision has been made to enable the defence in a criminal case to obtain adequate discovery of the material in the possession of the prosecution, we do not think that any change should be made in the present rules affecting the defence, by way of forcing it to disclose its nature. We realize, of course, that a preliminary hearing in a criminal case brings about some limited form of disclosure of the material available to the prosecution; but it is by no means a complete

disclosure, and no provision should be based on the view that there is at present any adequate discovery procedure operating in criminal cases.

B.C. Law Reform Commission

Section 7 -- Prior Notice

I am in agreement with the concept that prior notice of intention to call expert evidence should be given. The section is left flexible enough by providing that there may be exceptions where a judge may give leave for an expert to be heard without prior notice. The proposal is in line with the amendment to Section 13 of the B.C. Evidence Act incorporated in S.B.C. (1973) Chapter 31, Section 2.

Verch ere

With respect to section 7, the rule is loose. What is meant, in subsection (1), by "a report?"

The practice in the Federal Court of requiring service of an affidavit ten days prior to the date of trial is a good one and solves both problems raised above. The affidavit also has the additional advantage of obliging the expert to state his evidence

precisely and accurately because it gives counsel time to prepare for cross-examination and makes it difficult for the witness to shade his opinion one way or another if the cross-examination is becoming uncomfortable.

Stevenson

Our experience has indicated that this kind of proposal is not practicable, but one might find different opinions from those experienced in an appearance before the federal court. One may not be able to get the report in a suitable form. What constitutes "the grounds for each opinion"? I'm afraid this is an unwieldy mechanism.

Canadian Bar Association, Civil Justice Subsection, Manitoba Branch

The Committee was strongly in favour of the adoption of this section and indeed, would go much further than sub-section two provides and requires the entire report to be filed with opposing counsel and the court prior to the commencement of the trial, keeping in mind the current trend, particularly in civil cases, to provide full and complete disclosure of one's case to the opposition prior to trial. It was felt that to require disclosure of the entire report of an expert proposed to be called to give evidence was not an undue burden. Indeed, it would avoid any problem that

might arise where counsel inaccurately summarized the "substance of any facts and the opinions" to be given by the expert.

Canadian Bar Association, Study Group, Edmonton

Section 7

We are in agreement with the reciprocal exchange of expert reports in civil cases. In criminal cases we are of the view that the Crown must disclose their report but that the defence need not necessarily do so. We are aware of the inconsistency but in view of the state's unlimited funds and powers of investigation we feel it is wise to be ultra cautious before readjusting the balances in favour of the state and we feel that requiring the defence to disclose anything does readjust that balance.

Section 73 Court Appointed Expert

B.C. Law Reform Commission

Section 8 -- Court Appointed Experts

As pointed out in the commentary at page 36, last paragraph, this type of section where it is in force is rarely used and may be expected to be little used in our system. However I agree that it is a valuable provision to enable the trier of fact to be assisted by evidence of an expert who is freed from

the temptation, conscious or subconscious, to adopt a partisan attitude in favour of the party calling him. I suggest it should be incorporated in a new evidence code, and that we should give the provision a few years' life to see what use is made of it and what, if any, changes might be made to it.

Arnup

I am in hearty accord with much that is proposed, and particularly any step that takes the surprise and "gamemanship" out of trials. However, I do not favour the appointment of experts by the court. This proposal sounds attractive as a theory, but it frequently would not work out as its proponents imagine. A judge would be inclined to appoint an expert where the experts of the parties differed, and especially where neither set of experts agreed with the judge's own theory. A recent, and classic, example is to be found in Phillips v. Ford Motor Co., 1971 2 O.R. 637, especially at p. 657 and following.

The trial judge would start with a bias in favour of the credibility and stature of the man he chose; if experts are so unreliable as to arrive at opinions biased in favour of the party who hired them, why would they not also tailor their opinions to the view the judge thought was right? I can

just hear the judge charging the jury: "Now I come to Mr. Smith. He wasn't hired and paid by either of the parties. I chose him myself" (cf. section 8(2)).

I would hate to be the counsel who later had to explain to the client that not only had Mr. Smith flushed his case down the drain, but the judge had ordered the client to pay the whole of Mr. Smith's compensation, which the judge had fixed at $2,000!

This needs more study. I hope that the views of prominent trial lawyers will be sought. I would be surprised indeed if a substantial majority were not strongly opposed to this proposal.

This letter sounds critical. In fact, I have great respect for the Commission and for the high quality of the research and the writing that have gone into the study papers. I hope that people who know more about the subject than I do will write to you in as forthright terms as I have.

Stevenson

I am enclosing a copy of Alberta's Rule 218,

which you might compare with your Rule 8(2). While we have not had much experience with it yet, it has not given rise to any insurmountable obstacles.

> 218 (1) The court on its own motion or upon the application of any party in any case where independent technical evidence would appear to be required (including the evidence of an independent medical practitioner) may appoint an independent expert (herein called "the court expert").
>
> (2) The court expert shall, if possible, be a person agreed between the parties and failing agreement shall be nominated by the court.
>
> (3) The question or the instructions submitted to or given to the court expert, failing agreement between the parties, shall be settled by the court.
>
> (4) The report of the court expert shall be in writing, verified by affidavit, and shall be admitted as evidence at the trial and given such weight as the court thinks fit.
>
> (5) Copies of the report shall be forwarded by the clerk to the parties of their solicitors.
>
> (6) Any party may, within 14 days after the receipt of a copy of the report or within such other time as the court directs, apply for leave to examine the court expert on his report and the court, on the application shall
>
> (a) order the cross-examination of the court expert prior to the trial; or
>
> (b) order the cross-examination of the court expert at the trial,

or both.

(7) The court may make such further and other directions respecting the carrying out of the instructions by the court expert, including the making of experiments and tests.

(8) Subject to the ultimate determination by the trial judge as to who shall pay the remuneration of a court expert it shall be paid in the first instance by the opposing parties in equal portions at such time as the court directs.

(9) Where the court expert is a medical practitioner he has all the powers and duties conferred on a medical practitioner acting under Rule 217.

(10) The appointment of a court expert does not prevent the parties from calling their own expert or experts at the trial.

Williams and Brett

Section 8 of the proposed draft is admittedly an innovation. We are well aware of the criticisms that can be made of the "battles of experts" which sometimes occur in the course of trial. But we are not persuaded that the draft provides a desirable solution to these problems. As the accompanying commentary shows, the draft is based upon the view that the problems spring from the fact that expert witnesses are hired by either side, and that their testimony is accordingly biased in favour of the party who hires them. The remedy adopted in the draft to cure this difficulty is to put forward a

court-appointed expert who will not be hired by either side, and who supposedly will therefore be impartial. We do not agree, however, that the biases of expert witnesses necessarily or ordinarily result from the fact that they have been hired by one or the other party. Certainly that fact may have some influence upon them, but we doubt whether the influence is one of any great moment. The truth surely is that experts have their own particular biases, which result from their personal philosophies of life, ethical views, experience within their own particular specialty, and so on. For example, a prison doctor quite often encounters cases of malingering, and he may very well come over a period of years to have an unconscious bias in favour of the view that all prison inmates are malingerers. This view may naturally influence any diagnosis that he makes. There is the further difficulty that an expert may form an opinion in all good faith, but it may be a mistaken one; nevertheless he tends, once he has formed his opinion, to resist as strongly as he can any suggestion that he may be mistaken, since he views such a suggestion as an attack upon his professional integrity and standing.

These difficulties will not be overcome by the appointment of experts by the court. Indeed, such appointments may lead to considerable injustice; for no matter how

clearly the jury is told that the expert appointed by the court is simply one other expert (perhaps with the suggestion that he is free from bias), it will inevitably happen that his opinion, being supposedly free from bias because he has not been hired by one side, will acquire a stature and weight to which it may well not be entitled. We therefore believe that consideration should be given to other ways of overcoming the difficulties. These could include (a) the appointment by the court of an assessor, whose function will be to assist in interpreting and evaluating the evidence given by the expert witnesses on either side, or (b) a provision limiting the number of experts who may be called on either side. Such a provision is at present made in Ontario, and we believe that it has worked quite successfully in practice.

Finally we advert to two particular problems of expert evidence which are of constant recurrence, but which are not explicitly tackled in the proposals now before the Commission. The first of these concerns the question of expert evidence on matters of ordinary human behaviour. There appears to be a well-settled rule that such evidence is not admissible, on the

ground that ordinary human behaviour is not a matter of expert knowledge. For example, in Adam v. Campbell, 1950 3 D.L.R. 449, Cartwright, J., speaking for the Supreme Court of Canada, held inadmissible the evidence of an expert as to the reaction times which might be expected of ordinary drivers when confronted by unusual hazards and usual hazards. Similarly, and much more recently, in Lupien (1968), 4 W.W.R. 721, at 723-4, Davey, C.J.B.C., speaking of certain psychiatric evidence which he held should not be admitted on a particular issue, said that "the admission of expert opinion on the behaviour of normal people would be a most dangerous innovation". The actual decision in the latter case was reversed by the Supreme Court of Canada, but they in so doing characterized the evidence in question as evidence concerning the behaviour of a particular individual, and they made no reference to the more general proposition enunciated by Davey, C.J.B.C., nor did any judge in the Supreme Court say anything to suggest that his general proposition was incorrect. Under the present rule, therefore valuable and helpful evidence is often ruled out. It may be that the present draft is thought to cure this matter by the language used in section 2 and again in section 4. We think however that the matter is of such importance that some specific reference should be made to it, by stating that such evidence should be received whenever it is tendered. Whether the evidence is to be believed is, of course, a matter for the trier of fact

to decide.

The other problem is a far more difficult one. It is commonly assumed that certain matters are the subject of expert knowledge, and expert witnesses are accordingly permitted to testify, when the truth appears to be that much of what they are saying is only partly of a specialized nature, and open to considerable question because its basis is founded on assumptions of an ethical nature. For example, the question of "maturity", commonly adverted to by psychologists and psychiatrists, embodies a judgment of an ethical kind, in that "maturity" is often taken by such experts as being synonymous with conformity to current social pratices. Thus persons who hold views of this kind about "maturity" are forced to dismiss, and do dismiss, most of the leading figures in world history as having been or being "immature". To put the matter another way, some sciences are more scientific than others; and particularly in what are compendiously known as the behavioural sciences, the actual scientific content is intermingled with and overshadowed by political, ethical, or social ideologies. It is this fact, we believe, that is the cause of much present dissatisfaction with expert testimony in the courts. We have no ready solution to it, and simply draw its

existence to the attention of the Commission. Perhaps the solution lies in the better education of the legal profession on these matters, so that the underlying ethical and other assumptions can be made explicit by appropriate examination.

Canadian Bar Association, Civil Justice Subsection, Manitoba Branch

A minor amendment is proposed here to simply ensure that the expert witness is not only informed of his duties, but is fully informed of the matter in dispute and that counsel have an opportunity along with the judge to so inform the expert before he assumes the responsibility and undertaking that the court has requested of him.

Bowker

Study Paper #7 -- Opinion and Expert Evidence

Generally the recommendations seem to me to be an improvement. I suspect that you may have objections to permitting opinion on the "ultimate issue" under section 4 but the study paper makes a good case.

I think the most important provision is section 8, and the main problem will be to persuade courts to use it, and to overcome the prejudices of those who support the adversary system. There is one small point that occurs to me. Will

there be practical problems in getting out the evidence? Will the judge have to question the witness? I think he should be able to, but merely note my apprehension that proponents of the adversary system may object.

One small point about section 8(4)(d). It is probably only a matter of drafting, but I have not thought that when an expert has been appointed, he was at the same time called by a party.

Canadian Bar Association, Study Group, Edmonton

With respect to Section 8 we note that it does not suggest any criteria on which the judge will select the expert ex mero motu.

Most of us approach with caution the suggestion that a judge may disclose to the jury that the expert has been appointed by him as we feel it would be decisive. Mr. Ketchum feels that the comments on page 36 with respect to intellectual prostitution by experts are misdirected in that this does not reflect a weakness in the adversarial system or the integrity of the experts but in the inexactness of the state of knowledge on the subject under discussion. He feels that the appointed

expert called by either side. The majority felt that the best way of resolving which intellectual prostitute to jump in bed with would be as follows:

(a) Both parties agree on a panel of names.

(b) A judge other than the judge trying the case is asked to choose one (some criteria for the choice might be laid down).

(c) When that expert is called the trial judge will initiate the questioning of him and either party will be allowed to cross examine him.

(d) The above procedure shall not prevent the parties from calling other experts.

Part III - Real Evidence

Section 74 to 81. No comments.

Part IV - Judicial Notice

Section 82. Judicial Notice Defined.

Section 83(1) and (2). Facts Generally Known.

Canadian Bar Association, Civil Justice Sub-Section, Manitoba Branch

There was some doubt whether this section in fact alters the common law, or if in fact it was intented to alter the common law. The common law frequently uses the phrase "notorious" to describe circumstances in which facts may be taken Judicial Notice of. It is not clear whether the change in phraseology to "common knowledge among persons of average intelligence" was intended to give the judge a wider discretion in accepting facts not otherwise proven in evidence. Although the committee was unanimous, it was the general feeling that it was desirable to permit the trial judge to have a certain additional discretion in accepting facts by way of Judicial Notice and that the ends of justice would be best served in this way. Again however, it should be kept in mind that this increased discretion should not and cannot become a substitute

for facts that can be and should be proven in evidence.

2(2)(b) It was felt that the word "material" should be substituted for the word "sources" on line two of this sub-paragraph. It was the general feeling of the Committee (and this will be elaborated on the discussion on Section 4(2)(b) that a judge ought not to resort to outside viva voce sources of evidence for the purpose of taking judicial notice of any given fact.

Commission des services juridiques

Nous exprimons notre crainte devant cette latitude laissée au juge de prendre connaissance des faits dans le but de compléter la preuve de la Couronne.

A cet effet, voici des exemples: lors de sa preuve, la Couronne oublie de prouver que le lieu de l'infraction se trouve dans le district judiciaire concerné. La preuve étant close de part et d'autre, la défense soulève ce point. Pour compléter la preuve de la Couronne, le juge déclare alors qu'il prendra connaissance judiciairement de ce fait obligeant ainsi l'accusé à faire la preuve de son inexistence.

Cet exemple comme d'autres, risque fort de permettre au juge des faits de compléter arbitrairement le

travail nonchalant du représentant de la Couronne.

Cette porte entr'ouverte, mineure en soi peut apporter d'autres abus par exemple: lorsque la Couronne ne prouve pas dans une affaire de viol que la victime n'est pas l'épouse de l'accusé.

McFarlane

I have not had the opportunity to study carefully the papers on Judicial Notice, Opinion and Expert Evidence, and Burdens of Proof and Presumptions which you distributed in July.

I have, however, a comment on the subject of Judicial Notice which I hope may be of some interest to the Commission. I think this is a field in which bold and imaginative steps ought to be taken for reasons which will be apparent to anyone who reads Professor Thayer's chapter on the subject in his preliminary treatise on the Law of Evidence.

I suggest that the guide to action should be the statement by Duff, C.J. in the reference Re Alberta Statutes [1938] S.C.R. 100 where he said at p.128:

"It is our duty as judges to take judicial notice of facts which are known to intelligent persons generally."

In my opinion the proposals made in the study paper do not advance this very simple idea. In particular the provisions for giving notice to an opponent of an intention to ask a judge to take judicial notice of a specific fact really add unnecessary complications to the present practice of giving a mere notice to admit facts.

I suggest that at this stage judges should be able to act without evidence of matters known to intelligent persons generally and on material on which businessmen daily make important decisions. Further, some consideration might be given to the implications of the use of computers.

Bowker

There may be difficulty in distinguishing between the general facts described in section 2(1) and those facts described in section 2(2), especially those in (2)(b). I am thinking of such things as passages in medical literature. Perhaps this is all answered by section 4(3).

In connection with section 2(3) I have some difficulty in distinguishing between the facts therein

specified and those in section 2(1). We have had cases in the past saying that a court could take judicial notice of the great depression. Is this within (1) or (3)?

Verchere

The procedure in the Federal Court of serving a notice to admit facts on the opposing party would seem a simpler, and perhaps more functional, way of achieving the results of judicial notice. As a practical matter, counsel for one party simply lists the facts he alleges (usually relatively non-controversial) and sends this notice to the other party. If the other party does not admit the facts and they are then proven during the course of the trial the party who refused to admit must bear the burden of the expenses incurred. The attractiveness of this procedure is not only that it leads to precise, factual allegations but that such allegations are raised prior to trial.

Section 83(3) Facts Noticed In Determining Law

Schiff

Subsection 1(2) - Legislative Facts (pages 4-6)

17. The theory underlying the proposed provision, and the text of the Comment, is wrong. The provision in actual practice would encourage violation of the proper limits of

judicial law-making. Indeed, it would cause a constitutional revolution in the way common law judges have traditionally made (and ought to make) law. In my strongly-held view, the provision should be abandoned.

18. The provision is quite clearly a copy of Davis' suggested amendment to the Proposed Federal Rules of Evidence, found in Davis, Judicial Notice, [1969] LAW AND THE SOCIAL ORDER 513, 531, and reproduced verbatim in K.C. DAVIS, ADMINISTRATIVE LAW TREATISE, section 15.00 (page 526) (1970 Supplement). And your textual comment has been articulated completely in Davis' terms. But both Davis and the Comment assume without ever dicussing the matter that, whenever a judge in his role of determining concrete litigation fashions legal doctrine, he acts (and properly acts) just like a legislature when it passes a statute. And therefore Davis and the Comment assume that in fashioning law the judge should legitimately have recourse to the same wide range of relevant data including value-judgments (all seductively labelled "legislative facts") that legislators should (and do) investigate. These assumptions are wrong and dangerously wrong for the reasons set out in the following paragraphs 19-29.

19. First of all, consider the significant difference

between the effect of the court's determining adjudicative facts and the ultimate effect of the court's determining legislative facts. By definition, when the court determines adjudicative facts (be it by the ordinary trial process or by judicial notice) the determination applies to the parties-litigant before the court and to them alone. But, when the court fashions legal doctrine in the course of litigation in order to determine the dispute of the instant parties-litigant (and invokes factual information and value-judgments to justify the doctrine), that doctrine is inevitably applicable not only to the parties-litigant then before the court but also to all other persons in society into the future the material facts of whose conduct are encompassed by the doctrine's formulation.

20. In order that such permanent and generally applicable legal doctrine shall be "good" law in anybody's sense, it must be informed by factual information and knowledge of the value-judgments of those persons to be affected by it relevant to the general problem to which the doctrine is a response. And, in addition, the doctrine must be so formulated that it assures the respect and willingness to obey of all those persons who will be affected by it.

21. Compare the abilities of a court of law and a legislature to satisfy these criteria of "good" law. The court has facilities far inferior to those of the legislature for obtaining the relevant information and knowledge of value judgments. (To anticipate somewhat, the proposal in section 3(2) to add the parties' resources clearly does not expand the court's facilities very much. Moreover, quite clearly the proposal in no way obviates the grave difficulty, which is not shared by the legislature, that persons other than the present parties-litigant who will be affected by the legal doctrine in the future have no chance in the present litigation to aid the judge's research.) But the contrast between court and legislature goes much deeper: Even when obtained disputable factual information and knowledge of the range of relevant conflicting value-judgments do not by themselves yield legal doctrine. Law-makers must inevitably evaluate the information and choose among value-judgments, and the legal doctrine which they then formulate rests upon the evaluation and the choices. After the event, legislators may be disciplined for their failure adequately to evaluate and choose by the political check of the ballot-box registered by the public that refuses the necessary respect and willingness to obey. But judges as law-makers are subject to no such political check; the quality of their evaluations and

choices and the quality of their law-product cannot be reviewed in that way. The quality of judge-made law is subject only to the traditional discipline: criticism by bar and bench for any failure of its makers to adhere to the traditional technique of reasoned elaboration of doctrine set out in previous cases and adherence to reasonable community expectations.

22. Up to the present judges in developing the common law have wisely restricted their creativity to doctrine conforming to reasonable community expectations as these were illuminated by information that was common knowledge and value-judgments that were commonly held. And, tested against the criteria I positted above, the judges have tacitly recognized not only their lack of politically-imposed disciplinary limits but also the real roots of the moral force of the common law. Not only does the judge's life tenure free from threat of removal by the ballot box demand another source of restraint but the claim of the common law to public respect and obedience has always rested on its concurrence with the community's reasonable expectations born of the community's fund of shared information and value-assessments. Insofar as judge-made law departs from these reasonable expectations in order to

rest upon the judge's own determination of disputed factual knowledge or disputed value-assessments, its moral force disappears.

23. I turn now to the specific proposed statutory provisions, section 1(2) supplemented by section 3. Quite clearly, subsections (2) and (3) of section 3 give the judge very poor substitutes for the fact-gathering resources that a legislature can muster, and the section ignores (as it must) the interests and input of everyone not a party-litigant. But, even if I admitted that the proposed information-gathering resources were relatively adequate, I could not approve empowering the judge under section 1(2) (as he must be empowered in his false role as a pseudo-legislator) to base his law-product on any "fact"-determination he likes, so long as he "believes" in the existence of the "facts" he has determined. Inevitably in making the supporting determinations, the judge would be obliged <u>on the basis of his personal preferences</u> to evaluate whatever (if any) information he had gathered and to choose among competing value-judgments. Therefore, he and the court would be justly subject to public attack on the ground that the resulting judge-made law rested on the personal or political bias of the judge himself. Clearly, a statutorily supported regime of judicial law-making which made such attacks inevitable would wreck the judicial

system as society's forum for the official settlement of private disputes by adjudication. If you want to consider a recent although (as might be expected) rare example of Canadian judges relying on disputable facts and personal value-assessments, see Hershees of Woodstock Ltd. v. Goldstein et al., [1963] 2 O.R. 81, 38 D.L.R. (2d) 449 (Ont. C.A.). And for criticisms of the court's performance in Hershees using the analysis offered here, see Arthurs, Case and Comment (1963), 41 CAN. B. REV. 573, especially at pages 580-586, and Weiler, Legal Values and Judicial Decision-Making (1970), 48 CAN. B. REV. 1, 42-46.

23. It seems clear that you have been seduced by Davis. And this has happened even though before you he had failed to convince the draftsmen of the Uniform Rules (after earlier attacking the Model Code provisions concerning judicial notice) and, even more dramatically, had failed to convince the draftsmen of the proposed Federal Rules (after attacking the Uniform Rules provision and then even the 1969 first draft of the Federal Rules themselves). In my view, although none of the American evidence reformers take the time to rebut Davis, his error in analysing the problem arises from his initial false assumption that a court in its task of determining private litigated disputes should act as if it were an administrative agency engaged

in its statutorily assigned job of adjudicating claims between competing claimants sent to the agency under a statutory scheme of public relation. In building his argument upon this assumption, Davis has ignored the mixed, quasi-legislative functions of administrative agencies as opposed to the quite different function of courts of general jurisdiction. And he has forgotten about (after clearly outlining) the sizeable research staffs of all major American agencies whose full-time job it is to investigate facts, gather information, and generate policy under the mandate of the governing legislation.

24. To be sure, Davis cites instances where some American courts have appeared to search out disputable factual information and base their law-creation upon it. But, in his argument from these examples, he does not (for me at least) sufficiently distinguish between the cases of "due process" where the truth of the factual information was not relevant, the cases where the court used the disputable information to deduce more general factual proposition that really were indisputable, and the cases where the court squarely based its law-creation on the detailed disputable information. To me, there could be no quarrel on any proper theory of judicial notice with the court

taking judicial notice in the first two categories, but there must be a quarrel with the third.

25. Moreover, apart from Davis' failure to analyze his examples carefully enough, he never evaluates the propriety of what the courts were doing except by the inadequate tests of "convenience" and "fairness to the parties". Quite clearly, he never evaluates the courts' conduct against the criteria defining a court's proper performance of the function as society's chosen institution to settle disputes by adjudication. He is totally unconcerned with the lack of external institutional restraints upon judges' determination of disputable facts as the basis for their formulation of decisional doctrine. And he is unconcerned that public respect for judge-made law has been founded on its concurrence with reasonably-held community expectations and generally-agreed values. Public controversy in the United States about the premises underlying many judicial decisions, particularly of the United States Supreme Court, in the last fifteen years might have given him pause. At all events, when the Supreme Court into the future overrules some of those decisions resting upon disputable information and judicial preference for one set of disputed values over others, the flaws in his argument may seem more apparent.

26. Unfortunately the intellectual paths of commentators on Evidence law and on the legal processes have not usually crossed. Thus, it is clear that in adopting Davis' reasoning Professor McCormick and his current editors have not appreciated the political and jurisprudential implications of his argument. A rare exception was the collaboration of Professors Hart and McNaughton in their all too brief argument in Hart & McNaughton, Evidence and Inference in the law in EVIDENCE AND INFERENCE 48, 48-59, 63-65 (D. Lerner ed., 1958), reproduced in part in S. SCHIFF, EVIDENCE IN THE LITIGATION PROCESS 1-4, 741-743 (Draft ed., 1970). A very fine statement of the nature of, and the proper limits upon judicial law-making is contained in Weiler, Legal Values and Judicial Decision-Making (1970), 48 CAN. B. REV. 1. Weiler's statement is very largely based on the superb analysis in H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958), especially pages 1-9, 110-189, and Chapter III. A much more general (but more well-known) canvass of the limits of judicial law-making argued for is B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, Lecture III (1921).

27. Therefore, as the basis for judicial law-creation judges' use of factual information not on the record should

be limited in the same way as their notice of adjudicative facts. While it is not entirely clear to my mind that the judicial notice provisions in the Model Code and Uniform Rules were intended to govern both adjudicative and legislative facts, Davis thought so and, if he is right, I side with the drafters of the Model Code and the Uniform Rules. But even if the limitations on judicial notice of adjudicative facts (at least as the present draft of section 1(1) stands) are too narrow for notice of legislative facts, proposed section 1(2) would give true legislative powers to life-time appointees sitting as adjudicators in court--unchecked legislative power that would be unique, revolutionary and wholly inappropriate in the context of our society's institutions for law-making. It seems very likely to me that--despite their silence in the face of Davis' strong criticisms of their 1969 first draft-- the drafters of the Proposed Federal Rules saw the danger in this and, in the 1971 draft, clearly excluded judicial notice of legislative facts completely from the code.

28. English and Canadian judges have rarely articulated in the terms I have used their disinclination to fashion law as if there were true legislators. But, they have often expressed in reasons for judgment their sense

of the institutional impropriety of venturing very far beyond the strong foundations of the rules, standards and principles set out in the previous case law. Conversely, on some occasions when Canadian judges have consciously embarked on law-creation beyond the case law, they have resorted to notorious social facts including commonly-accepted value judgments. See Applebaum v. Gilchrist, [1946] O.R. 695, [1946] 4 D.L.R. 383 (especially the reasons of Chief Justice Robertson), and the reasons of Mr. Justice Judson in Fleming v. Atkinson, [1959] S.C.R. 513, 18 D.L.R. (2d) 81. Again, despite Davis' implicit argument to the contrary, I believe that limitation of judicial authority in this way will not (and indeed does not) hamper proper development of common law doctrine. What has tended to hamper development has been the judges' usual failure to recognize the legitimacy of their recourse to anything beyond the law reports and the statute books.

29. In the end, I conclude (as I think did the drafters of the Proposed Federal Rules of Evidence) that no statutory provision should govern judges' recourse to factual information beyond the record in their function of law-creation. That matter should be left free of statutory guidance so that it may be governed by the judges' own appreciation, through education over time, of the wide scope --but also the limits--on their power.

Arnup

I have reservations also about s.2(3). I am not clear as to what is embraced within "scientific, economic or social facts", and whether the ambit of it is subject to s.2(1). If it is not, it should be. The commentary refers to this broad class of facts as "data" (which I would have thought had a narrower connotation), and suggests that the judge may dig them out of (inter alia) "newspapers and so on". When I reflect on how many judges there are in Canada, at all levels, this broadening of the concept of judicial notice really shakes me.

Canadian Bar Association, Study Group, Edmonton

Paper 6 - Judicial Notice, Section 2(3)

Howard Rubin liked the idea of being able to file journals and treatises on scientific, economic and social facts of which the court should take notice. All the other members were against this section in its present form. Pierre Mousseau was very strongly against it. Briefly, our reasons are as follows:

The words "economic and social facts" get us into a very broad and almost uncontrollable area. We don't feel the trial judge should be given such a broad opportunity to give opinion on matters of social policy. We don't see

the need for it. If there is no agreement between counsel on these matters why not lead the evidence? In other words, we would like to restrict judicial notice to the facts within Section 2(1) and 2(2) which in our view restate the present law on judicial notice. We see here the American influence of the Brandeis brief and we are not particularly impressed, as we feel this approach, if appropriate at all, should be reserved for Appellate Courts.

David McDonald sees no distinction between the provisions of proposed Section 2(1) and those of proposed Section 2(2)(a). With regard to Section 2(2)(b) David McDonald notes that the project observed on page 9 that this subsection "should be the growing point for the doctrine". Mr. McDonald fails to see in what respect this subsection carries matters any further than they have developed by the common law. Therefore, if the observation on page 9 intends to justify an inference that the wording of the subsection is something novel it is not understood what is meant.

We noted that under Section 2(1) and 2(2) judicial notice can be taken notwithstanding that the Section 4 procedure has not been invoked. We had a query as to whether we should go so far as to recommend that a trial judge should not be allowed to take judicial notice without

invoking the Section 4 procedure. The general view was we shouldn't go as far as that.

Section 84 Judicial Notice of the Law

Bowker

There is a small point in connection with section 3(2)(c). I do not think that application of the law of Canada is necessarily the opposite to a dismissal of the action. I should think that application of the law of Canada might result in a dismissal of the action.

Generally section 3 is a great improvement on the common law position. My memory is that the late Professor Morgan, a great authority, once wrote an article saying that courts should make much more use of judicial notice to save time. I think this is the purpose of the proposed provisions, and I approve.

McKelvey

I am enclosing herewith a clipping from today's edition of the Saint John Telegraph Journal reporting on a trial of a pollution charge under the Regulations of the Canada Shipping Act. You will note that the case was dismissed because the Regulations were not introduced in

evidence in accordance with the existing Rules so that the matter was never heard on its merits.

I note that in the above-mentioned study paper there is a recommendation that judicial notice should be taken of Regulations if published in the Canada Gazette. This, I think, is a very desirable recommendation and the case reported in the enclosed clipping is a very good example of the ridiculous results under the law as it now stands.

Canadian Bar Association, Study Group, Edmonton

Section 3(1)

We are all agreed that generally it is okay. John Weir drew attention to the fact that Section 3(1)(c) is not clear as to what is meant by "constitutional law" since the cases leave some doubt as to what the constitutional law is in certain areas. Howard Rubin pointed out that territorial ordinances are not included by specific reference and Donald McDonald takes umbrage with the word "decisional" in Section 3(1)(a) which appears to be an Americanism and not a word known to the English language in use in Canada.

Canadian Bar Association, Study Group, Edmonton

Section 3(2)(a)

John Weir noted that this should be clarified to make it clear that only the existence of the record is what is judicially noted and not the truth of its contents.

On Section 3(2)(b) is the project talking about both public and private international law, and is it not deemed part of the law of Canada in any event?

With respect to Section 3(2)(c) we unanimously adopted David McDonald's comment which is as follows:

"I think a careful look should be taken at the suggested Section 3(2)(c). I have no objection to a judge having the power to take judicial notice to the laws of jurisdictions whose laws are readily ascertainable by reference to books available in Alberta. However, with regard to jurisdictions which do not fall within those categories, I do not regard it as a mark of undue conservatism to require that law either be agreed to by the parties, or be proved by proper evidence. Furthermore, as a matter of drafting, the last three words 'dismiss the action' are surely inappropriate, for they imply that the judge must dismiss the action if he is unable to determine what the foreign law is, even if it is not the plaintiff but rather

the defendant who invited the court to apply the foreign law."

Hattersley

While I generally agree with the proposals here,I wonder about Section 3(2)(c) which permits a Judge to take judicial notice of the law of countries other than Canada, permitting the Judge if unable to determine what the law of the country other than Canada is to apply the law of Canada or dismiss the action.

This would seem to give a Judge almost unlimited discretionary power in deciding how to handle a case where foreign law applies, and the provisions of Section 4 do not completely deal with the situation.

I would far prefer a situation where the law of foreign countries has to be proved as a matter of evidence by the calling of an expert, and suggest that paragraph 3(2)(c) should be deleted from the proposal.

McDonald

While I generally agree with the proposals here, I wonder about Section 3(2)(c) which permits a Judge to take judicial notice of the law of countries other than Canada, permitting the Judge if unable to determine what the law of

the country other than Canada is to apply the law of Canada or dismiss the action.

This would seem to give a Judge almost unlimited discretionary power in deciding how to handle a case where foreign law applies, and the provisions of Section 4 do not completely deal with the situation.

I would far prefer a situation where the law of foreign countries has to be proved as a matter of evidence by the calling of an expert, and suggest that paragraph 3 (2)(c) should be deleted from the proposal.

Stevenson

Study Paper No.6 - Proposed Section 3(2)(b)

I rather doubt that the court should take judicial notice of international law, in view of the difficulty in determining that law. I think also that it would be wise to amend the proposal to read "Public International Law", to be certain that the law of conflicts is excluded.

Proposed Section 3(2)(c)

I have some difficulty in understanding why the

court would be given power to "dismiss the action". Presumably, the alternative would be to determine the matter on the basis that there was no evidence of the foreign law. This seems to me to be a most extraordinary proposal. It is doubtful whether one should really talk in terms of judicial notice of the law of other countries, because of its uncertainties.

British Columbia Law Reform Commission

The proposed legislation is in draft form only and will presumably be refined if it ultimately to be presented to Parliament. It contains some inconsistencies in wording, which may lead to difficulty in interpretation, for instance between the wording in Section 3(1)(b) and Section 3(1)(e). The B.C. Commissioners suggest that the subsections could be conveniently combined and reworded and that in the rewording provision should be made to include judicial notice of former statutes, which may at the time of trial no longer be in force, but which may be the subject of litigation, or which may by reference throw light upon the meaning of present statutes which are the subject of litigation. The proposed wording for a combined section is as follows:

> The acts and ordinances both public and private, in force at any time in Canada or any Province or Territory of Canada.

The B.C. Commissioners also have difficulty with Section 3(1)(a) in knowing what is meant by "decisional law in force" and how it is to be proved. Assuming that the proposed legislation is not meant to have reference to the argument of law following the conclusion of presentation of evidence, in which argument cases are noticed by simple reference from the law reports, when is the decisional law necessary to be proved as a matter of fact in evidence, if it is the law of Canada, rather than foreign law? Is a judge to notice a decision upon production of any report, official or unofficial, or is some higher standard of proof required, such as a copy of Reasons obtained from the appropriate Court Registry?

Under Section 4 a judge shall exercise his discretion in taking judicial notice on the terms set out in Section 4(1)(a) and (b). The latter sub-section is inconclusive in that it does not suggest what the required degree of belief (see Study Paper Number 8) is before the judge complies with the request to take or direct judicial notice.

Section 3(2)(a) marks a change from the present law in British Columbia by providing that it is within the judge's discretion to take judicial notice of a statutory

instrument. Under Section 4 a procedure for persuading the judge is set out. This would include reference to some statutory instruments which are now judicially noticed on a mandatory basis, such as Certificates of Encumbrance or certified copies of documents from Land Registries, or Company Registries. It would appear to be a retrograde step to make these the subject of a discretionary power in the judge, rather than to be able to rely simply upon producing the certificate under the appropriate hand and seal. Although it would tend to complicate the matter of judicial notice there is something to be said for making the proposed legislation subject to any other enactment, and then including in the Land Registry Act or the Companies Act, or any other relevant Statute, a distinct provision that some documents issued under the authority of a Registrar or other officer must be noticed mandatorily and not at the discretion of a judge. Dealt with on that basis the law could be handled more flexibly, although with the added confusion of requiring more than one statutory source to be researched.

The proposal for noticing foreign law embraced within Section 3(2)(c) and Section 4 is an improvement over the present method of treating foreign law as a matter of fact to be proved in evidence. The present system means

that once foreign law is fixed at the trial as a finding of fact, the litigant on appeal has no method of citing a subsequent foreign decision which may recognize that the item of foreign law was not what it was thought to be at the time the trial was held. In other words the foreign case upon which you rely at trial may be overruled by a superior foreign tribunal before you go to appeal. At present the only possible relief from this situation would be under the Fresh Evidence Rules in the Court of Appeal. Under the proposed legislation that fresh evidence could be called either viva voce, or simply by citing the reports which would be included in the expression "sufficient information" appearing in Section 4(1)(b). I suggest for greater clarity, however, that within the proposed legislation there should be a specific reference to the same powers as are proposed in it being available to any Appellate Court.

Canadian Bar Association, Civil Justice Sub-section, Manitoba Branch

3(1)(a) It is not clear what this is intended to mean. If it refers to common law decisions of other provinces, then the sub-section adds nothing and should be eliminated.

3(2)(c) The provision permitting a judge to dismiss an action where he is not satisfied respecting proof of foreign law is objectionable and a derogation of judicial responsibility. If an experienced trial judge is not satisfied respecting proof of foreign law, then he can and should advise counsel of this and give counsel an opportunity to adequately prove it. Alternatively, he can follow the acceptable common law rule and apply the domestic law. He should not be permitted to simply dismiss the action.

Schiff

Section 2 - Judicial Notice of Law (pages 6-12)

30. Contrary to the assertion in the last sentence of the first paragraph, the underlying reasons for distinguishing "domestic law" (that the judge may judicially notice, that is, search out for himself) and "foreign law" (that the parties-litigant must prove as fact to the judge) are more than the comparative accessibility of the source materials and the comparative judicial knowledge of the relevant legal doctrine itself. Another and very important reason is the judge's relative incompetence, even if the materials were readily available to him, to understand the nuances of many foreign legal systems so that he can properly understand the relevant legal doctrine.

31. In light of this extra reason, in a proper system governing judicial application of foreign law, the following considerations should govern: First, whenever the relevant legal doctrine is that of a foreign jurisdiction whose legal system is sufficiently different from Canada's system that the judge is really a novice concerning that legal system, then the legal doctrine should be proved in the traditional way by witnesses who are competent to understand and explain it. But second, whenever the relevant legal doctrine is that of a foreign jurisdiction whose legal system is sufficiently similar to Canada's system that the judge's legal expertise reasonably permits his intelligent comprehension of the legal doctrine, then the sole issue is whether the source materials are readily accessible to permit the judge to take judicial notice. In this second situation, the burden is on the party-litigant who wants mandatory judicial notice to make the source materials readily available to the judge if they are not so available already; otherwise the judge has the power (but not the duty) to search out the doctrine himself.

32. The references to "laws...contained in source materials" and "law contained in readily accessible material" on page 6 of the Comment really misstate the

nature of judge-made law. The source materials do not "contain" the law except in the sense that the decisional rule, standard or principle for the case at bar is immanent and may be drawn from previous reasons for judgment.

33. The second last full sentence on page 6 ("However, even for these matters...material as well.") is misleading. The court does not judicially notice "material": it notices the law which it reasons out of the material. Insofar as section 3(1) applies properly to "law", the "information" there referred to is the relevant statute books and the court reports of the foreign country involved, that is, "the material".

Subsection 2(1) - Mandatory Judicial Notice of Law (pp.7-8)

34. I doubt that many readers will readily understand the term "decisional law" in paragraph (a) of section 2(1), used instead of the usual term "common law". Other than that, I find the proposed provision acceptable.

35. The text of the Comment is acceptable, except for the use of the adjective "notorious" in mid-page 8 to describe a "statutory instrument...published in one of the official Gazettes". The proper test for compulsory judicial notice of law is not notoriety but rather easy accessibility

to the court of the relevant source materials and the court's capacity immediately to comprehend their contents.

Subsection 2(2) - Discretionary Judicial Notice of Law (pp.8-12)

36. I find acceptable the proposed paragraph (a) of section 2(2). I also find acceptable the text of the Comment on the provision set out on pages 9-10, except for the reference near the bottom of page 9 to "the notoriety... of this information". As I said above, notoriety is not a test of the propriety of judicial notice of law.

37. I disagree with proposed paragraph (b) of section 2(2) insofar as it lumps together without differentiation all "foreign" countries and their political sub-divisions. And I do this with full consciousness that rule 9(2)(b) of the Uniform Rules does the same thing. (But compare Model Code, rule 802(d).) First of all, as I understand it, "[t]he precise manner of proving foreign law and whether a judge may consult material not formally proved" is not "the subject of much doubt" as the text asserts in the first full paragraph on page 10. But, more important, the text on pages 10-11 takes no account of the relative incompetence of Canadian judges to determine particular legal doctrine of a foreign jurisdiction whose legal system is very differ-

ent from that of Canada, simply by the judges' perusal of the "statutes, reports, cases" etc. referred to on page 11.

38. In place of paragraph (b) of section 2(2), I suggest a more conservative provision that takes this problem into account. First, limit the judge's discretionary authority to take judicial notice under subsection (2) to the law of those jurisdictions whose legal systems are closely similar to that of the common law provinces of Canada (e.g., all the common law countries of the Commonwealth, and all the common law states of the United States of America). Second, in order to avoid unfair surprise to the opponent, require that the party who wants this judicial notice shall set out in his pleading the relevant legal doctrine. (See section 32 of the Evidence Act of Manitoba rendering mandatory judicial notice of the law of all such jurisdictions, but also requiring pleading as a condition precedent.)

39. At all events, I find strange your criticism in mid-page 10 that "the relevant law is often a matter of personal opinion". Our litigation process no longer denigrates helpful expert testimony on the ground that it is "mere opinion.

40. The sentence following the proposed subsection (2), which I assume is supposed to be subsection (3), is a curious provision. It is perfectly valid to say that the judge cannot "determine what the law of a foreign county...is" in a trial situation where the legal doctrine of the foreign jurisdiction must be proved to the judge by expert evidence. But, if the judge is permitted to take judicial notice of that legal doctrine, it is anomolous to say that he cannot determine the law: by definition, if the judge does take judicial notice of the foreign legal doctrine, he then does determine it. The injustice you are trying to resolve by this provision has not previously arisen in the course of judges' taking judicial notice of foreign law, because under the present governing rules no judge ever does. Moreover, as I have argued, judges should not be permitted to take judicial notice of law that is predictably beyond their judicial experience to decipher.

41. If the particular legal doctrine of the foreign jurisdiction is so "difficult, expensive or impossible to discover" (quoting from the text at the bottom of page 11) that the judge cannot determine its content through his own researches, then that fact argues that he

probably should not have tried in the first place. When a court is faced with the necessity of determining foreign legal doctrine where source materials are relatively inaccessible or the intricacies of the foreign legal system are novel, judicial notice should not be permitted. If you follow the suggestion I made in paragraph 38 above, the court will always be able to determine the law of those foreign countries where discretionary judicial notice of law is permitted. The law of all other foreign jurisdiction would remain to be proved as at present--with, if you want, your proposed subsection (3) tacked on.

42. The last two words of subsection (3) are "without prejudice", but the text does not explain their significance. Does the term "without prejudice" mean that, if the court were to dismiss the action for failure of the court to determine the legal doctrine pressed by the plaintiff, the plaintiff could start the action again and have a fresh trial armed with better documentation? If that is what the words mean, I question that reason for giving the plaintiff a second chance even under your proposed scheme of judicial notice of all foreign law. And, of course, there is even less reason for giving him a second chance under my proposal where the plaintiff would be obliged to prove the legal doctrine emanating from any non-common law

legal system.

43. At all events, I suggest that a better wording for subsection (3) would be: "If a court is unable to determine the content of the relevant law of a foreign country...in order to take judicial notice of it, the court may...".

Section 85(1) Judicial Notice on Request

Schiff

Section 3 - Procedure (pp.12-15)

Subsection 3(1) - Mandatory Notice (pp.12-13)

44. I repeat here my submission, set out in paragraph 11 above, that judges should be obliged without request to take judicial notice of all facts of universal notoriety. See again Uniform Rules, rule 9(1), and compare Model Code, rule 801.

45. While these are obliquely referred to in section 3(2), paragraphs (a) and (b) of section 3(1) do not adequately identify the purposes, and therefore the content of the "notice of the request" and the "sufficient information". Regarding any adjudicative fact, the purpose of the "notice of the request" under paragraph (a) is identification of the particular fact the proponent wants the

judge to determine without courtroom evidence and the detailed ground under section 1(1) allegedly justifying the judge's complying with the request. And, regarding an adjudicative fact the purpose of the "sufficient information" under paragraph (b) is identification of the particular fact and demonstration that its existence is not reasonably disputable because it is "generally known..." under paragraph (a) of section 1(1) or because it is "capable of..." under paragraph (b) of section 1(1). If the proponent invokes paragraph (b) of section 1(1), then the purpose of the information is demonstration that the source he puts forward is unquestionably accurate regarding the fact identified for judicial notice. Regarding legislative facts under section 1(2) and law under section 2(2), the purpose of the "notice of the request" is identification of the fact or the particular legal doctrine and (perhaps) a statement of justification by reference to the judge's particular function then invoked; the purpose of the information is identification and demonstration that the fact or the legal doctrine exists.

46. In order to clarify for the reader the purpose and content of the notice of the request and the sufficient information, I suggest that paragraphs (a) and (b) of section 3(1) should be amended to refer at least to "the

tenor of the matter to be noticed" and "the propriety of taking judicial notice". Compare Model Code, rule 804, Uniform Rules, rule 10(a), Proposed Federal Rules of Evidence, rule 201(e). The amended paragraphs might read as follows:

> (a) gives each adverse party sufficient notice of the request, including a statement of the tenor of the matter to be noticed and the ground on which propriety of judicial notice is alleged to exist, so that each party may duly prepare to meet the request; and
>
> (b) furnishes the judge or court with sufficient information regarding the tenor of the matter to be noticed and the propriety of judicial notice of that matter on the ground set out in the notice given under paragraph (a) that the judge or court may comply with the request.

Section 85 (2) Sources to be Consulted in Taking Judicial Notice

Arnup

As to s. 4(3), I have grave doubts about permitting judges to do their own research, even if the information and its source is "made a part of the record" -- whatever that means. Could a judge simply attach a schedule to his reasons for judgment, showing his sources?

Canadian Bar Association, Civil Justice Subsection, Manitoba Branch

4(3) would be completely eliminated. By virtue of the foregoing amendments it would be made clear, firstly that a judge ought not to resort to viva voce outside information to take judicial notice of any particular fact and, secondly, that any resort to information obtained outside the confines of the court room by a judge must be reported to counsel and counsel must be afforded an opportunity for rebuttal.

The Committee felt quite strongly that, while it was highly desirable to codify and to an extent widen the authority of a trial judge to take judicial notice of certain facts, to permit a judge after the close of evidence to take

judicial notice of facts based on oral information referred to him was going too far and smacked of the inquisitorial system of justice.

Canadian Bar Association, Study Group, Edmonton

Section 4

John Wier doesn't see how this Section remedies the present law on judicial notice. Philip Ketchum notes that the use of the word "representations" is vague - does it include all usual types of evidence or is it only argument that is contemplated.

With respect to Section 4(2) the majority were of the view that the machinery should not be able to be set in motion after the trial judge has rendered judgment whereas on the present wording it would appear that it could be.

With respect to Section 4(3) the majority were of the opinion that this should be totally eliminated, the feeling being that the problem is covered by Section 4(2)(b). A judge consulting his social worker daughter on a question of custody is not our idea of justice.

With respect to Section 4(5) we note that there is

no definition of "information " - see Ketchum's comment on "representations". And we note that the last two lines eliminate the possibility of obtaining leave to present new evidence on appeal under the usual rules. We feel that such leave should still be available.

With respect to the comment on page 7 toward the bottom of the page the references to "probative value", reasonableness of the conduct of the parties" and "credibility of witnesses" are in our submission matters which have nothing to do with judicial notice procedure. These matters are not within the doctrine of judicial notice and we are opposed to broadening the doctrine to include them.

Section 85 (3) Opportunity to be Heard

Canadian Bar Association, Civil Justice Subsection, Manitoba Branch

4(2)(b) This sub-section would be completely revised by your Committee as follows:

If the judge resorts to any material or information that is not received in open court, that material shall be disclosed to the parties before judgment, shall be made

a part of the record in the proceedings, and the judge shall afford each party reasonable opportunity to make representations as to the validity of the material or information.

Arnup

Going back to s.4(2)(b), the draft again says "if requested". It is not clear to me how this would actually work. How would counsel know the judge was considering taking judicial notice of a fact or other matter? If he has already done so (cf. "has taken" in s. 4(2)(a), would not counsel be hesitant to argue with the judge about the validity of his research, or the learning of the persons whose "advice" has been obtained?

Section 85 (4) Judge to Instruct Jury to Take Judicial Notice

Arnup

Section 4(2)(a) of the proposed legislation appears to contemplate that the judge will only afford the parties the opportunity of making representations "if requested". It would follow that if there were no request, there would be no affording of the opportunity. However, subsection (5) of section 4 operates only when a judge has taken judicial notice of a fact or matter and the parties have been given an

opportunity, etc. I presume this is deliberate but the result would be that "contradictory evidence" could be given where no request for an opportunity to make representations was made.

I respectfully suggest that if this is the intention, the order of the two events referred to in subsection (5) should be reversed, i.e. the subsection should read:

"(5) If the parties have been given an opportunity to present information on a fact or other matter, and a judge has taken judicial notice of the fact or matter, the fact or matter is conclusively taken to be true ... etc."

Schiff

Perhaps through an inadvertent drafting error, section 3(5) does not prohibit contradictory evidence on any fact that the judge decided was proper for judicial notice or so obviously true that he did not hold a hearing under section 3(2). The provision should include a duty on the trial judge to direct the jury that they must determine a judicially noticed adjudicative fact as he tells them.

Breen

There is, however, one provision of your proposed legislation which I would invite your project group to consider further: that is, Section 4(5). If this sub-section were deleted, then the proposed legislation would be applicable to administrative tribunals.

Many administrative tribunals have their own fact-finding arms. For example, the Air Transport Committee has its own statistics gathering section. Naturally, the section compiles and interprets statistics. The same goes for economic facts about the various commercial air carriers. At present, the Air Transport Committee makes use of its own statistics and its own economic data. Such use is rarely, if ever, acknowledged. Therefore the statistics and other economic facts can hardly be challenged.

If the Air Transport Committee were bound by your proposed rules on judicial notice, the Committee would be required to give the parties notice of the data being used. And the parties, subject to the ruling of the Committee, would be entitled to produce their own statistical and economic data, which might contradict the Committee data.

You can see how Section 4(5) would appear to limit

the rights of the parties to produce contradictory evidence... It may simply be a matter of confusion: this subsection was designed, having in mind proof, shall we say, of foreign law, or the length of the day, or airline or train schedule, in a sort of trial within a trial. In administrative law hearings, the facts of which judicial notice (if that is the correct term) are to be taken, often form part of the critical facts: as an example, in an air carrier matter, the statistics of passengers and cargo carried.

Recall that Professor Davis, on whom you drew so heavily, set up his formulation in the context of administrative law. He enlarged the device of judicial notice, largely to cover the case of the administrative tribunal - which tribunal decided the case, in part, on the facts adduced before it in the ordinary way and, in part, on the statistical and other data gathered by its own staff. I note that Professor Davis, in his draft rule on judicial notice, omitted any provision similar to your Section 4(5). Rather, he left it open to the judge or tribunal to hear opposing evidence, if he thought it necessary, or to hear argument on the evidence of which he had taken notice.

TITLE VI

Application

Section 86 and 87. No Comment

TITLE VII

Abrogation and Repeal

Section 88(a) Rule in Hodge's Case Abrogated

British Columbia Law Reform Commission

The outstanding change proposed by the working paper is the abolition of the rule in Hodge's Case. It is proposed in Section 3(2) that where a case depends upon substantially circumstantial evidence, the trier of fact need not charge on the basis of the rule. He is still free to do so. The justification argued at Page 9 of the working paper is that the thrust of the rule, "that the circumstances must be consistent with the accused having committed the act and also inconsistent with any other rational explanation", is no more and no less than saying "proof beyond a reasonable doubt."

The Commission, after discussion, agrees that in terms of defining the act of reasoning to persuasion,

the rule in Hodge's Case does not advance the general burden of persuasion beyond a reasonable doubt in a criminal case. The Commission urges the retention of the rule because while it remains as a mandatory instruction to every jury, and a mandatory self instruction to every judge on a circumstantial case, it operates as a salutary reminder to the fact finding body as to the nature of the enquiry into the circumstantial evidence that they must make, and as to the degree to which they must be satisfied by it. It reminds the fact finding body to search to see whether there is another rational explanation of the circumstances, other than the guilt of the accused.

While greater chance of confusion in the minds of a jury exists where a greater number of matters must be canvassed by a trial judge, the time honoured instruction on Hodge's Rule is in my opinion less likely to be confusing to a jury than are many other necessary instructions. If the proposed Section 3(2) is to be enacted there would probably be a body of case law built by defining those cases in which the instruction on Hodge's Rule should be given, even though in general it need not be given. That factor itself would tend to lead to confusion in the minds of lawyers and judges.

Section 88(b) Corroboration Not Required

Hare

I have just read your paper on Corroboration in the series on Evidence.

I would like to make a quick comment on your proposal that the rule of regarding corroboration be dropped for treason.

I am concerned that the government would find it much easier to charge and convict people on treason if this rule was dropped. I personally would rather see this rule extended to cover all other offences against national security. In addition the rule should state that there must be two witnesses to the actual commission of the offence.

I am afraid that there might come a time when the government will be inclined to prosecute vigorously people who may be opposed to government policy. The likelihood is rare but I would like some protection from an over-zealous government which does not tolerate dissent.

reason to disagree with the Commission's view that, in these common sense cases, any requirements of law calling for warning by judges or corroborating testimony should be abolished -- with their opportunities for appeals on technicalities.

But there is reason for concern about fallible evidence which common sense does not tell us is fallible. The law regards oral eye-witness testimony as the best testimony. But human memory is fallible; and yet each individual -- witness, juryman, judge, counsel -- cannot easily accept that his memory is fallible, since he must act on its basis; and is therefore naturally disinclined to give memory testimony the "pinch of salt" which experience suggests that it deserves. (All this could no doubt be better put by a psychologist.)

Subsequent identification of a person (the accused) as the person seen committing a crime is an extreme example. We do not know the process by which the memory stores away pictures of people in memory banks and records the distinctiveness of a previously unseen physiognomy. But it is clearly a pretty crude classification system. ("All Chinese look alike".)

To make it worse, the picture is not some permanently fixed photographic plate, but an image that can be modified, and the original obliterated, by subsequent impressions. Put shortly, the witness who glimpsed a criminal and made an identification at an identification parage, is identifying, in his evidence at the trial, not the criminal of whom he caught a glimpse, but the person he identified in the identification parade. And he is likely to be confident in his identification since he has had time to study the man in the parade and to create a clear print -- over-print -- of his physiognomy in his memory bank. Set out in full like this, it might be suggested that the fallibility of eye-witness identification was also common sense; and that it could be left to the defence counsel to bring this out and the jury to evaluate it. But it is also "contrary to common sense" since everyone must act on the basis of their memory banks as they are, and the process by which they are modified is unconscious.

(To give a recent example of mistaken identity in Scotland, the eye-witnesses were subsequently invited to an identification parage in which the real culprit was present, and indicated that he was not the man they saw. Counsel for the wrongly convicted man tried delicately to suggest that the witnesses were, though honest, in some sense

unconsciously parti pris in order to explain their failure. The much more plausible explanation did not occur to him that, once they had identified the wrong man, the picture of the criminal they had seen started to look more like the man they identified and therefore less like the real culprit. (He was pardoned anyway.))

Granted the postulate that there is testimony which is given more weight than experience and such psychological knowledge as exists suggests that it warrants, what is to be done? It cannot be left to wait until knowledge of the fallibility of that type of testimony has been absorbed, over some natural reluctance, into the knowledge of each counsel acting in the criminal courts. The only straight-forward course, granted that the legislature of the Supreme Court are satisfied of the fallibility and the dangers of its non-recognition, is for a duty to be placed on the trial judge in some form or other to bring it to the attention of the jury. (Perhaps after a hundred years, it too will become "common sense", and the requirement abolished, as the Commission are proposing for existing requirements.)

My basic comment therefore is that, although a good case is stated in the study paper for the abolition of existing requirements, this must not go so far as to establish that the creation of new requirements is unjustifiable, or that they may not be desirable to improve jury deicisions. Identification is quoted only as an example of a case where it might be desirable to require the judge to bring the fallibility of the memory processes involved to the notice of the jury. In this connection the Commission may wish to consider the report, when published, of a Home Office Committee now sitting in England and Wales under the chairmanship of Lord Devlin which is examining identification in the light of some cases of mistaken identification in that law district.

Haines

With respect I agree with this paper and from a trial judge's viewpoint I would like to see the removal of the need for corroboration. There are several reasons:

1. It confuses the lawyers who often cannot agree on what is corroboration.

2. During my first year on the Bench I read every Canadian case on corroboration and was astounded at the conflict of judicial opinion. I still am. The Court of Appeal will take months to decide whether a piece of evidence is

corroborative may even then disagree. What is the trial judge to do, when counsel cannot agree, and he has only moments to decide? Such confusion should be terminated.

3. My experience has not been that of the L.S.E. Jury Project, 1973 Crim. L.R. 208. It has been the opposite. Juries tend to think that the Crown must prove its case twice.

4. We have two kinds of corroboration. The first is general corroboration in the sense of anything that supports proof. That is the way we test all evidence whether it is consistent with other accepted facts. Then we have corroboration in the special sense used in your working paper. The result is the jury is confused in distinguishing between general corroboration which is really the harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances of the particular case, and on the other hand, corroboration that confirms in some material particular the crime has been committed and that the prisoner committed it. Along the way the juries tends to lose the judge and there is danger of their thinking the judge is directing them to acquit.

As to victims in sex cases, I think the rule

downright harsh. Some judges allow defence counsel to ramble over the entire sexual history of the complaint solely to demean her in the hope that the jury will not enforce the law on her behalf. Juries are very selective in rape cases -- and they can find themselves in a state of doubt about proof of consent concerning a female they dislike without being involved in corroboration. It's a courageous female who complains of rape. The trauma of the trial is great. I wonder of the post-trial trauma where a predatory male has been acquitted and how it affects the life of an innocent female who swore she did not consent and the case was lost because of lack of corroboration.

Primrose

I have just read your study paper No. 11 on Corroboration of Evidence, from which the conclusion is to do away with the necessity for corroboration. I don't think I would go that far in some instances, e.g. accomplices. In my experience, Bar and the Bench, I think there is a danger in convicting on the evidence of an accomplice and I really don't think there should be a conviction on the uncorroborated testimony.

In cases of treason, perhaps it is theoretical, but one must remember that treason carries a death penalty and

and corroboration. On the other hand, in such cases, the attitude is probably "hand the bastard" so perhaps as you suggest, corroboration would be of no protection. But I must say I agree with Wigmore.

I am inclined to the view that in the case of child witnesses there is some danger because of the mental immaturity of a youngster and that probably that rule should not be changed where children are too young to give sworn testimony.

Canadian Bar Association, Study Group, Edmonton

Corroboration

We all agree with the draft proposals to do away with the mandatory requirement of corroboration in the offences of forgery, perjury, and treason.

With respect to accomplice evidence we all would like to have some empirical researcy by way of questioning of the appropriate law enforcement agents to ascertain to what extent:

1. Unconvicted accomplices are promised immunity, and

2. Convicted accomplices are promised early parole, and

3. Juveniles are promised no waiver to adult Court, in return for giving evidence; i.e. the question of turning Queen's evidence.

In the absence of this research, we agree (Mr. Justice David McDonald abstaining and D.C. Abbott dissenting on the grounds that the caution should be discretionary) that the mandatory caution with respect to accomplice evidence should be retained. We find it hard to reconcile the draft papers' confidence in the good sense of juries with the results of the L.S.E. Jury project mentioned on page 2, namely that juries are more likely to convict if the Judge gives them a cautionary instruction on the danger of convicting on uncorroborated evidence.

Dean Fridman points out that the premise that "all relevant evidence is admissible unless strong and particularly helpful and may be a circuitous reference because it begs the question of what is relevant. For instance, if a child fantasizes, is this relevant evidence?

With respect to the fourth paragraph under the heading "Accomplices", we take issue with many of the reasons

given and suggest that at best they are quesses and at worst have no factual basis. For instance, wouldn't it be equally true to say that it is easier for a jury to understand a caution with respect to accomplices than to understand the rule in Hodge's case, or that any rule of law that results in an appeal shouldn't be a rule. Also, the fact that one can think of other witnesses who are more prone to lie than accomplices isn't a valid reason for removing the caution with respect to accomplices any more than it is a valid reason for saying that there should be a mandatory caution with respect to those witnesses, i.e., two wrongs don't make a right.

Child Witnesses

With respect to the requirement for children being sworn, we note that these have been so significantly broadened that nowadays a child that cannot be sworn must either be very dense or exceedingly young and immature. For instance, we note that the effect of the Horsburgh and Bannerman cases is that the child need only understand that there is a moral obligation to tell the truth and that he can give these answers in response to leading questions and after a rehearsal of his evidence by the party calling him prior to his appearance in Court. In view of this we feel that

there is a greater need for some corroborative requirement of a child's evidence, and we were unanimously in favour of retaining the necessity of corroboration for the unsworn evidence of a child. With respect to the sworn evidence of a child Dean Fridman was in favour of mandatory corroboration of this evidence also, but the balance of the members present felt that this was a distinction that the Judge would inherently draw to the jury's attention.

With respect to the problem of the evidence of one group of child accomplices being corroborated by another group of child accomplices, the general consensus was that this was dangerous and that we would be reluctant to see the House of Lords' decision in D.P.P. vs. Kilbourne 1973, 1 AER 440, followed in Canada.

Victims in Sex Cases

We feel that the draft proposals to do away with the caution respecting corroboration of a rape victim's testimony have to be considered together with the present proposals to take away from the Defence the opportunity of cross-examining the rape victim on her previous character and sexual conduct. However, before reaching any conclusions on these recommendations we wish to meet with and receive the views of some female members of the public and the bar on the

question of whether there is in fact a special danger that females may give false evidence in these cases owing to sexual neurosis, jealousy, fantasy, spite, or a girl's refusal to admit that she consented to an act of which she is now ashamed. We are scheduling such a meeting for early May and will report to you shortly thereafter.

Section 89 No comment