These study papers, prepared by the Evidence Project of the Law Reform Commission of Canada are circulated for comment and criticism. The proposals do not represent the views of the Commission

EVIDENCE

1. COMPETENCE AND COMPELLABILITY

2. MANNER OF QUESTIONING WITNESSES

3. CREDIBILITY

4. CHARACTER

The Law Reform Commission of Canada will be grateful for comments before October 30, 1972. All correspondence should be addressed to:
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August 1972
(Second Printing)

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Study Papers prepared by the Law of Evidence Project

August 1972

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PREFACE TO STUDY PAPERS

The just and effective operation of our substantive law depends on the existence of a procedural law that is able to deal with the nature and complexity of modern litigation. Many of our present rules of evidence, however, were fashioned for a society and type of litigation far different from those which they now seek to regulate. For this reason, and because the law of evidence is an area of the law in which there is a need for a quick, authoritative, and understandable reference to the present law, the Law Reform Commission decided to give priority to a critical study of the law of evidence with a view to its codification.

NEED FOR REFORM

Public pressure for reform of the law of evidence has not been as great as for improvement of some of the areas of substantive law. The law of evidence is, in the main, lawyer's law; laymen are affected by it only when they appear in court. Therefore, except with respect to those few rules of evidence which affect the accused person because of his special status in court, the rules have never become a public issue. 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. They 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. Changing conditions have rendered many of the rules historical oddities. There are many examples; the complexity of modern business with its increased reliance on records and computers ; the trend toward specialization of knowledge which has necessitated an increased reliance on experts; the better education and sophistication of present-day jurors; developments in psychology which now permit us to question the assumptions about human behaviour behind some of our rules; changing notions of fairness to the accused; and the pressing need to expedite trials, particularly in civil cases.

REASONS FOR CODIFICATION

Evidence, perhaps more than any other branch of the law, is an area in which codification seems justified. The rules of evidence must be readily known, understandable and capable of precise application. If the rules are not readily known, the orderly progress of the trial must be broken to resolve evidentiary issues. If the rules are not understandable simple, and concise, persons interested in and affected by court procedures become dissatisfied with the judicial process. If the rules are not precise and capable of reasonable certainty in their application, counsel experience difficulty in planning for trial, and appeals on evidentiary matters are likely to waste the resources of the courts.

Under present practice many questions of evidence do not reach the appellate courts. For these questions the practice varies from court to court, and research is exhausting and perplexing. On the other hand, even those questions of evidence

which do reach the appellate courts often do so on a narrow point of law, and an opportunity to lay down clear guidelines for their application is not presented to the court. Furthermore, the most satisfactory resolution of some evidentiary questions cannot be achieved by the traditional remedies of the appellate court.

TYPE OF CODIFICATION

The ability of the substance of the Code of Evidence to assure a sound result in individual cases is a paramount consideration in the drafting of a new code. But the Project feels that clarity, preciseness, and completeness are also important. These considerations necessarily follow from the reasons given above as justifying codification. Although the Project does not envisage a Code of Evidence detailing every step in the trial and in the admission of evidence, such a code must be comprehensive enough to serve as a helpful guide to the court, lawyers, and anyone interested in courtroom procedures. Also, to assure sound results in individual cases, 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.

PROCESS OF REFORM

For the work done at the Commission, the members of the Law of Evidence Project have decided to adopt the team approach. The participants engage in in-depth research on the various areas

of the law of evidence, collect materials, prepare memoranda and then debate and discuss the legislative alternatives among themselves until the issues have been articulated and some tentative views reached. The Project is also engaging people to do interdisciplinary work whenever it appears helpful.

Study papers, along with possible formulations of proposed legislation, will be sent to the provincial law reform commissions, all people intimately affected by the proposed legislation and to organizations, officials, lawyers, judges, and law professors who have indicated that they would review and comment on the tentative recommendations. The Project's final recommendations, along with the various replies, will then be submitted to the Commission. The Commission in turn will propose a draft Evidence Code and will distribute it and accompanying explanatory notes in the form of a Commission working paper to the Canadian public. Finally, after considering the responses, the Commission will submit its recommendations including a draft Evidence Code to the Minister of Justice. The study papers sent out by the Project do not express the view of the Commission. In writing its working paper, the Commission will consider not only the views of the Project, but also the views of all those who respond to the Project's study papers. In this way, the input by members of the profession and the public will be as meaningful as possible.

By this process of discussion and consultation 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. We also hope to encourage an awareness of the law's purposes and limitations and in

the end a greater acceptance of, and satisfaction with, the proposed rules.

PURPOSE OF THE DISCUSSION PAPERS

The study papers we are sending out for comment have two purposes. The first is to inform those we consult of the difficulties and limitations involved in reforming this area of the law and of the purposes of the rules. The second is to elicit comments and criticisms which the Law Reform Commission will be able to utilize in redrafting the proposed sections. Because these are the purposes of the study papers, and because they are being sent to an audience with diverse interests and expertise, no authorities or references are set out in them. The attempt is simply to articulate the assumptions and issues in each area, and the Project's tentative views on them. It is hoped that this format will prove to be a useful one.

ACKNOWLEDGEMENTS

The Project believes in the importance of comparative studies as an approach to reform. Therefore, it has studied documents from many jurisdictions and borrowed liberally from them whenever its members thought the merits of a remedy proposed in another country suited the Canadian experience. In particular, in the areas so far studied, we have examined closely the studies by the English Criminal Law Revision Committee; the Draft Evidence Code (First Part) of the Scottish Law Commission; the evidence acts of the Australian states and Israel; and the recent American codifications, including the Model Code of Evidence, Uniform

Rules of Evidence, Proposed Rules of Evidence for the United States District Courts and Magistrates, and the California Evidence Code. Because of their very different courtroom procedures, the rules of procedure in the countries of continental Europe have been of less assistance.

The Project also wishes to acknowledge the use of the excellent and scholarly papers prepared for the Ontario Law Reform Commission, which that Commission very kindly forwarded to us.

FIRST PAPERS

This first group includes three study papers dealing with the rules of evidence relating to witnesses: (1) the kinds of persons that should be competent to be witnesses, (2) the order and manner in which their testimony should be given, and (3) their accrediting and discrediting. A fourth paper discusses the admissibility and manner of proving the character of the parties.

Within three or four months the Project hopes to send out papers on: (1) the compellability of the accused, (2) judicial notice, (3) burden of proof, (4) confessions, (5) opinion and expert evidence, (6) professional privileges, (7) hearsay.

Study Paper #1

LAW REFORM COMMISSION OF CANADA

A Study Paper by the
Law of Evidence Project

COMPETENCE AND COMPELLABILITY

POSSIBLE FORMULATION OF PROPOSED LEGISLATION

Competence and Compellability

Section 1. (1) Except as otherwise provided in this Code, every person is competent and compellable as a witness for any party in a trial or other proceeding whether criminal or civil.

(2) A judge or other person presiding and a person whose duty it is to determine the facts are not competent as witnesses.

(3) [The questions of sovereign or diplomatic immunity and the compellability of the accused have not yet been fully examined and this proposed legislation is not to be considered as affecting those areas.]

Section 2. (1) A witness shall not take an oath or make an affirmation, but he shall be instructed by the judge or other person presiding at the proceeding 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 proceeding may, in his sole discretion, give such additional instruction as he may determine to any child, person of defective mental capacity or other like witness.

COMMENT

SECTION 1 - GENERAL RULE RESPECTING COMPETENCE AND COMPELLABILITY

Introduction

Various individuals with knowledge of the facts in dispute were formerly completely barred by the common law from giving testimony. Among those disqualified were persons who had been convicted of serious crime, those who had an interest in the litigation, those who did not profess the Christian faith, those who were mentally disordered, and those of tender years whom the court considered incapable of appreciating the nature of an oath. The modern trend, however, has been to allow all persons to give evidence but to permit the trier of fact to take into account, in determining the weight which should be given to their testimony, those characteristics of the witness that would formerly have disqualified him. The proposed legislation would bring this trend to its logical conclusion. Rules respecting corroboration of a witness' testimony may need to reflect this relaxation of competency requirements.

Mental Capacity

Few witnesses have been disqualified because of mental incapacity. Few counsel would tender such a witness. If a witness of doubtful mental capacity is called, the trial judge has great difficulty in distinguishing between incapacity which affects credibility and incapacity which excludes the witness entirely. It seems preferable therefore simply to let the triers of fact, property instructed by the trial judge, take into account any such incapacity in assessing the weight to be given to the testimony.

Children

Under the present law the testimony of children of tender years is treated in a special manner. The judge must be satisfied that the child, before being sworn, understands the nature of an oath. If he is not so satisfied the evidence of the child may be received if the judge is satisfied that the child is possessed of sufficient intelligence and understands the duty of speaking the truth, but no case shall be decided, nor conviction sustained, unless such evidence is corroborated. The complexity of the present rules and the consequences of error, together with their disparate interpretation and application, are sufficient reasons for change aside from the question of their justice.

Since the currently expressed judicial attitude to the testimony of children, even when sworn, is that trial judges ought to instruct the jury respecting the frailties inherent in the child's immaturity which may affect his capacity for observation, recollection, and communication, and his moral responsibility, there is no reason for erecting an additional preliminary hurdle for children which is not faced by adult witnesses. The inherent difficulty in distinguishing between degrees of mental incapacity, suggests that, similarly, a child's infirmity would be better treated as a matter of credit than of competency. To insist on an answer from a child as to what divine retribution will follow a lie under oath is to insist on an answer that no adult, not even the most learned moral theologian, could give. 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 respecting the importance of telling the truth. Before making a definite recommendation to the Commission, the Project proposes to await the results of empirical studies concerning the evidence of children generally, with some regard to the Israeli system which permits the reception of the evidence of children, in trials involving sex offences, through a youth examiner's testimony, without insisting on the child's personal attendance.

Judge and Juror

Numerous problems would arise if a judge or juror were to take the stand as a witness in a case with which he was involved. If his evidence is contradicted or his credit attacked, does he join in determining the acceptability of his own testimony? Does the judge determine the limits to his own cross-examination? Could counsel conduct an effective cross-examination without fear of offending his trier of fact? Would the judge's testimony carry unfair weight with the jury? To permit a judge or juror to be a competent witness would be fundamentally inconsistent with the requirement that a tribunal must be seen to be impartial. The proposed legislation rendering them incompetent should work no hardship as the occasion will seldom arise in which their testimony is essential and, when it does, suitable arrangements for another arbiter could be made.

Lawyers

Although a number of early Canadian decisions hold that counsel is not competent as a witness, more recent cases hold that he is technically competent but that the practice of his giving evidence is objectionable and should be discouraged. Although there are a number of reasons why counsel should not call himself as a witness, and these will discourage him from so doing, particular cases may produce great hardship if he is totally forbidden to take the stand. It is concluded that the matter should be handled by the provincial governing bodies as a question of professional ethics and practice and therefore the proposed legislation does not make lawyers incompetent to testify in cases in which they are acting as counsel.

Testimony by a Spouse

By section 4 of the Canada Evidence Act the spouse of an accused person is incompetent to testify for the prosecution except on the trial of certain offences therein specified for which the spouse is both competent and compellable. The section also provides that if a spouse testifies at trial, he or she has a privilege to refuse to disclose any marital communication. Both rules of law are discussed here since for at least the last century they have been retained for the same reason: the protection of the marital relationship. It is proposed to recommend to the Commission the abolition of both rules thus making the spouse of an accused both competent for and compellable by the

Crown as well as the defence in all cases, and removing the marital communication privilege. This decision was made after weighing the competing interests of the possible protection of marital relationships and the protection of society from a person who may be dangerous.

Competence and Compellability of Spouses

The historical reason for the common law rule rendering one spouse incompetent to testify for or against the other spouse was that husband and wife were regarded as one person and, since the litigant-spouse was incompetent to testify because of interest, the other spouse also was considered incompetent. When this mystical unity of husband and wife was abandoned as a scriptural fiction, the incompetency of the spouse was rationalized on the grounds that he or she had an interest in a law suit of his or her spouse. The present rationale put forward, after incompetency on the grounds of interest was abolished, is that if one spouse was compelled to testify against the other spouse, not only would it be unseemly, but it would endanger the marital relationship. Thus the rule, rather than the reflection of a clear-cut fundamental policy decision, appears to be simply a product of history. This is confirmed when we note that a fundamental policy decision surely would be based on concern not only for the married couple but for the family unit as a whole, and yet no one has suggested legislation making fathers and sons or mothers and daughters incompetent witnesses for the prosecution against their parents or children.

Perhaps a century ago society was unwilling to imperil in any way a single marital relationship. It will be recalled that in England until 1857 marriages could be dissolved only by special legislation. However, the recent divorce legislation in Canada shows that now we do not consider that a marriage should be preserved at all costs. So it may well be that the present society, in weighing the competing interests previously set out, would regard its interest in convicting the guilty as heavily outweighing its interest in preserving the very small number of marriages that removal of this ground of incompetency might affect. If the spouse is willing to testify in aid of the prosecution, family harmony is certainly, in the vast majority of such cases, beyond saving. There is no reason to permit the accused to prevent his spouse from testifying and it is proposed to recommend therefore that, at the least spouses be made competent witnesses for the prosecution.

We also propose to recommend that spouses be compellable witnesses for the prosecution in all cases and not just those enumerated in Section 4. We propose this for three reasons. First, while the specifically enumerated crimes are of a kind that show that marriage is probably not working well and is deemed therefore not worth preserving, it is very difficult to draw a distinction between those crimes and many others that could be added to the list. Second, to make the spouse compellable saves him or her from having to make the decision herself and so relieves her from the consequent pressures such decision-making would bring. Finally, the possibility of animosity

between the spouses might be reduced if the law demanded her attendance as a witness since the defendant spouse could not then consider her attendance to be on her own initiative. It should also be noted that a party's spouse is currently compellable by both sides in civil cases and in provincial prosecutions and that there is no evidence of marriage breakdown resulting therefrom. It is recognized that in some cases it may appear harsh to require family members to testify against an accused, and the solution may be to give 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.

Marital Communications

Currently, no witness is compellable to disclose any communication by his spouse made to him during their marriage. If the reason for the rule is to protect a marital relationship existing at the time of the trial, then the same arguments previously advanced for making the spouse competent and compellable apply here. If the reason is to encourage frank communication between husband and wife, it is not at all certain that the right of one spouse freely to confess a crime to the other spouse is necessary for a viable marital relationship or is an important value worth protecting for any other reason. Even if it is, the present law probably has no effect on disclosures between husband and wife as few citizens today even know of the privilege.

Conversely, a person who knows the present law could never be sure that the privilege would apply at a later stage because he would also know that the privilege respecting communications during marriage might not apply after divorce.

The rule as it presently exists does not make sense. It is clear that if the rationale is to encourage frank communications, the privilege is given to the wrong person. According to the section, it is the spouse who is giving evidence who has the privilege, but if we wish to encourage frankness in communication, it would be the person who made the communication who would have the privilege and not the recipient. Further, the privilege does not cover private or confidential acts done in the presence of the spouse. Nor does it embrace the family unit and include communications with minor or dependent children.

We therefore propose to recommend that the privilege for marital communication be abolished.

SECTION 2 - THE OATH

The use of the oath in judicial proceedings, like the law in relation to the competency of witnesses, has undergone considerable historical development. At one time, of course, the oath was considered a method of proof. Later it operated to disqualify as witnesses all those except Christians who were prepared to swear on the gospels. In the middle of the eighteenth century the requirement that all witnesses give evidence on oath was held to exclude only those who had no fear of divine punish-

ment. Finally, in England in the nineteenth century, atheists or those who refused to take the oath because of conscientious scruples were permitted to testify by affirming, and this is presently the law in Canada. By section 14 of the Canada Evidence Act the witness, before he can affirm, must object "on grounds of conscientious scruples." We feel that a person should not be forced to declare publicly his religious beliefs, or the lack of them. At the very least, the law should give the accused the choice of giving evidence under oath or affirmation by providing simply that, "every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law." However, some triers of facts may take the view that an affirmation is a less powerful deterrent; that a witness who affirms is less reliable than one who swears. Such an inference is unacceptable since it means that the quality of the evidence by one who affirms might be unjustly impaired and a witness who takes an oath may have his testimony unjustly bolstered. It is proposed therefore to go further and abolish the oath completely. Many countries recognize the strong pull of self-interest in criminal cases by not requiring, and in fact forbidding, the accused or his relatives to take an oath. Many people do not take the oath seriously; for many it has become a meaningless perfunctory ritual. Indeed, organized religion may be quite relieved to have the linking of God and what we know in many cases to be false oaths done away with. In any event, this is a matter upon which we hope to get the views of religious

bodies. Many religious persons must recognize the hypocrisy of oath-taking as it now tends to be practised. Indeed, in many cases, it can only be regarded as tantamount to blasphemy. Moreover, all religious beliefs that we know of require that the truth be adhered to whether a solemn promise is made or an oath taken.

The oath, therefore, is more than a harmless relic. It is a ritual which, even though only in a small way, contributes to the mythology of courtroom proceedings. Its very presence is incongruous at a time when we are attempting to have respect for the courts stem from the fairness of their proceedings and the solemnity of their tasks. A witness' sense of responsibility for telling the truth should issue neither from a reminder of divine retribution, nor from the solemn assumption before God of a moral obligation to speak the truth, but rather from his responsibility as a citizen in a democratic society. This can be imparted to him just as effectively by the legislation which we propose to recommend, which reminds him of the purpose of the trial and the possible consequences of his evidence, as it can by the repetition of an oath.

Study Paper #2

LAW REFORM COMMISSION OF CANADA

A Study Paper by the
Law of Evidence Project

MANNER OF QUESTIONING WITNESSES

POSSIBLE FORMULATION OF PROPOSED LEGISLATION

Manner of Questioning Witnesses

Section 1. (1) The examination of a witness and the presentation of his evidence shall be conducted in such manner as may be determined by the party producing the evidence, except that the judge or other person presiding at a proceeding shall exercise reasonable control over such examination and presentation so as to ensure that the witness gives his evidence in a fair and expeditious manner and in a form that can be readily understood.

(2) For the purpose of exercising the control referred to in subsection (1), the judge or other person presiding at a proceeding may determine any matter, including:

(a) the order in which witnesses shall be called and examined and other evidence shall be introduced;

(b) the number of witnesses that may be called by any party to give evidence on any relevant matter;

(c) the number of counsel for any party that may examine or cross-examine a witness;

(d) any restrictions that should be imposed upon counsel in his examination or cross-examination of a witness so as to ensure that:

(i) the witness is not misled, intimidated or harassed; and

(ii) the witness is permitted, so far as is practicable, to give his evidence as a continuous narrative;

(e) the use that may be made by witnesses and counsel of models, maps, plans, photographs and other like objects or documents for the purpose of illustrating the evidence of a witness or the argument of counsel, and

(f) the use of exhibits by a jury, or other persons whose duty it is to determine the facts, during their deliberations on the verdict.

Section 2. (1) Except as provided in subsection (2), the party calling a witness should not ask him a question that is so framed as to suggest the desired answer.

(2) Subsection (1) does not apply where, in the opinion of the judge or other person presiding at the proceeding,

(a) the question relates to an introductory or other undisputed matter;

(b) the examination of the witness would be unduly prolonged or protracted by any other form of questioning, because of his mental or physical condition, his difficulty in expressing himself in the language in which the proceedings are being conducted, his age or other like reason;

(c) the witness is deliberately suppressing evidence on matters that are known to him;

(d) the witness is reluctant to give evidence or is being evasive in his answers; or

(e) the question will tend to elicit fairly in the circumstances the honest belief of the witness.

(3) 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.

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.

Section 4. (1) Subject to subsection (2), a party examining a witness may put to the witness any question, or use any writing, object or other means of stimulating the memory of the witness if the judge or other person presiding at the proceeding finds that:

(a) the witness is unable to recall fully a matter on which he is being examined; and

(b) 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.

(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.

Section 5. (1) Except as provided in subsection (2) the judge or other person presiding at a proceeding shall, at the request of a party to that proceeding, exclude from the courtroom or other place where the proceeding is being conducted any witness who is not being examined so that such witness cannot hear the evidence being given by witnesses who are being examined.

(2) The judge or other person presiding at a proceeding shall not exclude from the courtroom or other place where the proceeding is being conducted, any person who

(a) is the accused in a criminal proceeding or a party in a civil proceeding or other matter;

(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;

(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;

(d) in the opinion of the judge or other person presiding at the proceeding, can remain without prejudicing any of the parties.

(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.

COMMENT

SECTION 1 - GENERAL RULE RESPECTING COURSE OF THE TRIAL

Introduction

The proposed section attempts to codify the authority that the trial judge has under the present law to control the conduct of the trial. The section makes it clear that the trial judge is to be considered as more than a mere passive umpire or referee at the game of litigation. He has an affirmative responsibility in both criminal and civil cases to see that the trial is conducted fairly, expeditiously, and intelligibly. The section is necessary because in many instances trial judges appear to be in doubt about their discretionary powers. Ordinarily, of course, the presentation and examination of witnesses will be left to the lawyers for the parties, and will be uninterrupted by the judge. This is necessary not only because the parties themselves in an adversary system should have the primary responsibility for presenting and going forward with their case but also because usually only the parties will know the essentials of their case, the witnesses to be called, and the facts they wish and need to elicit.

Subsection (2) does not limit the generality of the general provision but was included for illustrative purposes and to resolve any doubts on the particular points mentioned. If there are other problem areas in the conduct of a trial in which trial judges are uncertain about the extent of their discretionary power, the Project would appreciate having these called to its attention.

Note that this section of the Code deals only with the trial judge's discretion to control the mode and order of interrogation. It does not give him authority to exclude evidence on the grounds that it is unfairly prejudicial, time-wasting, or confusing. Such an ability may be conferred in another section of the Code.

Subsection (2)(a) - Order of Presentation of Evidence

Normally, the plaintiff or the prosecution will open the evidence and will be required to introduce, before resting, all the evidence which they intend to offer upon every issue that is a necessary element of their case. Then the defendant will introduce all the evidence he intends to offer both in rebutting the plaintiff's or prosecution's case and in alleging any affirmative defence. Thereafter, if necessary, each party will introduce evidence alternately until each has had an opportunity to rebut any new evidence introduced by the other. 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 inadvertence or some other excusable circumstance has failed to introduce evidence in its proper order.

It is sometimes assumed that counsel have the absolute right to decide the order in which their witnesses are called and the order in which items of evidence in support of their case are

introduced. At common law, however, trial judges had a discretion to vary this order if they thought it was necessary in the interests of justice, and the proposed legislation makes it clear that they have retained this power for use in exceptional cases. In general, the court should be very reluctant to interfere with the sequence in which a party calls his witnesses. If the adversary system is to work efficiently, each counsel must be permitted to make the most effective possible presentation of his case. The order in which his witnesses and his written evidence is placed before the trier of fact is of the utmost importance. Only the parties and their counsel will be aware of the complexities and exigencies of the case and of their intended tactics.

In England the trial judge currently has a discretion to order the accused to testify, if he proposes to testify at all, as the first witness for the defence. The reasoning is that this prevents him tailoring his evidence to conform to the testimony of other defence witnesses which he has heard and also prevents his preparation for the line of cross-examination exhibited by the prosecution. In Canada, however, it has recently been held that the decision to call the accused as the defence's first witness is a decision solely for the defence counsel. The argument for retaining what appears to be the present Canadian law is that often defence counsel may have very important and legitimate reasons for not putting the accused on the stand as his first witness. Since the Crown is able to present its

evidence in the most effective and persuasive manner, the defence should have the same ability and this may often mean developing the defence's case in a way which precludes the accused from testifying first. It is also urged that often defence counsel will be undecided about whether to call the accused until he has assessed the impact of the testimony of other defence witnesses. Moreover, since both the prosecution and the judge can comment under the present law on the opportunity of the accused to hear the evidence of other defence witnesses and to tailor his testimony accordingly, there is no compelling reason why the present practice should be changed.

The project envisages at least four ways of dealing with this problem and is particularly anxious to receive comments on them:

(1) No provision would be enacted affecting the present practice,

(2) A provision could be enacted making it compulsory for the accused to testify, if at all, as the first defence witness, except in exceptional circumstances,

(3) The judge could be given a discretion to order the accused to testify first, if at all, or

(4) Since the practice seems to vary across the country, a provision could be enacted specifically providing that the prosecution and trial judge can comment on the accused's failure to testify first, if he testifies.

Subsection (2)(b) - Number of Witnesses

While the trial judge would seldom limit the number of eyewitnesses to an event in dispute, the proposed section confers a broad discretion permitting him to limit the number of character witnesses and expert witnesses. Present legislation limits the number of experts to five but provides the trial judge with the discretion to give leave for more. Since it is impossible to predict the number of experts appropriate to a particular case it was deemed sensible to remove any numerical specification.

Subsection (2)(c) and (2)(d) - Number of Counsel and Type of Questioning

To permit the trial judge to fulfil his duty to administer an expeditious, orderly, and fair trial, the proposed legislation recognizes his power to protect witnesses from undue pressure and unfair tactics. The trial judge may limit the number of counsel that may examine or cross-examine a witness and may disallow questions which are ambiguous or unintelligible, compound, argumentative, too general, misleading, repetitious, questions that misquote a witness, and questions that assume facts not in evidence. In deciding whether to permit particular interrogation tactics, the judge will have to consider the importance of the witness' testimony, the nature of the inquiry, its relevance to credibility, and the vulnerability and disposition of the particular witness.

The usual procedure in examining a witness is by question and answer. This is often necessary to guide the witness, since the rules of substantive law make irrelevant much that a layman might think pertinent, and because the exclusionary rules of evidence render inadmissible much that is logically relevant. On the other hand, a perfectly proper narrative can be broken and made ineffective, and the witness hindered and confused, by needless interrogation. Usually it will be a tactical question for counsel to decide whether the information which the particular witness will give can be elicited more effectively by a succession of questions about specific facts and happenings or by a general question calling for a narrative answer. This legislation makes it clear that the trial judge has a discretion to control the form of examination to the end that the facts may be clearly and expeditiously presented.

Subsection (2)(e) - Use of Demonstrative Evidence

This paragraph applies to the use of demonstrative evidence for the single purpose of illustrating the testimony of witnesses or counsel's argument. Thus the devices used need not be authenticated or admitted as independent evidence. In determining whether a particular model should be used for illustrative purposes, the trial judge will weigh its value in illustrating the evidence against the possibility that it may confuse or mislead the trier of fact.

When studying Real Evidence, the Project may impose requirements on its use, such as a requirement for notice to the adverse party and an opportunity to inspect, which might affect the exercise of the trial judge's discretion under this paragraph.

Subsection (2)(f) - Use of Exhibits in the Jury Room

In exercising his discretion under this paragraph the judge will weigh the assistance the exhibit might be to the jury in testing the inferences for which such items of evidence are offered, or in understanding the evidence, against the danger that the exhibit may result in an undue emphasis on certain of the evidentiary facts, or will otherwise confuse them.

Section 2 - Leading Questions

This proposed section, although in substance a restatement of the existing law, is an attempt to word the prohibition against asking leading questions, and its exceptions, in terms of the underlying rationale of the rule. Although it continues the traditional view that, because of the suggestive powers of leading questions, they are as a general proposition undesirable if put by the party who called the witness being examined, the section recognizes that the matter clearly falls within the area of control by the judge over the mode and interrogation of witnesses, and accordingly even the general provision is phrased in words of suggestion rather than command.

The section does not use the word "leading question" but instead defines the prohibited question as "a question that is so framed as to suggest the desired answer". Although there is no mechanical test for distinguishing a leading question from a non-leading question, this definition is consistent with that advanced by most authorities. Obviously, in determining whether a question is leading, that is, whether it suggests the answer, the trial judge will have to consider not only the manner in which the question is framed but also the inflection of the questioner's voice and perhaps even the non-verbal conduct of the questioner.

The principal rationale for not allowing leading questions is that, if a witness is sympathetic to the lawyer questioning him, and in particular if he has talked to the lawyer before the case and reached an agreement with him about the facts, the witness will be especially susceptible to suggestions from the lawyer as to what the facts were. Therefore he may acquiesce in a false suggestion, either by adopting an assertion only approximately accurate or by adopting it even if he thinks it is inaccurate because he thinks his questioner wants him to. Also, by asking only leading questions, a lawyer could assure that his witness did not testify about any matter unfavourable to his case.

Under existing law there are four well-known exceptions the rule prohibiting leading questions on direct examination, and the proposed section recognizes all of them. Basically, the

exceptions to the rule permit leading questions on direct examination where there is little danger of improper suggestions and the asking of leading questions will save time, or where such questions are necessary to obtain relevant evidence.

Subsection (2)(a) would permit leading questions on direct examination for introductory matters, such as the name and occupation of the witness, and any other matters not in dispute between the parties. In these instances the danger of false suggestion is absent and it is a waste of time to ask non-leading questions. Obviously the decision of whether or not to frame a leading question under this exception will depend primarily on the good sense and fairmindedness of the examiner.

Subsection (2)(b) covers many instances in which leading questions are necessary to obtain relevant testimony. It seems generally agreed that the rule against leading questions should be relaxed when strict adherence to it would have the effect of depriving the court of the witness' testimony. This section will often be used when a witness fails to answer a question because his recollection is exhausted and the examiner wishes to suggest to him facts or circumstances which may refresh his memory, but it will also be used when the witness is a child or otherwise so handicapped, timid, ignorant, embarrassed, evasive, or so deficient in the language in which the proceedings are being conducted that he cannot otherwise be brought to understand what information is sought. Obviously no attempt can be made to list

the numerous situations that might appear before the courts and require the application of this section. Of course in most of these situations the danger of false suggestion is at its highest and therefore it is a matter peculiarly for the trial judge's discretion.

Subsections (2)(c) and (2)(d) describe the exception to the prohibition against asking leading questions when a witness is hostile to the party calling him. In these instances the normal assumption about the relation between the witness and the questioner on direct examination does not hold. Instead of agreeing on the facts, or at least being favourable to the interests of the party for whom he is called, and therefore anxious to oblige him, the witness is hostile to the party. Under the present law many courts have given a literal and limited meaning to the concept "hostile" and consequently the scope of this exception has perhaps been narrower than the reasons for it would dictate. The wording of the proposed legislation makes it clear that if the trial judge finds that the witness does not desire to give testimony which is favourable to the party calling him, or for some other reason is reluctant to tell what he knows, then leading questions should be permitted. 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.

At common law the trial judge had a discretion to allow leading questions if the interests of justice demanded it. 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.

Subsection (3) states the well-known rule that, generally, it is no objection to a question asked in cross-examination that it is a leading question. However, the section also recognizes that, if the witness is biased in favour of the cross-examiner and hostile to his adversary, the reason for not allowing leading questions applies as much on cross-examination as it does on direct examination in the usual case. The danger that the witness would be unduly susceptible to the influence of questions that suggest the desired answer is equally present.

Section 3 - Calling and Questioning of Witness by the Judge

Under the present law, although it is generally conceded that the judge can at any time question witnesses, in civil cases at least it is felt that the trial judge has no power to call a witness unless all parties consent, or at least fail to object. In criminal cases most courts have held that the trial judge does have power to call any witness on his own volition, even over the objections of the parties. The Project has come to the conclusion that no justification exists for this distinction

between civil and criminal cases and that in both cases the judge should have full authority to call and question any witness.

The Anglo-American trial system is often characterized as the adversary system and it is sometimes argued that to allow the judge to call his own witnesses is inconsistent with this most basic premise of our procedural system. The Project did not feel this was so. The members regard the adversary system as only a means to an end: the disclosing of truth and 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. There could be instances in both criminal and civil cases where a party might not wish to call a witness because of his uncertainty about the testimony the witness might give, or because, although the witness' testimony might be favourable to the party on one issue

before the court, on another issue his testimony might be very damaging. This might be the position of a party even if the rules relating to impeachment and the asking of leading questions were liberalized. Also 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, since there is a tendency to associate a witness with the party who calls him. Of course the judge's power of calling witnesses is general and is not limited to meeting the particular needs suggested here.

Allowing the judge to call and question witnesses might also meet two frequent criticisms of our present system. First, it will go some way toward meeting the criticism that our legal system tends to resemble a game between contestants rather than a controlled search for truth. 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.

Some members of the Project thought that the broad wording of paragraph (a) might lead some judges to usurp the function of counsel by calling witnesses whenever they thought

it convenient. These members were therefore in favour of, at the least, adding a provision to the section such as, "The judge may call a witness on his own motion only after the parties have concluded their evidence." However, the other members of the Project did not think that the danger that a trial judge might abuse his discretion should make it impossible for all trial judges to decide that in a particular situation it was necessary for the proper administration of justice to call a witness during the presentation of a party's case.

Paragraph (b) gives the judge the authority to question any witness. This power is implied in paragraph (a) and is clearly recognized by present law. Indeed under present law not only is the judge undoubtedly entitled to ask questions, in some circumstances he has a duty to do so. The judge will usually intervene with questions, if at all, when both counsel have finished their examination and then he will do so only for the purpose of informing himself on some material matter which has not been brought out, or is obscure, or to afford a witness an opportunity to explain a particular answer. But he may also ask questions during the examination by counsel if it is necessary to assist a confused or hesitant witness, to clarify any matter raised in the examination, or to force an unwilling or evasive witness to answer questions.

Although the limits of the trial judge's discretion to question witnesses is not susceptible to formulation in a rule, he must of course avoid extreme exercises of the power to question

just as under the present law he must avoid extreme exercises of his power to comment on the evidence. He must also pay due regard to the rights of the examining lawyer. Not only might excessive judicial interruption impair the effectiveness of counsel's examination and the ability of the judge to observe the demeanour of the witness, but also lengthy questions might make it difficult for the judge to avoid the appearance of bias or prejudice. If, in questioning witnesses, the judge crosses the line between judging and advocacy, he is obviously abusing his discretion.

Section 4 - Refreshing the Memory of a Witness

This section deals with the situation in which a witness' memory about a particular event is vague or in which he has a temporary total failure of recollection and thus cannot give effective testimony unless his memory is stimulated or refreshed. 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. They are most likely to occur when the witness is excited or confused by the unusual courtroom experience, when something unexpected happens, when the facts to be testified to are complex, or when the witness, for instance a police officer or doctor, has been involved in so many similar situations that he would be unable to remember the particulars of each situation without refreshing his memory.

The most common means of refreshing memory is the presentation of writing, but, since memory is revived by the association of ideas, the section makes it clear that any object, such as pictures, even kangaroos, may be used to refresh memory.

Subsection (1) places no restriction on the writing that may be used to refresh recollection. Under the present law it has been held that, before a witness can use a written statement to refresh his memory, such a statement must be proved to have been made substantially at the time of the occurrence of the events about which the witness is testifying, made for the purpose of recording the event, and made or read over by, or under the supervision of, the witness.

The proposed subsection rejects these restrictions and provides that a witness can refresh his memory from any writing which the trial judge decides can be used legitimately for that purpose, whether or not the writing was made contemporaneously with the events reported, whether or not it was his own writing, and whether or not it was written for the purpose of making a record of the events reported. 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. The subsection thus clarifies the distinction between the requirements of foundation testimony for a writing used to refresh memory and for writing used as past recollection recorded. The requirement that writing used to refresh memory must have been made

made contemporaneously with the event and approved by the witness resulted from a confusion between the theory justifying refreshing recollection and that permitting a witness, with no present memory to testify with the aid of writings representing his past recollection as recorded by him. It is only the foundation for past recollection recorded that logically requires that the writing be made contemporaneously with the event reported, that the witness before its use disclaim any present recollection of the events, and that the witness recall the making of the statement as representing accurately his perceptions at the time. The early English cases recognized this distinction and imposed no restriction upon the use of memoranda to refresh recollection.

Refreshing memory is premised upon the basic principle of memory-association which is a part of everyday experience, often taking the form of a "reminder". If the witness is shown some objects or writing related to the desired testimony, his memory of these facts may be revived, and he may be able to testify to their existence independently of the writing shown him. Thus it is his testimony which is evidence, not the writing. Obviously, if his recollection is to be refreshed, there is no need for any safeguard about the writing to be used, its sole purpose being to revive his memory; having been introduced for that function, it is not evidence. However, if the witness is unable to revive his memory, but is able to state that he recognizes the writing shown to him, and recalls that when the facts were fresh in

his mind he regarded the statement as correct, then special safeguards are needed to ensure the accuracy of the writing, since the evidence depends upon the reliability of the writing and not on the witness' present memory. The Project will be dealing with this latter situation when it studies hearsay evidence.

There are dangers in allowing a witness to use any writing to refresh his memory. Upon viewing such writing the witness may legitimately recall the event and his memory be thus revived; but he may be led by the suggestion of the writing to think that he independently recalls the event. There is then a clear danger that the imagination, rather than the memory, will be stimulated, and the witness will simply proceed to parrot or paraphrase the written words. This danger admitted, it still seems better to permit the use of any memorandum or object as a stimulus to present memory, without restriction as to authorship, guarantee of correctness, or time of making. It was felt that adequate safeguards existed to prevent abuse of the rule. First, the section sets out that it is a preliminary question for the judge to decide whether the writing actually is capable of or in fact did refresh the witness' memory. 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. Second, under

subsection (2) the judge would be entitled to allow the adverse party to examine the writing and to make objections before it is used. After the writing is used, the adverse party is of course entitled to examine the writing and cross-examine on it. 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. Also, although the party using the writing is not entitled to put it into evidence under the section, if the adverse party wishes, he may introduce the memorandum or a copy of it into evidence and submit it to the jury for their inspection. 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.

Under the present law, some cases deny the adverse party any right of access to a document which a witness uses to refresh his memory before he takes the witness box. The proposed subsection makes it clear that an adverse party has the right to inspect any writing used to refresh a witness' recollection, whether the writing is used by the witness before or during his testimony. The reasons for allowing inspection seem equally applicable to writing used by a witness to refresh his memory before he testifies and to writing used while he testifies, and the need of a safeguard is just as great in both situations.

The moment in time when the writing is used is fortuitous and unrelated to the reason for the rule requiring production of things used to refresh memory. 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.

Section 5 - Exclusion of Witnesses

Under the present law, the judge has a discretion to order the exclusion of witnesses upon the request of either party. By separating the witnesses, the order prevents the individual witness from hearing the testimony of other witnesses, and thus prevents him from changing his own testimony to make it conform to that of the other witnesses. Further, the separation of the witnesses may make it possible to show that they are telling identical stories, or are frequently using identical language, which may indicate that the testimony is a memorized story or a possible fabrication. Also it prevents the witness from learning and preparing for the direction cross-examination will take.

Proposed subsection (1) codifies the present law. Although the judge makes the order for exclusion, the parties and their lawyers are chargeable with the duty of seeing that their witnesses comply with the court's order. If a witness knowingly remains in the courtroom in disobedience to the judge's order, his evidence will be scrutinized with care, comment may be made upon it by counsels or judge, and he might be subject to prosecution for contempt.

Subsection 2(a) states the well-recognized rule that the order of exclusion does not apply to the parties. This exception is based on the right of the parties to confront and face all witnesses and opposing parties.

Subsection 2(b) permits the lawyer to have present with him in the courtroom the person most knowledgeable about the lawsuit if the party is a non-natural person.

By subsections (2)(c) and (2)(d), the judge is given discretion to exempt witnesses from the rule. Most often this discretion will be exercised in favour of expert witnesses, or, in criminal investigations, the investigator who had charge of the investigation.

Subsection (3) provides the trial judge with a discretion to prevent the parties from circumventing the policy of the section by informing witnesses who have not testified of matters already testified to.

Study Paper #3

LAW REFORM COMMISSION OF CANADA

A Study Paper by the

Law of Evidence Project

CREDIBILITY

Possible formulation of Proposed Legislation

Credibility

Section 1 Except as otherwise provided in this Part, any party in a trial or other proceeding, whether criminal or civil, may, for the purpose of attacking or supporting the credibility of a witness called by him or any other party,

(a) examine the witness, or

(b) introduce extrinsic evidence,

concerning any matter relevant to his credibility.

Section 2 Evidence relevant to the credibility of a witness may be excluded, if, in the opinion of the judge or other person presiding at the trial or other proceeding, its probative value is substantially less than the likelihood of

(a) creating unfair prejudice to the witness or to any party in the trial or other proceeding,

(b) confusing the issues to be decided,

(c) misleading the jury or other person or persons whose duty it is to determine the facts, or

(d) unduly delaying the trial or other proceeding.

Section 3 (1) 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

(a) for the purpose of attacking the credibility of the witness, and

(b) for the purpose of supporting the credibility of the witness if any evidence has previously been adduced for the purpose of attacking his credibility.

(2) Except as provided in section 4, evidence of specific instances of the conduct of a witness that is relevant only to his veracity and honesty, is inadmissible.

Section 4

(1) Subject to (2), evidence that a witness has been previously convicted of an offence is inadmissible for the purpose of attacking his credibility, except that the judge or other person presiding at the trial or other proceeding may, in his sole discretion, following an inquiry to be held in the absence of the jury, if there is a jury, decide that it ought to be received on the grounds that

(a) the previous offence involved a false statement or an element of dishonesty,

(b) the previous conviction was not too remote in time from the proceedings over which he is presiding, and

(c) the party attacking the credibility of the witness can produce evidence of the record of the previous conviction.

(2) If the witness is the accused in a criminal proceeding, evidence of his previous conviction for an offence is inadmissible for the sole purpose of attacking

his credibility unless he has first introduced evidence for the sole purpose of supporting his credibility.

Section 5 (1) When a witness is being examined as to a prior statement made by him, it is not necessary to

(a) disclose to him any information concerning the prior statement, or

(b) if the prior statement was made in writing, to show, read or disclose to him any part of the writing.

(2) Extrinsic evidence of a prior statement made by a witness, that is inconsistent with any part of the testimony of the witness, is admissible only after the witness has been given an opportunity to identify, explain or deny the statement.

(3) When a prior statement made by a witness is admissible, it is receivable

(a) to establish the truth of the matter stated, or

(b) to attack or support the credibility of the witness.

COMMENT

SECTIONS 1 and 2 - GENERAL RULES RESPECTING CREDIBILITY

Introduction

These sections are based on the theory that, unless some strong consideration of policy calls for unconditional exclusion, or the trial judge in his discretion determines that the probative value is substantially outweighed, all relevant evidence respecting credibility should be received. No attempt is made to define or catalogue those matters which may be so received since they will vary with the ingenuity of counsel and the circumstances of each particular case. Besides observing the witness' demeanour while testifying, the court may be persuaded by evidence affecting credibility such as his opportunity and capacity to observe, his power of recollection and narration, the existence or non-existence of a bias, interest, or hostility, previous statements consistent or inconsistent with the witness' present testimony, and the witness' character for truthfulness or otherwise.

Collateral Facts

Witnesses may be discredited by introducing other evidence to contradict a fact to which the first witness has testified. The object of this kind of impeaching evidence is to show that the witness, having made an erroneous

statement on one point, is capable of making errors upon other points. By the present law, this kind of impeachment is subject to the "collateral facts" limitation which precludes contradiction of facts that are not relevant to a substantive issue. The rationale for this limitation is not that such contradiction is irrelevant to credibility but rather that it may produce the dangers of surprise and confusion of issues and may waste time. One effect of these sections is to eliminate the existing inflexible rule of exclusion. The Project concluded that it was better to leave the decision to exclude to the individual trial judge's discretion. The trial judge would weigh the above risks against the probative value of the contradiction on the credibility of the witness as it affects the ultimate solution of the particular case.

Impeaching One's Own Witness

Another effect of these sections is to eliminate the rule that a party may not impeach the credibility of a witness called by him. The extent to which a party is prohibited from cross-examining or leading his own witness is dealt with as a distinct matter in another section of the Code.

While parties are free at present to contradict by other evidence the testimony of one's own witness on a material issue, they are prohibited from impeaching his credit

by general evidence of his bad character and also from proving a previous statement by the witness unless the witness is ruled adverse and leave of the trial judge is obtained. These prohibitions may have been justifiable in another time when witnesses played a different role and a party had a real choice of which witnesses he would call. Witnesses are not now chosen from among the party's friends to act simply as compurgators. Today a party is able to select only from those, often previously unknown to either party, who have personal knowledge of the event being litigated and his choice is limited to calling those who appear willing to give helpful testimony. To say that a party, by calling a witness to testify, thereby vouches for his trustworthiness and that it would be unseemly to permit him the right to impeach should the witness give unfavourable testimony is to overlook the realities of the present situation. Today there is no property in a witness and no rule of law should have the effect of assigning a witness to one party or the other.

If no strong policy consideration exists to warrant the exclusion of evidence, the trier of fact should be allowed to receive it to permit the closest approximation to a just decision. Although, the right to attack the general character of one's own witness may seldom be utilized, inconsistent statements may be of considerable value. Since a party's adversary will not elicit the previous contradictory statement, the

existing rule deprives the court of a valuable aid in evaluating the witness' testimony and therefore constitutes a serious obstruction to the search for truth.

A suggested alternative to the Project's recommendation was that, since a party had a free hand in choosing character witnesses and expert witnesses, he should at least be compelled to take their evidence, good or bad. The Project concluded that this qualification could only be supported by tradition and could not be shown to assist the court in reaching a just decision or to promote any other value.

SECTION 3 - CHARACTER OF A WITNESS

Subsection (1) - Opinion and Reputation

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. Though an impeaching witness is not permitted in direct evidence to recite particular instances on which the reputation or opinion is based, the witness is subject to cross-examination thereon. Where a witness' general reputation for veracity is attacked, general evidence that the impeached witness is worthy of credit may be received, but character evidence in support of a witness is inadmissible prior to such attack. This rule is evidently the result of the presumption of a witness' truthfulness and the danger

of raising unnecessary collateral issues. Some consideration was given to eliminating this rule and relying on the trial judge's discretion to exclude the supporting evidence in particular cases, but the Project concluded that receiving evidence of a witness' good character could never be justified unless his character had been attacked.

The proposed sub-section is simply a codification of the existing law with a slight modification permitting use of an individual's opinion to support a witness' credibility as well as to impeach. The question of what, if any, special provision should be made with respect to psychiatric opinion on credibility will be dealt with in the sections of the Code dealing with expert witnesses.

Subsection (2) - Specific Instances

By the present law, except for previous convictions, evidence of specific instances of a witness' past conduct, is inadmissible to attack or support his credibility. The familiar dangers of unfair surprise, undue consumption of time, and confusion of issues outweigh whatever probative value proof of such specific instances may have. Subject to the trial judge's discretion, questions concerning previous misconduct by the witness may be put in cross-examination even if they are irrelevant to the issue being litigated; the witness may refuse to answer such questions and his answers may not be contradicted.

The proposed sub-section makes inadmissible any evidence of previous instances of conduct and this includes evidence in the form of testimony from the witness himself. The proposed legislation would prohibit a party from asking a witness about a specific instance of his previous conduct if it would be relevant only as tending to show a character trait for the purpose of attacking or supporting his credibility. The Project concluded that this type of questioning was of such little value and could be so unfair that it would deter witnesses from coming forward and that an absolute rule of exclusion was to be preferred to leaving it with the individual trial judge's discretion.

SECTION 4 - PRIOR CONVICTIONS

The present law permits cross-examination of, and proof against, any witness, including the accused, respecting any previous conviction for crime. The proposed section makes a distinction between a witness and a witness who is also the accused in a criminal trial since different considerations obviously apply to the latter.

Sub-section (1) - All Witnesses Including the Accused

The present law is evidently based on the assumption that a conviction for any type of crime is relevant to a witness' credibility. The Project concluded that this

generalization is far too broad and that limitations are necessary. The Project was also concerned about the relevance even of previous convictions involving dishonesty or false statement since there might be large differences between the circumstances surrounding the commission of the prior offence and the position of the witness on the stand; we therefore considered restricting proof of previous convictions to convictions of perjury. In the end it was concluded that it would be better to make evidence of all previous convictions inadmissible unless the impeaching party satisfied the trial judge, in the absence of the jury, that he ought to exercise a discretion and receive the same. Guidelines for the exercise of that discretion in weighing the interests of relevancy and fairness to the witness are given in the section based on considerations of the type of crime, remoteness, and ease of proof. The last consideration produces the desirable side-effect that crimes for which a pardon has been granted are not to be considered. The proposed sub-section excludes, without the appropriate showing by the impeaching party, all evidence of past crimes including questioning of the witness himself.

Sub-section (2) - The Accused as Witness

The Project concluded that one of the most significant problems in the administration of criminal justice in Canada is the impeachment of criminal defendants by means

of their prior criminal convictions when they testify on their own behalf. Section 12 of the Canada Evidence Act is based on the fallacy that it is rational to treat the accused like an ordinary non-party witness. If a witness with a criminal record testifies, the effect of the section is to annihilate the rule that makes inadmissible evidence which is relevant because it tends to show that the accused is the kind of man who might have committed the crime charged. 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. Recent jury studies appear to confirm that the suspicion and prejudice created by a previous conviction goes far beyond its truth-testing value.

In the interest of discovering the truth it is important that the accused should be encouraged to take the stand and to tell his own story. The present impeachment doctrine effects an invidious distinction between defendants with and without a criminal record in the exercise of their right to testify. 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 balance between the necessity to inform fully the trier of fact respecting the credibility of the person they are being asked to believe and the grave risk of prejudice in branding the accused a criminal is only shifted when the defendant choses to introduce evidence in support of his own credibility. The proposed sub-section therefore permits evidence of an accused witness' previous conviction, subject to sub-section (1), if the accused has led evidence solely to support his credibility, so that the jury may not be misled.

SECTION 5 - PRIOR STATEMENTS

Prior Consistent Statements

By the present law, a prior statement by the witness which is consistent with his present testimony is not admissible to support the witness' credibility unless it satisfies the criteria of certain exceptions: e.g., recent complaints in sex cases, to rebut the allegation of recent invention, or as part of the witness' identification of the accused. The basis for the rejection of such evidence is apparently the superfluity of such evidence and the danger of parties manufacturing evidence in advance of the trial.

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. The Project concluded that this discretion to exclude was a more satisfactory answer to the superfluity argument than a rigid rule. The ability of counsel to bring out the circumstances surrounding the particular previous statement, exhibiting to the trier of fact the possibility of an interest in the witness to fabricate evidence, and allowing those circumstances to affect the weight to be given to the evidence, seems to be a better protection against the danger of manufactured evidence than an inflexible rule of exclusion with pigeon-hole exceptions.

Sub-sections (1) and (2) - Techniques of Proof

These sub-sections continue the present law with respect to the technique of proof of previous statements relevant to credibility. To ensure the full effectiveness of cross-examination it is not necessary to disclose in advance to the witness any information the party may possess respecting a previous statement. On the other hand, if it is sought to contradict the witness by the previous statement, then fairness demands that, before the party proves the statement, the witness must be given an opportunity to

identify, explain, admit, or deny it. This procedure may also save time since independent proof of the statement will not be necessary if the witness admits to making it.

The proposed legislation changes the existing law by deleting the condition that to be admissible the prior inconsistent statement be "relative to the subject-matter of the case." This seemed an unduly narrow requirement. Obviously the same considerations ought to apply in determining the testimony upon which a witness may be contradicted by his own prior statements as apply in determining the testimony which be contradicted by proof through other witnesses. As noted above, in discussion of the "collateral facts" rule, the Project concluded that it was preferable to leave such decision-making to the trial judge's discretion to exclude.

Sub-section (3) - Prior Statements as Substantive Evidence

When received under the present law, prior statements of a witness, whether consistent or inconsistent with the present testimony, are received only for the purpose of supporting or impairing credibility and they cannot be considered as proof of the facts stated therein. The justification for this limitation is said to be that such a statement is hearsay.

The proposed sub-section constitutes a marked but necessary change in the law. While the absence of the safeguard of the oath is one basis commonly given for the hearsay rule, most would agree that the absence of cross-examination is a far more critical defect in arriving at the truth. Of the two safeguards only the oath is missing when a prior statement of a witness now testifying or available in court is offered as proof of the facts stated. Both the witness' present testimony and his earlier statements are subject to the same test of cross-examination and therefore ought to be received equally as substantive evidence. While some may argue that the efficacy of cross-examination is somewhat impaired when it does not immediately follow the making of the statement, the prior statement does bring with it the promise of greater accuracy since it was made when the event testified to was fresher in memory. Existing law recognizes sufficient probative force in a previous inconsistent statement and its surrounding curcumstances to permit a jury to disbelieve present testimony. It is not consistent to deny that there is sufficient probative force in the statement to permit the jury to believe the statement itself.

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. To argue that bestowing substantive evidential value on previous statements might lead to the manufacture of evidence overlooks the fact that a temptation to do so equally exists under the present law since the jury, despite the instruction, will regard statements, though received solely for the purpose of impeachment, as substantive evidence.

Where the prior statement is that of an accused and is sought to be used in a criminal trial by the Crown, other sections of the Code may be needed to dictate additional requirements respecting its voluntariness and the timing of its introduction at trial.

Study Paper #4

LAW REFORM COMMISSION OF CANADA

A Study Paper by the

Law of Evidence Project

CHARACTER

POSSIBLE FORMULATION OF PROPOSED LEGISLATION

Character

Section 1. Except as otherwise provided in this Code, evidence relevant to the character of any person, or of any trait of the character of any person, is admissible, and may be given in the form of:

(a) opinion evidence, or

(b) evidence of the person's reputation among those who know him or would know about him, or

(c) evidence of specific instances of his previous conduct.

Section 2. Evidence relevant to the character of any person may be excluded, if, in the opinion of the judge or other person presiding at the trial or other proceeding, its probative value is substantially less than the likelihood of:

(a) creating unfair prejudice to any party in the proceeding, or

(b) confusing the issues to be decided, or

(c) misleading the jury or other person or persons whose duty it is to determine the facts, or

(d) unduly delaying the proceeding.

Section 3. (1) Evidence of any trait of character that is relevant solely to the disposition of a person to act or fail to act in any particular manner is inadmissible except:

(a) evidence of a relevant trait of the character of the accused that is:

(i) offered by the accused, or

(ii) offered by the prosecution after evidence has been offered by the accused relevant to a trait of his own character or to a trait of the character of the victim, or

(b) evidence of a relevant trait of the character of the victim of an offence other than a sexual offence, offered either by the prosecution or the accused, or

(c) evidence of the character of a witness as provided in the sections of the Code dealing with credibility.

(2) Nothing in this section prohibits the admission of evidence that the accused was previously convicted of an offence or has previously committed a civil wrong or other act if the evidence is relevant to prove any fact, other than his disposition to commit any such offence, civil wrong or other act, including motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident.

(3) When evidence is admissible under this section it may be given only in the form of:

(a) opinion evidence, or

(b) evidence of the person's reputation among those who know him or would know about him, or

(c) evidence of a previous conviction of an offence.

COMMENT

SECTIONS 1 & 2 - GENERAL RULES RESPECTING CHARACTER

A person's conduct or reputation previous to the event being litigated may be relevant to a material issue in the case without any necessity for an inference having to be made by the trier of fact that the person acted in conformity therewith on the occasion in question. For example, in a case of a-sault, a claim of self-defence might be founded on the accused's belief, based on his knowledge of the victim's previous conduct, that the victim had a disposition towards violent behavious which caused the accused to view the victim's actions with apprehension.

Occasionally the character of a person is a material issue in the case, an operative fact which dictates the rights and liabilities. Examples of such cases when character is a defence or justification, an element of the crime charged or cause of action alleged, or in which it is relevant to the appropriate punishment or measure of damages are: cases involving the lack of fitness or incompetency of an employee; actions for defamation in which justification is pleaded; charges of rape of a female between the ages of 14 and 16 in which the defendant alleges that the complainant was not of previous chaste character; cases in which reputation is material with respect ot the measure of damages.

When character is directly relevant to a fact in issue and not just circumstantial evidence from which conduct might

be inferred, or when the substantive law makes character the very core of the inquiry, evidence of it must be admitted. The proposed legislation dealing with character therefore begins with a broad rule of admissibility and a liberal stance respecting the manner of proof. A discretion is given to the trial judge in Section 2 to exclude in particular cases when the probative value of the type of evidence sought to be used is outweighed by any of the dangers enumerated therein.

SECTION 3 - EVIDENCE OF CHARACTER TO PROVE CONDUCT

Introduction

Character evidence may be relevant circumstantially on the premise that character reflects disposition, and a person's disposition to act, think or feel in a particular way is evidence from which it might be inferred that he behaved in conformity with that character on a particular occasion. Existing rules forbidding the prosecution to adduce evidence of the accused's bad character as part of its presentation in chief, are based not on any concern for relevance but rather on the fact that the danger of unfair prejudice to the accused outweighs the probative value. A trier of fact might convict merely because the defendant is seen to be a person capable of committing a crime or because he is viewed as a bad man deserving of punishment. Also, the trier of fact, having heard evidence of the bad character of the accused, might be less

critical in assessing the evidence of the accused's guilt of the specific offence charged, perhaps feeling that the consequences of a mistake would not be too serious. Therefore, to ensure a rational decision on the merits of each particular case, and to ensure that any person regardless of his past can receive a fair hearing, the proposed section begins with a codification of the existing rule that forbids character evidence that is tendered solely as circumstantial evidence to prove conduct.

Section 3(1)(a) - Character of the Accused

The rationale underlying the rule that forbids the prosecution to initiate evidence of the accused's character, that such evidence might unfairly prejudice the accused, obviously does not apply when the accused himself seeks to introduce evidence of a trait of his character that would render it unlikely that he committed the crime. Section 3(1)(a) states a well-known common law exception to the rule excluding character evidence when used circumstantially to prove conduct. The Project questioned the probative worth of character evidence and the techniques of its proof but was persuaded that an accused in a criminal trial, with his liberty at stake, was entitled to the special dispensation from the general rule that the common law has bestowed. No matter how indefinite character evidence may be as a basis for the prediction of conduct, it may, in some cases, be enough to raise in the mind of a reasonable person

a reasonable doubt about an accused's guilt. The codified exception makes it clear that the accused is not entitled to prove his good character at large but may prove only a trait of his character which is relevant to the crime charged.

If the accused leads evidence of a trait of his character to prove that he did not commit the crime charged, under the existing law the prosecution is entitled to respond with contrary evidence of the defendant's character. This right is codified by the proposed section. This prevents the accused from misleading the trier of fact by presenting a mere parade of partisans, or by giving false testimony as to his own good character. 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 proposed section is adopted, section 593 of the Criminal Code, which permits proof of <u>any</u> criminal convictions should the defendant adduce evidence of good character, would need to be repealed.

<u>Section 3(1)(b) - Character of the Victim</u>

This subsection deals only with the admissibility of character evidence when it is used as circumstantial evidence tending to prove conduct. Under present law, in a prosecution for rape where the defence is consent, the complainant can be cross-examined as to other immoral acts with the accused, and these acts may be independently proved if she denies them.

Such evidence is relevant as tending to prove an emotional relationship between the particular accused and the complainant which might have allowed him to repeat the liberty. It may also be relevant as tending to prove the accused's reasonable belief that on the particular occasion the complainant was again consenting. In a prosecution for homicide or assault in which the defence is self-defence, the fact that the victim's character for violence was known to the accused can be proved as evidence of the accused's reasonable belief that he was in danger. The Project's recommendation here does nothing to disallow the continued reception of this type of evidence.

By the present law the character of the victim, good or bad, is generally not receivable as circumstantial evidence of the victim's conduct on the occasion in question. The only exception exists in cases involving sex offences. For example, in a rape case the victim's reputation as a prostitute may be received as evidence tending to establish that she had consented to the intercourse complained of and character evidence in rebuttal is similarly admissible. Indeed, in some cases the woman's reputation, not her consent, becomes the central issue. Besides questioning the probative worth of such evidence, the Project was deeply concerned with the effects of existing abuses of this type of evidence. 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. The Project

therefore is now recommending 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. 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.

The above-noted concerns were not considered to be as overpowering in the trial of other crimes and the Project is therefore recommending that evidence of the character of the victim should be receivable, when relevant to the crime charged or defence raised, even though such character was unknown to the accused at the time of the incident. For example, in a prosecution for homicide or assault, the victim's character with respect to violence may be of considerable probative value to show that he was the aggressor. Safeguards surrounding the accused's decision to lead this type of evidence are provided by allowing the prosecutor both to rebut the evidence so led and to lead evidence exhibiting a relevant trait of the accused's character. This latter ability, conferred by section 3(b)(ii), was deemed necessary lest the trier of fact be misled; for example, in determining who was more likely to have been the aggressor in an altercation, the trier of fact should be able to take into account character for violence of both the accused and the victim.

The proposed section also permits the prosecution to lead relevant evidence of the victim's good character even though the defendant has not directly adduced evidence of the victim's bad character. For example, in a case of homicide in which the accused alleges self-defence but does not lead evidence of the victim's propensity for aggressiveness, the prosecution would nevertheless be permitted to lead evidence of the victim's character for peaceableness. The danger in this proposal of course resides in possible prejudice to an accused, for the trier of fact may be unduly influenced by the attractiveness of the victim and decide the case emotionally out of feelings of pity or vengeance. 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.

Civil Cases

By the present law, character evidence cannot be used as circumstantial evidence in a civil case to prove the conduct of the parties. It is evidently agreed that character evidence is of such slight probative value that it ought to be excluded in civil cases especially when weighed against the possibility of prejudice, consumption of time, distraction from the main issues and the hazard of surprise. In those civil cases, however, when a party is charged with criminal, immoral or fraudulent conduct,

for example in actions for assault or seduction, or in actions for intentional conversion or for fraud or deceit, the defendant may have his reputation and property at stake as much as in a criminal case involving the same matter. The imputations and even the sanctions may be the same. While the proposed legislation would codify the existing prohibitions and limit proof of character as circumstantial evidence to criminal cases, the Evidence Project is particularly anxious to receive comments on this limitation. Should the legislation give the trial judge a discretion to admit such evidence in civil cases and allow him to balance, on the facts of each individual case, the probative worth against the dangers enumerated above? Should the legislation prescribe that the same rules with respect to character evidence in criminal cases be applicable to civil actions which involve an allegation of moral turpitude? The recommendations of the provincial law reform commissions with respect to civil cases under their jurisdictions will be of great interest.

Section 3(2) - Similar Fact Evidence

Evidence of previous conduct which is introduced solely to prove disposition, and from which the trier of fact is asked to infer that in the particular case the defendant acted in accordance with such disposition, is made inadmissible by proposed section 3(1) subject to certain exceptions. If the evidence of previous conduct is relevant to some factor other than disposition, for example as tending to show motive, intention,

knowledge, identity or the like, section 3(1) is not operative and the evidence would be receivable. Proposed section 3(2) is therefore technically unnecessary and has been inserted solely to codify the existing law and to avoid any misunderstanding and confusion. Evidence of previous similar facts is receivable subject to the codified discretion noted in proposed section 2. The list of purposes in the section is illustrative only since it was believed that a closed list of all possible uses of such evidence could never be compiled and that any attempt to do so might appear to be a complete predetermined index of the kinds of evidence important enough to always overcome prejudicial content.

Section 3(3) - Manner of Proving Character

Listed in descending order of persuasiveness the forms which evidence of character could take are (1) proof of specific instances of the person's conduct as reflecting his disposition, (2) opinion testimony based on the witness' personal observation of the person's disposition, and (3) testimony respecting the person's reputation. The present law allows character evidence, when used circumstantially, to be proved only by evidence of reputation. While evidence of the person's reputation has the advantage of being an aggregate judgment, it suffers from its hearsay base and may be nothing more than community gossip. Opinion evidence of character suffers from the possibility that the witness' personal assessment might be warped by his own feelings or prejudices but it may be of more value than the "secondhand, irresponsible product of multiplied guesses". The Project recommends the codification of the ability to prove

character by reputation and a change in the law to permit proof by opinion testimony as well. It appeared to the Project that the accuracy of each form of proof was equally susceptible to testing and that the danger of collateral issues was no more likely to be inherent in opinion than in reputation evidence. Recognizing that the complex organization and mobility of our present society may deny some persons a reputation in the community, the Project recommends that character may also be proveable by a showing of the person's reputation among those who know him or would know about him. Special problems connected with the use of expert opinion evidence respecting character will be discussed in a separate paper dealing with opinion and expert evidence.

Although evidence of specific instances of past conduct would probably be the most persuasive method of proving character, particularly if a pattern could be shown, the Project decided to codify the existing law which holds that such evidence, other than evidence of previous convictions, should not be receivable as circumstantial evidence of conduct. The proof of alleged particular acts ranging over a substantial period of the lives of the defendant or victim would make preparation to refute the allegations most difficult if not impossible, and the leading of evidence to prove and disprove such acts would result in an undue consumption of time and a confusion of the issues with collateral matters. Moreover, there is a danger that the trier of fact would give excessive weight to the specific instances

of past conduct. With proof of previous convictions there is much less danger of surprise, consumption of time and confusion of issues, and their prejudicial effect is outweighed by their probative value. The convictions which can be proved for this purpose are limited, by section 3(1)(a), to those offences which are relevant to the crime charged or the defence raised.

The proposed section limits the receivable evidence to previous convictions, and makes any evidence of other previous instances of conduct inadmissible; this, of course, will foreclose not only direct evidence of the previous instances but also cross-examination with respect thereto when the questions are designed to show the character of the victim or defendant as circumstantial evidence of his conduct. However, the present law, codified by the sections of the proposed Code dealing with credibility, makes reputation and opinion evidence as to the character of a witness for truthfulness receivable; though the person giving his opinion or testifying to reputation may not indicate during his examination-in-chief the particular facts, circumstances or incidents which formed the basis of his opinion or produced the reputation, he may be cross-examined with respect to them. Of course, cross-examination is permitted to test the means of knowledge and hence the credit of the witness; by the proposed section answers given on cross-examination may be contradicted subject to the trial judge's discretion. So too, therefore, cross-examination of any character witness

may include inquiry as to his awareness of specific instances of the defendant's or victim's conduct to test the witness' credit and contradictory proof offered in response to answers so elicited. Cross-examination of the victim or defendant concerning previous instances of their own conduct, as tending to show a relevant trait of their character and hence to attack or support their credibility is, of course, foreclosed by the proposed legislation dealing with credibility. It will be particularly important for the trial judge to be vigilant in this area and prepared to exercise the discretion, granted in the proposed credibility legislation, to exclude evidence relevant to credibility when its probative worth is substantially outweighed by the other considerations there noted. Section 1 of that proposed legislation would also permit the reception of evidence of bias or feelings of hostility in the character witness towards the defendant or victim.