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

6. JUDICIAL NOTICE

7. OPINION AND EXPERT EVIDENCE

8. BURDENS OF PROOF AND PRESUMPTIONS

The Law Reform Commission of Canada will be grateful for comments before October 1, 1973. All correspondence should be addressed to:
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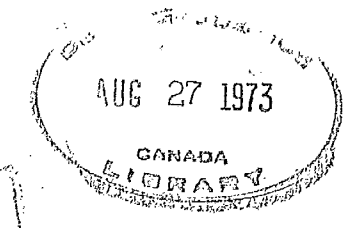
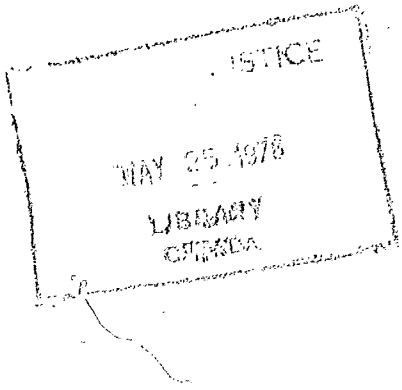
July 1973





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Study Papers
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PREFACE

In the preface to our first four Study Papers on the law of evidence we expressed our desire for comments from lawyers, judges, law professors and all persons affected by the proposed rules. Numerous briefs have been submitted, each has been read carefully, and we are indebted to those who took the time to respond. There is no question but that the criticisms and suggestions received will greatly improve the Project's report to the Commission and help the Commission in the preparation of its own working paper.

Two aspects of our first four papers appear to have caused the most concern; namely, the amount of discretion given to the trial judge, and the concept of codification. Therefore, in this preface we have amplified our thoughts on these matters.

Judicial Discretion

Some persons were critical of the discretion that the recommendations in the first four papers would give to the trial judge. Indeed, they saw an inconsistency between our giving the trial judge such a wide discretion and our express objective of making the law of evidence more certain. As a result of these comments, more express standards for the exercise of the trial judge's discretion will be included in the next draft of these papers, as well as a provision ensuring that an abuse of the discretion is appealable. However, we remain convinced that the philosophy underlying our recommendations is sound. Although we still think that in these preliminary Study Papers on evidence citation to authority would normally inhibit rather than assist critical thought, in this instance a quotation from the late Dean Wright seems appropriate. Commenting on the rules of evidence and the "endless piling of authority upon authority, of isolated case upon isolated case, of countless distinctions of cases from other cases", he said:[1]

> *...it may be queried if all these cases represent anything more or anything less than attempts by courts to exercise a discretion in admitting what seemed formally relevant to a fact in issue, while attempting to give effect to their understanding*

> *of the underlying policies of many rules of exclusion which on the surface would seem automatically to demand that the evidence be rejected. Only in this way can one sympathize with the mental torture involved in the confused treatment of the many exceptions, for example, to the hearsay rule. And if this be so, should we not recognize, reconsider and enunciate just what the underlying objections to the reception of evidence may be, leaving a wide discretion in the court so that if those considerations have been taken into account the discretion should not be interfered with. Surely this would be sounder than the present rigid and time-consuming process of searching for a form of words to cover up a logical process and, possibly, excluding in the result evidence that any sane man would act on in the conduct of his own affairs.*

Thus what the Project has attempted in drafting its proposed rules is to codify the rationale for the rules of evidence, rather than the concepts by which we come to refer to them. As Dean Wright said, "Such an approach must fundamentally be based on vesting in the judge an extremely wide discretion." He goes on to say,

> *...such a discretion may perhaps be admitted in practice, although books like Phipson disclose that the past history of this part of the law has been to treat evidence in the same manner as the law of real property - to categorize and classify rigidly and to develop those categories sometimes, one would be tempted to say, merely for the sake of mediaeval logic.*

We do not think that giving the trial judge a discretion to apply the rationale of a rule in deciding whether evidence should be admissible will result in less certainty. Indeed, it should result in greater certainty since lawyers will know they will have to come to court prepared to argue why, in terms of purposes, certain evidence should be admitted or excluded.

The existing rules only give the appearance of certainty. There is confusion in the cases, and certainly few lawyers can agree on such things as what is a collateral fact, what is an attack on a witness's statement as being a recent fabrication, when is a child of tender years, what is an adverse witness, what is a leading question, and for what purposes character evidence can be introduced. Although many persons who responded to our first four Study Papers felt certain they knew the answer to these questions, this

of course is not the type of certainty we think the law of evidence should strive for. Rather we think it should be certain in the sense that people can agree on its content. Indeed, many trial lawyers and judges have admitted to us in their responses that the present rules of evidence work only because lawyers and judges do not know the rules, they are too embarrassed to apply them with full rigor, or that most evidence is admitted "subject to objection".

One of the most strenuously argued objections to giving the trial judge a discretion in controlling the conduct of the trial to ensure that it is conducted fairly and expeditiously, and to giving him a discretion to exclude evidence if its probative value is substantially less than the likelihood of creating unfair prejudice, confusing the issues, misleading the trier of fact or unduly delaying the trial, was that such a discretion might be abused. It was argued that although fair and intelligent judges could unquestionably conduct a fairer trial by use of such discretion, stupid and milicious judges would misuse it. To answer this objection we would refer the reader to a rather lengthy quote from a pre-eminent American judge, both for its authority and for its compelling reasoning:[2]

> *I go not one inch with those who would refuse discretion to the trial judge merely because it is possible that he may wilfully misuse the discretion. If the judge intends to mistreat a litigant, there is no occasion for the judge to look to the discretions committed to him under the Code of Evidence as the means to the perpetration of the mistreatment. Bigger and better ways whether termed discretions or powers have always been available, and will continue to be available even after the enactment of the Code of Evidence. Preeminent among these ways are: (1) The judge's demeanor on the trial towards a litigant and his counsel and witnesses, a matter which is well-nigh impossible to record, and (2) the coloring matter in his charge to the jury, as well as his facial expression and the tone of his voice when he charges the jury, this, too, being a matter which doesn't lend itself to recordation, and (3) his power to grant a motion for a new trial. The opportunity for the trial judge maliciously to bludgeon a litigant by these methods, with disastrous consequences largely impervious to attack on appeal, so far eclipses any opportunity to mistreat intentionally the litigant under the provisions of the Code of Evidence as to make near-mockery of any contention that those provisions should be rejected on account of the latter opportunity. If the trial judge isn't fit to be trusted to make a conscientous*

> *choice of possible decisions under the rules giving him discretion, he isn't fit to be trusted to sit as the trier of fact in the numerous non-jury issues which are now decided by him; he isn't fit to be on the Bench at all. We had just as well recognize candidly that fairness to a trial depends to the highest degree upon the good faith and the will-to-be-fair of the trial judge, and that, if the judge intends to be unfair, the trial will be a farce no matter how many detailed rules we provide for him.*

Codification

A number of lawyers and judges have expressed reservations about the need for reforming and codifying the law of evidence. They contend that there is no urgent need for a revision of most rules of evidence at the present time and doubt whether any code can achieve our stated objective of making the law of evidence "readily known, understandable and capable of precise application".

A book could be written on the advisability of codification, and indeed the literature on the subject is voluminous. However, we question whether a debate carried on at that level of generality would be meaningful. Since it cannot be decided *a priori* whether a particular rule of evidence is readily known or easy to determine, whether it leads in most cases to the best result, whether it is capable of satisfactory juristic development or whether a code is institutionally feasible, it would appear intellectually more sound to apply particular criticisms to each area of the law of evidence after that area has been thoroughly studied. We admit that we begged a question we wished to ask by stating our objective in the Preface to our first four Study Papers to be the codification of the whole of the law of evidence, particularly because of the ambiguity of the word "code". It would have been more accurate to have said that we intended to study the law of evidence, consult with interested persons, and then determine which, if any, rules of evidence should be revised, whether the rules should be embodied in a statutory scheme that builds on the common law, or whether the rules should be embodied in a statutory scheme that entirely pre-empts the principles of the common law. The project, of course, never intended that the adoption of a Code of Evidence would foreclose subsequent judicial development of the law of evidence; we do not regard a code with flexibility as a contradiction in terms.

Some of those who criticized the concept of a Code of Evidence did so because they were concerned about the problems that appear to be inherent in statutory drafting.

The draft proposed sections are included in our Study Papers to provide a convenient summary of our recommendations, to permit those responding to our papers to direct their attention and comments specifically to the sections, and to obtain criticism of the drafting. Does it embody our policy objectives? Is it complete? Is it understandable? These draft sections are, of course, very preliminary; indeed, the Law Reform Commission is presently studying the whole problem of legislative drafting. However, the comments on the drafting and the different possible interpretations of the sections that we have received so far will be extremely useful in any re-draft of the sections.

We said in the Preface to our first Study Papers that although we did not envisage a Code of Evidence detailing every step in the trial and in the admission of evidence, a Code should be comprehensive enough to serve as a helpful guide to the court, lawyers, and anyone interested in court-room procedures. Although we are not sure now that we will recommend codifying the law of evidence, we think that a Code is a worthwhile device within which to study the major areas in the law of evidence and their inter-relationship. We thought it might be useful to outline tentatively those areas of study. The words "Study Paper" after the headings in the following outline indicate that a Study Paper has been issued on that subject and the detailed provisions can be found in the relevant Study Paper. The Project is presently working on hearsay and privilege.

Areas to be Studied

1. Witnesses

    a. Competence and Compellability - Study Paper #1
    b. Manner of Questioning Witnesses - Study Paper #2
    c. Credibility - Study Paper #3

2. Character Evidence - Study Paper #4

3. Compellability of the Accused and the Admissibility of his Statements - Study Paper #5

4. Judicial Notice - Study Paper #6

5. Burden of Proof and Presumptions - Study Paper #7

6. Expert Witnesses and Opinion Evidence - Study Paper #8

7. Hearsay

8. Privilege - Although the privileges that we recommend recognizing cannot, of course, be determined until our study is complete, we are studying the following privileges:

   a. protections of confidential communications to: physician, accountant, psychotherapist, social worker, clergyman, patent agent, spouse, lawyer, newsman.

   b. privileged topics: state secrets, identity of informer, political vote, religious beliefs, self-incrimination.

9. Documentary Evidence and Related Matters

10. Circumstantial Proof

   a. Habit Evidence
   b. Subsequent Remedial Conduct
   c. Offer to Plead Guilty
   d. Offers to Compromise
   e. Liability Insurance

11. Corroboration

12. Relevancy - This area will deal with a definition of relevancy and the trial judge's discretion to exclude relevant evidence because the probative value of the evidence is substantially less than the likelihood of its creating unfair prejudice, confusing the issues to be decided, misleading the trier of fact, or unduly delaying the trial.

13. Illegally Obtained Evidence

Present Papers

The three Study Papers now being circulated are not directly related to one another. A general comment about each might be made at this point.

The provision for judicial notice of general economic, social and scientific facts in the paper on judicial notice obviously reflects a philosophy of the role of the courts in government. It is a philosophy that many people will not agree with. Our reasons for including such a provision are mentioned in the paper, and we are anxious to receive comments on them.

The Study Paper on expert and opinion evidence can be criticized for being too narrow and not examining the broad and important question of the suitability of the courts

as a dispute-solving tribunal for complex economic and scientific questions. Our self-imposed terms of reference, however, preclude such a study at this time. We are putting forward this proposed Code of Evidence as the best possible for the present system. We assume that we will continue to make use of the adversary system as a means of achieving the ultimate ends of litigation, that courts will continue to adjudicate claims, that a legally trained judge, and in some cases a jury, will be the trier of fact, and that most evidence will be presented by witnesses appearing in court. All of these assumptions, and others, about our present system of litigation could be challenged. Since the process of examining the law to see if it is achieving those goals and values it ought to be achieving will now be done continuously, these assumptions will undoubtedly be examined in the not too distant future.

The question of whether an expert ought to be permitted to file a report with the court, instead of personally attending to testify, will be examined when we study the hearsay rule. The proposed rules recommended in the Study Paper on Expert and Opinion Evidence coupled with the proposed rules in the Study Papers on Credibility and Character Evidence are broad enough to permit an expert to testify with respect to a witness's veracity or a party's character.

As we mention in the paper on Burdens of Proof and Presumptions, the General Principles Project of the Law Reform Commission will also be examining that area.

We have attached to these present papers a Selected Reading Bibliography. One of our reasons for not preparing Study Papers of great detail, examining with footnote references the present law and all the proposals made for change, was because so much had already been done along those lines in the law of evidence. Some persons, however, have expressed to us a desire to review some of this literature and for that purpose we have attached these bibliographies. The bibliographies are selective and in no way exhaust the literature or sources the Project has studied in reaching its conclusions. The books and articles were selected for inclusion in the bibliographies because they represent the best sources to turn to for a person who wants a quick review of the areas.

ENDNOTES

1. Wright, *The Law of Evidence: Present and Future* (1942), 20 Can. Bar Rev. 714, 716.

2. McElroy, *Some Observations Concerning The Discretions Reposed in Trial Judges By The American Law Institute's Code of Evidence* 357, 358, in American Law Institute, Model Code of Evidence (1942).

Study Paper #6

LAW REFORM COMMISSION OF CANADA

A Study Paper by the
Law of Evidence Project

JUDICIAL NOTICE

POSSIBLE FORMULATION OF PROPOSED LEGISLATION

Judicial Notice

NOTE: (These sections are drafted on the assumption that) ("judge" will be defined as meaning "the judge or) (other person presiding at a proceeding" and that) ("jury" will be defined as meaning "the jury or) (other persons whose duty it is to determine the) (facts".)

Section 1. (1) Judicial notice means use by the judge or jury of a fact or matter not proved according to the legal rules governing the presentation and admission of evidence.

(2) Except as provided in this Part, a judge or jury shall not take judicial notice of a fact or matter, and shall not act upon any private knowledge or belief or upon any information that is acquired from personal and private sources.

Section 2. (1) A judge or jury shall take judicial notice of all general facts that are of such common knowledge among persons of average intelligence and experience that they cannot be the subject of reasonable dispute.

(2) A judge may take judicial notice, and if he is sitting with a jury may instruct the jury that they shall take judicial notice, of a fact that the judge determines cannot be the subject of reasonable dispute and is

(a) common knowledge within the territorial jurisdiction of the trial court; or

(b) capable of determination by resort to sources whose accuracy cannot reasonably be questioned respecting the particular fact to be noticed.

(3) A judge may take judicial notice of scientific, economic and social facts in determining the law or in determining the constitutional validity of a statute.

Section 3. (1) Judicial notice shall be taken of

(a) the decisional law in force in Canada or in any province of Canada;

(b) the Acts in force in Canada or in any province of Canada;

(c) the constitutional law in force in Canada or in any province of Canada;

(d) any matter that is published in the Canada Gazette or the official gazette of any province of Canada; and

(e) the private Acts of the Parliament of Canada and of the legislature of any province of Canada.

(2) Judicial notice may be taken of the following matters to the extent that they are not embraced within subsection (1):

(a) statutory instruments and the official record of the proceedings of a federal, provincial or municipal body of a legislative, executive or judicial nature;

(b) international law;

(c) the law of countries other than Canada and of political subdivisions of such countries. If the judge is unable to determine what the law of a country other than Canada or of a political subdivision of such country is, the court may either apply the law of Canada or dismiss the action.

Section 4. (1) Notwithstanding subsection 2(2) a judge shall take judicial notice or, if he is sitting with a jury, shall instruct the jury that they shall take judicial notice of a fact referred to in that subsection, and, notwithstanding subsection 3(2), a judge shall take judicial notice of a matter of law referred to in that subsection, if he is requested to do so by a party and that party

(a) gives each adverse party sufficient notice of the request to enable the adverse party to prepare to meet the request; and

(b) furnishes the judge with sufficient information to enable him to comply with the request.

(2) With respect to any fact referred to in subsection 2(2) or 2(3) or any matter of law referred to in subsection 3(2),

(a) if the judge has been requested to take, or proposes to take, or has taken judicial notice, he shall, if requested, afford each party reasonable opportunity to make representations as to the fact or matter of law involved and as to the propriety of taking judicial notice; and

(b) if the judge resorts to any source of information, including the advice of persons learned in the subject matter, that is not received in open court, that information and its source shall be made a part of the record in the proceedings and the judge shall, if requested, afford each party reasonable opportunity to make representations as to the validity of that information.

(3) In considering whether a fact should be judicially noticed under subsection 2(2), and in determining any matters to be judicially noticed, the judge may consult any source of information, including the advice of persons learned in the subject matter, whether offered by a party or discovered through his own research. He may determine whether the parties

should make written representations, present oral argument or cross-examine the persons tendering the advice. No exclusionary rule of evidence, except a valid claim of privilege, need be applied to any such representation, argument or cross-examination.

(4) No information presented to the judge by the parties concerning a fact to be judicially noticed, or concerning whether a fact is subject to reasonable dispute, shall be made known to the jury.

(5) When a judge has taken judicial notice of a fact or other matter, and the parties have been given an opportunity to present information on it, the fact or other matter is conclusively taken to be true for the purposes of that case and no contradictory evidence is thereafter admissible.

(6) Judicial notice may be taken at any stage of the proceedings.

COMMENT

Introduction

These rules provide a comprehensive scheme for taking judicial notice of both facts and law. They should result in a more liberal use of judicial notice in determining certain kinds of facts and consequently a reduction in trial time and more rational fact-finding. Without unduly impairing the convenience of taking judicial notice, the legislation prescribing the procedure for taking judicial notice is designed to provide adequate safeguards against the danger that an expanded use of judicial notice might result in procedural unfairness. By recognizing the distinction between adjudicative and legislative facts, and by significantly changing the present law with respect to the proof of delegated legislation and foreign law, the sections will also rationalize the court's use of those materials in determining the law applicable in a particular case.

SECTION 1 - DEFINITION OF JUDICIAL NOTICE

Judicial notice is a concept that has acquired many usages. Often it is used to refer to only the recognition of those facts that the trier of fact can be assumed to know as a person of average intelligence and experience, or of those facts that he has a responsibility to determine by his own conduct. In its widest sense, however, it refers to the recognition of any matter that the court can use in resolving the dispute before it, but which need not be introduced during the trial according to the rules of evidence. It is in this broad sense that the term is defined in section 1 and used in this paper. Thus it includes: (1) the use by the judge and jury of their own knowledge in determining such things as the ordinary usage of words, the probative value of particular evidence, the reasonableness of the conduct of the parties, and the credibility of witnesses; (2) the recognition by the judge of specific facts that are not reasonably disputable because they are common knowledge; (3) the recognition by the judge of the broad social and economic facts that provide the context for many disputes; (4) the recognition by the judge of the appropriate rule of law to apply to a given factual

situation. For some of these matters information must be informally presented to the judge before he is required to take judicial notice of them, but for other matters, for instance the relevant rule of law, the judge has an affirmative responsibility to find the information and take judicial notice of it.

SECTION 2 - JUDICIAL NOTICE OF FACTS

In practice, although most often only implicitly, courts in taking judicial notice of facts distinguish between facts that are relevant in determining what the facts in the dispute before them are, and economic and social facts of a more general nature that are relevant in determining the law to be applied to the particular facts of the case. Proposed section 2 codifies this distinction.

Subsections 2(1) and 2(2) - Adjudicative Facts

These subsections provide for judicial notice of what have been called adjudicative facts. These are the facts in issue or facts from which the facts in issue can be inferred. They are relevant in determining, as between the parties, who did what, where, when, how, and with what motive or intent. These facts can normally be proved only by the introduction before the trier of fact of information according to the strict rules of evidence. When such facts, however, are not subject to reasonable dispute, the court can take judicial notice of them in order to save the time and expense of proving them by formal evidence and, since the trial court is society's forum for the settlement of real disputes, to prevent litigants from calling on the court to decide moot questions.

One kind of adjudicative fact, as that term is used in this paper, is a proposition of generalized knowledge. These are the facts from which more specific and often material facts are inferred. It must be assumed that the trier of fact is a person of ordinary intelligence and experience. If he were not, the evidence presented at trial would have little meaning to him. Subsection 2(1) thus provides that the trier of fact must take judicial notice of the facts and propositions of generalized knowledge that everyone uses in his ordinary reasoning process and which are seldom proved at trial by evidence introduced according to the ordinary court procedures.

This generalized knowledge would include the ordinary meaning of words, typical modes of human behaviour,

and the causal relations between commonplace events. The subsection is simply a codification of the present law. The expression "common knowledge" has been given in the subsection the express qualifications that it has been given in the cases, namely that knowledge which is common "among most persons of average intelligence and experience".

Subsection 2(2) states the grounds for taking notice of facts that are not necessarily common knowledge among most persons of average intelligence and experience. Such facts might include scientific, historical, geographical or chronological facts for which to establish their indisputability reference might be needed to such sources as treatises, maps, almanacs or encyclopedias. The proposed subsection clarifies the present practice of the courts by recognizing two distinct tests for defining the degree of certainty required before judicial notice of a fact can be taken.

Paragraph 2(2)(a) is in accord with the present law as articulated by the courts. Paragraph 2(2)(b) states a ground for taking judicial notice of adjudicative facts that is not often articulated in the cases. When it is mentioned it is usually under the fiction of the judge refreshing his memory of a matter that is common knowledge. A fact capable of determination as mentioned by the section should not have to be proved by the formal rules of evidence. This ground for taking judicial notice should prove to be the growing point for the doctrine.

Some cases have held that if a fact is "common knowledge" within a special group or trade, that would be sufficient notoriety to justify taking judicial notice of the fact. All the facts that could be noticed under such a test will probably be included within the test set out in paragraph 2(2)(b).

Subsection 2(3) - Legislative Facts

The rules of evidence were developed to regulate the proof of facts that were specific and that affected only the parties before the court. However, in at least two instances the facts that the court might use in deciding on the ultimate disposition of a case are characteristically of a general nature, and the effect of their determination by the court will invariably transcend the interest of the immediate parties.

Firstly, the court might consider general economic and social facts when determining the legal doctrine that is applicable not only to the particular facts of the case before it, but also to all cases of a like kind that may

come before the courts in the future. In the majority of contested cases a court is called upon simply to resolve the factual dispute between the immediate parties and to apply the existing law. When the applicable rule of law is in dispute it can be resolved usually by resort to traditional legal material such as previous judicial decisions. However, occasionally a court is called upon to forumulate a new rule of law, to interpret a vague statute, or to adapt an old law to changing conditions. The determination of such a rule of law obviously depends upon a knowledge of present-day conditions. Although in the immediate past the courts have been reluctant to articulate their use of these facts, many judges are now less reluctant to admit that at least in some cases they must consider the public interest in formulating rules of law. In determining these conditions the court may resort to its own knowledge of relevant social and economic conditions or to factual material found or presented to it in books, treatises, legislative histories, newspapers and so on. When it does this the court is, in a sense, acting legislatively. Thus these facts have been styled legislative facts. Although the authority to notice these facts is inherent in the requirement that the court take judicial notice of the law, it is stated separately here to clarify the court's use of this data and to ensure that its use is subject to the procedural safeguards set out in proposed section 4.

Secondly, the courts frequently make use of broad economic and social facts in determining the constitutional validity of legislation. This use has been amply acknowledged in the cases. These facts are regarded as a particular type of legislative fact and are often described as "constitutional facts". They are used most often in determining the effect of an impugned statute, or in determining the economic and social context of legislation in deciding whether it is validly enacted within the power of the provincial or federal legislature.

The economic data, books and periodicals that a court may consider in arriving at a determination of what the law should be will necessarily include controversial and disputable matters, in the same way that the court's interpretation of statutes and previous cases is inevitably controversial and disputable. Therefore, the proposed section does not require that these matters be beyond reasonable dispute before the judge notices them. The reason that judicial notice is taken by the courts of these facts is not that formal proof according to the rules of evidence is unnecessary because these facts are indisputable, but rather that because of the nature of these facts the formal rules of evidence are an inappropriate means of determining them. Also, their determination will almost always involve considerations and have consequences far

beyond the particular parties to the controversy. Therefore the judge should have some initiative in ensuring that he considers all the relevant information in reaching his decision. Moreover, these facts are usually noticed at the appellate level where proof by formal evidence is not as practicable as at trial.

These rules do not, of course, determine the admissibility of economic and social facts; they deal only with the manner in which the court is informed of them. The admissibility of these facts will be governed by the traditional rules of statutory and constitutional interpretation. Nor are these rules an invitation for, or a suggestion to, judges to assimilate their roles to that of a legislator; nor do they contemplate any change in the manner of legal reasoning now employed by judges. The rules were drafted on the recognition that some courts and judges now use, and have expressed a need for, these types of facts, and that the existing methods of informing the court of them are inadequate. The Project believes that its proposal provides a method of proof that takes cognizance of the consequences of finding these facts, assures fairness to the immediate parties before the court, and for these reasons should be part of an Evidence Code.

SECTION 3 - JUDICIAL NOTICE OF LAW

Judges have always had the responsibility to make their own investigation of the law, relying usually on the informal presentation by counsel of cases and statutes as an aid to their task. That is to say, judges have always taken judicial notice of the law. However, certain laws are contained in source material assumed not to be readily available to the judge or, if available, the judge is assumed not to have the skill to comprehend their contents, and therefore for purposes of proof these laws have been characterized as fact.

The proposed section maintains the distinction between material readily accessible to the judge and material not readily accessible to the judge, but makes proof of all law a matter of judicial notice. The material is treated differently in that law contained in readily accessible materials is classified as matters of law that the court shall judicially notice, whereas law contained in materials not readily accessible and less well known is classified as law that the court may, in its discretion, judicially notice. However, even for those matters for which judicial notice is only permissive if a party requests

judicial notice, notifies the other parties, and furnishes the court with sufficient information, the court must judicially notice this material as well. See subsection 4(1). In terms of the legal consequences, the important difference between a matter that the court must notice and a matter that the court may notice is that if the court fails to notice the former in most cases its judgment will be reversed on appeal. If the court refuses to notice the facts within the latter category the exercise of its discretion will seldom be reversed.

Subsection 3(1) - Mandatory Judicial Notice of Law

Included in subsection 3(1) are those matters of law that the judge is presumed to know or can reasonably be expected to discover even if the parties fail to provide him with the appropriate statute or case.

Although it seldom arises in the cases to which the *Canada Evidence Act* applies, it appears that at least in civil cases a court sitting in one province cannot take judicial notice of the decisional law of another province. Proposed paragraph 3(1)(a) provides that the decisional law of all provinces shall be noticed. The law of other provinces is usually as accessible and readily understood as the law in the province in which the court is sitting. Indeed, courts refer to the law of other provinces continually when determining the law of their own provinces.

Paragraphs 3(1)(b) and (c) state in substance the existing law as found in sections 17 and 18 of the present *Canada Evidence Act*. Acts of the Imperial Parliament, which are not a part of the law of Canada and under the present law can be noticed pursuant to section 17 of the *Canada Evidence Act*, will be subject to judicial notice pursuant to paragraph 3(2)(c) of the proposed legislation.

Paragraph 3(1)(d) makes judicial notice of all delegated legislation published in an official gazette mandatory. This would include rules, regulations, orders or proclamations, and all documents, including licences, notices, appointments and similar instruments. Under present law, sections 21 and 22 of the *Canada Evidence Act*, section 23 of the *Statutory Instruments Act*, subsection 17(4) of the *Interpretation Act*, and section 715 of the Criminal Code deal in general with proof of delegated legislation. The decisions interpreting these sections are in conflict and often turn upon the terminology used to refer to a particular piece of delegated legislation.

The proposed section assumes that no distinction should be made between types of delegated legislation. If

the relevant statutory instrument is published in one of the official gazettes it is sufficiently accessible to require the court to take judicial notice of it without necessarily requiring counsel to provide the court with a copy of the relevant gazette. Of course, as a matter of practice most counsel will present the court with this information.

Paragraph 3(1)(e) states the present law as found in section 18 of the *Canada Evidence Act*, but extends judicial notice to the private acts of the legislatures of any province of Canada.

Subsection 3(2) - Discretionary Judicial Notice of Law

Judicial notice of matters of law specified in this section is discretionary. It would place too great a burden on the judge to require him to take judicial notice of these matters since they are not likely to be known to the judge nor to be discoverable from sources of information readily available. However, if a party requests it and is able to supply the judge with sufficient information as to what the law is, then the judge is required to notice it. See subsection 4(1). Presentation of information unhindered by the formal rules of evidence is, in almost all instances in which these matters need to be proved, the most convenient manner in which to determine them. The requirements that reasonable notice be given to the adverse party, and that "sufficient" information be presented before judicial notice must be taken, should be adequate procedural safeguards to ensure fairness to all parties and to ensure that the judge is furnished with the truth.

If a legislative enactment or regulation is published in an official gazette, judicial notice of it is mandatory. See paragraph 3(1)(d). However, many regulations passed by government subdivisions are exempt from publication in official gazettes. As well, of course, many other official acts of governmental institutions are not published in the gazette, for instance: the minutes, decisions, and proceedings of the various administrative boards and legislative committees; matters of record in land offices or other offices or departments (see section 26 of the *Canada Evidence Act*); and records or proceedings of the courts of Canada (see section 23 of the *Canada Evidence Act*). For those matters, paragraph 3(2)(a) provides that judicial notice is permissive. It is reasonable to require the party requesting judicial notice of them to furnish the judge with sufficient information to enable him to be satisfied of their existence. However, since the accessibility of this information varies greatly it seems unreasonable to require a formal method of proof for all of them as the present *Evidence Act* now requires. In deciding in each case what

is sufficient information to prove the existence or content of a particular official act, the judge will weigh the inconvenience of obtaining the information against the necessity for procedural fairness.

Paragraph 3(2)(c) provides that foreign law may be judicially noticed. Under present law, if the law of a foreign country is germane to a lawsuit it is often treated as if it were a fact and thus it must be pleaded and proved according to the formal rules of evidence. The precise manner of proving foreign law, and the question of whether a judge may consult material not formally proved, are the subject of some doubt under the present practice.

For the following reasons proof by formal evidence is often a most inappropriate and outmoded means of determining foreign law: the relevant law is often a matter of personal opinion; the judge and not the jury now determines the foreign law; the expense and difficulty of procuring experts who are qualified according to the existing law to give an opinion on foreign law is often great; the existing requirements apply too rigidly since the difficulty of determining foreign law varies from case to case; the formal rules of evidence keep out much information that would be legitimately helpful in determining foreign law; material written in English and French on foreign law and means of communication have greatly increased since the rules were first adopted by the courts; and, the rules as to what evidence is admissible to prove foreign law frequently make it difficult and often impossible, as a practical matter, to establish that law. The proposed section meets these objections to the present law by making foreign law a subject of judicial notice. A judge may take judicial notice of a foreign law, and must take judicial notice if a party requests it and supplies the judge with sufficient information to prove the law pursuant to subsection 4(1). Thus, the section is only permissive and places no burden on the judge to do independent research on foreign law.

If a party requests judicial notice, in aiding the court in determining what the foreign law is, he will be free to choose the materials to present to the court and the method by which to present them. Statutes, reports and cases, appropriate treatises and articles, statements and affidavits by officials, lawyers and scholars of a foreign country, and the opinions of persons not available for cross-examination, may all be submitted and referred to as material for judicial notice even though not admissible under the formal rules of evidence.

The reasons, as mentioned earlier, that the courts traditionally did not take judicial notice of foreign law

was not only that the source material of foreign law was inaccessible but also that judges were not familiar with the legal methods and sources of foreign legal systems. The suggestion has been made, therefore, that the judge's discretion to take judicial notice of foreign law should be limited to the law of those jurisdictions whose legal systems are similar to the legal system of the province in which the issue arises. For instance, the common law provinces would judicially notice the law in all the common law countries of the Commonwealth, and all the common law states of the United States of America. The law of those foreign jurisdictions whose legal system is very different from that of Canada should still have to be proved as a fact. However, because the judge may under subsection 4(3) vary the kind and manner of presentation of information according to the difficulty of ascertaining the particular foreign law in question, there does not seem to be any need to erect what in many cases might be very arbitrary rules of proof in terms of the difficulty of correctly ascertaining the foreign law. Moreover, to require that foreign law be proved in the same manner as ordinary facts ignores the large differences between the nature of these two kinds of "facts". A more accurate determination of foreign law will be achieved in most cases if the judge and counsel are free to consult materials and present argument unhindered by the rules of evidence.

In a case in which the judge cannot determine to his satisfaction the foreign law, there are two conceivable courses of action open to him. He may presume that the foreign law is the same as the law of Canada, which is the course of action he would have to adopt under the present law, or he may dismiss the action on the grounds that an essential element of the cause of action is not proved. In a particular case either one of these alternative courses of action might cause an injustice. Where proof of foreign law is difficult, expensive, or impossible, the second alternative may unjustly deprive a party of his cause of action. On the other hand, where the foreign law is obviously radically different than the domestic law, the first alternative can be invidious fiction.

The proposed subsection permits the judge in each individual case to decide which alternative would lead to a just disposition of the case. If the judge decides that the foreign law is likely to be radically different than Canadian law on the point under consideration, or that there is a strong connection between the foreign country and the parties or their transaction, or if the judge concludes that the case for some other reason can or should be decided under the foreign law, then he could under the proposed section dismiss the action if that law is not proved.

SECTION 4 - PROCEDURE

Subsection 4(1) - Mandatory Notice

Under the present law it is not clear in which cases judicial notice is mandatory and in which cases it is permissive. Proposed section 4(1) clarifies this distinction.

The notice required pursuant to paragraph 4(1)(a) to make judicial notice of a fact mandatory is merely reasonable notice and should be administered with flexibility in order to ensure that the policy of the rule is implemented. Depending on the circumstances of the case, notice in the pleadings might be required in some cases, while in other cases notice at trial will be reasonable. But even if no notice is given by the party requesting judicial notice, the court may, whenever it considers it appropriate, take judicial notice on its own motion. However, note that under section 4(2) the judge must afford each party a reasonable opportunity to present information relevant to the matter to be judicially noticed.

The other requirement for mandatory notice, that sufficient information be furnished by the party requesting it, will also necessarily vary from case to case. In some cases one reliable reference might be all that is needed. In other cases the court might justifiably require that a party requesting judicial notice provide expert assistance to clarify especially difficult problems.

Subsection 4(2) - Opportunity to Present Information to the Court

When the judge takes judicial notice on his own initiative, or when a party requests judicial notice pursuant to subsection 4(1), proposed paragraph 4(2)(a) assures that both parties are given an opportunity to present the judge with information either as to the matter to be noticed or as to the propriety of taking judicial notice of a matter. If the judge takes judicial notice on his own initiative, whether he gives such opportunity to the parties before or after he takes such notice will in most cases depend upon the possibility that the fact will be challenged.

This requirement for reasonable opportunity would, of course, apply to judicial notice taken by an appeal court as well as a trial court. The section also applies to judicial notice of legislative facts as well as adjudicative

facts. Although the courts take judicial notice of legislative facts to assist them in determining what the law is, the knowledge of these facts or the methods of acquiring them are often not within the peculiar knowledge of the judge. Therefore, since the interests of the litigants might be affected by the use of social or economic data, they should be given an opportunity to present information about these facts in all appropriate cases.

Paragraph 4(2)(b) assures the parties procedural due process when the judge, in determining whether to take judicial notice, resorts to information not received in open court.

Subsection 4(3) - Information That May be Received on a Matter to be Judicially Noticed

This proposed section provides the judge with a discretion to decide in each case the most suitable sources of information to consult and the most suitable manner of proceeding in considering whether to take judicial notice, and in considering what facts to notice.

Subsection 4(4) - Jury Cases

Although most facts of which judicial notice is asked to be taken will not be crucial to the case, in those instances when it is, it is important that the jury does not hear information presented not subject to the rules of evidence. A party presenting such information, who is unable to convince the court that judicial notice should be taken, may not later be able to prove the fact according to the rules of evidence, and if the jury had heard information on it informally, the other party's case might be prejudiced.

Subsection 4(5) - Effect of Taking Judicial Notice

There are no clear holdings in the Canadian cases on whether or not a fact judicially noticed by the judge can be disputed by the introduction of contrary evidence. However, the Project was of the view that, because a ruling by a trial judge upon whether to take judicial notice could always be challenged like any other ruling, and new information presented, the admission of formal evidence to contradict a judicially noticed fact could serve no purpose and might only prolong the trial, thus negating the advantage of the doctrine itself. If a judge is persuaded of a fact's existence by the informal presentation of information, and information presented informally by the adverse party cannot persuade him to change his mind, it is difficult to see how information presented subject to the formal rules of evidence

could have this effect. Moreover, the purpose of judicial notice, to ensure that the parties do not call upon the court to decide indisputable questions, would be defeated if contradictory evidence were admissible. Thus subsection 4(5) provides that if a court takes judicial notice of a fact its finding cannot be contradicted by evidence.

Subsection 4(6) - Time of Taking Notice

In accord with the present practice, subsection 4(6) provides that judicial notice may be taken at any stage of the proceedings: pre-trial, trial, sentencing, or on appeal.

Selected Reading Bibliography

JUDICIAL NOTICE

Judicial Notice of Facts

Very little has been written in Canada on judicial notice of facts. The most complete discussion is found in Schiff, The Use of Out-of-Court Information in Fact Determination at Trial (1963), 41 Can. B. Rev. 335, 338-355. For shorter discussions see Bowker, The Law of Evidence: 1923-1947 (1948), 26 Can. B. Rev. 246 at pp. 254, 255; Popple, Canadian Criminal Evidence 40, 214 (2d ed. 1954); Trials sec. 18, 21 C.E.D. (Ont. 2d); Evidence sec. 24 at 407, 410-414, 10 C.E.D. (West. 2d). For a discussion of judicial notice of constitutional facts in Canada see Strayer, Judicial Review of Legislation in Canada ch. VI, particularly at pp.173-177 (1968); Canadian Constitutional Law ch. IV, particularly at pp. 186-189 (rev. 3d ed. 1969).

In England as well as discussions in the leading treatises, Phipson, Evidence secs. 46-71 (11th ed. 1970); Cross, Evidence ch. 7 (3d ed. 1967); there is an excellent article by Professor Nokes. Nokes, The Limits of Judicial Notice (1958), 74 L.Q.R. 59.

The distinction between adjudicative and legislative facts was first made by an American scholar, Professor Kenneth Culp Davis. His writings on judicial notice are cited and summarized in 4 Davis, Administrative Law Treatise ch. 15 (1958, Supp. 1970). Other discussions of judicial notice by leading American scholars are: McCormick, Evidence ch. 35 (2d ed. 1972); 9 Wigmore, Evidence secs. 2565-2583 (3d ed. 1940); Keefe, Landis, and Shaad, Some Sense and Nonsense about Judicial Notice (1950), 2 Stan. L. Rev. 664; Knowlton, Judicial Notice, 10 Rutgers L. Rev. 501 (1956); McNaughton, Judicial Notice - Experts Relating to the Morgan-Wigmore Controversy (1961), 14 Vand. L. Rev. 779; Morgan, Judicial Notice (1944), 57 Harv. L. Rev. 269.

Judicial Notice of Law

A discussion of judicial notice of law and in particular judicial notice of delegated legislation is found in Evidence sec. 24 at 407-410, 10 C.E.D. (West. 2d).

An article on proof of foreign law reviewing the present Canadian law and recommending that the court should be permitted to take judicial notice of foreign law is, Castel, Proof of Foreign Law (1972), 22 U. Toronto L.J. 33.

The literature in the United States on the proof of foreign law is voluminous. The lead articles advocating a reformist approach to proof of foreign law include Nussbaum, The Problem of Proving Foreign Law (1941), 50 Yale L.J. 1018; Nussbaum, Proving the Law of Foreign Countries (1954), 3 Am. J. Comp. L. 60; Keefe, Landis and Shaad, Sense and Nonsense About Judicial Notice (1950), 2 Stan. L. Rev. 664; Miller, Federal Rule 441 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-hard Doctrine (1967), 65 Mich. L. Rev. 613. Those articles in which the merits of the traditional approach to proof of foreign law are emphasized include Sommerich and Busch, The Expert Witness and the Proof of Foreign Law (1953), 38 Conn. L.Q. 125; Stern, Foreign Law in the Courts: Judicial Notice and Proof (1957), 45 Calif. L. Rev. 23.

Study Paper #7

LAW REFORM COMMISSION OF CANADA

A Study Paper by the
Law of Evidence Project

OPINION AND EXPERT EVIDENCE

POSSIBLE FORMULATION OF PROPOSED LEGISLATION

Opinion and Expert Evidence

NOTE: (These sections are drafted on the assumption that "judge" will be defined as meaning "the judge or other person presiding at a proceeding" and that "jury" will be defined as meaning "the jury or other persons whose duty it is to determine the facts".)

Section 1. (1) Except as otherwise provided in this Part, a witness may testify only to matters that he has perceived with his own senses.

(2) Evidence that a witness has perceived a matter with his own senses may be provided by the testimony of the witness himself or by any other admissible evidence.

Section 2. A witness, whether or not he has been accepted as an expert witness, may give his opinion or drawn an inference from relevant facts if his opinion or inference is

(a) rationally based on matters that he has perceived with his own senses; and

(b) helpful to a clear understanding of his testimony or to the determination of a matter in issue.

Section 3. A witness who has been qualified as an expert by reason of his special knowledge, skill, experience, training or education may be accepted as an expert witness and may give his opinion or otherwise testify when scientific, technical or other specialized knowledge will assist the jury to understand the evidence or to determine an issue.

Section 4. Testimony of an expert or other witness that is given in the form of an opinion or inference may, if it is otherwise admissible under this Part, be received in evidence, notwithstanding that it embraces an ultimate issue to be decided.

Section 5. (1) An expert witness may base his testimony upon evidence given by other witnesses or on facts made known to him before the hearing.

(2) Expert opinion evidence may be received when it is based upon facts of a kind reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject, notwithstanding that evidence respecting such facts has not otherwise been given by a person who perceived them with his own senses.

Section 6. (1) A judge may require that a witness be examined with respect to the facts upon which he is relying before the witness gives evidence in the form of an opinion or an inference.

(2) When a witness proposes to give evidence in the form of an opinion or an inference, and he is relying on the evidence of other witnesses, his opinion shall be elicited by hypothetical questions, unless the facts upon which he is relying are readily apparent.

Section 7. (1) Except by leave of the judge, a witness shall not testify as an expert unless a report has, pursuant to subsection (2), been given to all other parties.

(2) When any party intends to adduce expert evidence he shall, within a reasonable time before the date of the trial, provide to all other parties a report that

(a) identifies the person expected to be called as an expert;

(b) states the subject-matter on which the expert is expected to testify;

(c) states the substance of any facts and the opinions and inferences to which the expert is expected to testify; and

(d) provides a summary of the grounds for each opinion.

Section 8. (1) A judge may, on the motion of a party to the proceedings, or in his own discretion,

(a) enter an order to show cause why expert witnesses should not be appointed; and

(b) request the parties to submit nominations of persons qualified to be expert witnesses.

(2) A judge may appoint an expert witness who has been agreed upon by the parties or selected by him if the expert witness consents to his appointment, and the judge may disclose to the jury that the expert has been appointed by him.

(3) When an expert witness has been appointed, he shall be informed of his duties by the judge

(a) in writing, in which case a copy of the written duties shall be filed with the clerk, or

(b) at a conference in which the parties have an opportunity to participate.

(4) An appointed expert witness shall

(a) advise the parties of his opinion, if any;

(b) make a deposition at the request of any party;

(c) give his testimony at the request of a party or on direction of the judge; and

(d) be subject to cross-examination by each party, including the party calling him.

(5) Nothing in this section limits or affects the right of a party to call expert witnesses of his own choice.

(6) An expert witness who has been appointed under this section is entitled to reasonable compensation in an amount to be determined by the judge, and that compensation is payable

(a) in criminal cases, from funds provided by law,

(b) in civil cases, by the parties in such proportion and at such time as the judge directs, but, that compensation shall thereafter be dealt with in like manner as other costs.

COMMENT

SECTION 1 - PERSONAL KNOWLEDGE REQUIREMENT

The modern rule prohibiting a witness from testifying about his opinion encompasses two historically distinct rules. As originally understood, the opinion rule was a rule of testimonial qualification having common roots with the hearsay rule. It disqualified from testifying any witness who did not have personal knowledge of the event in dispute. This exclusionary rule assured that testimonial evidence had some minimum probative value; a witness whose testimony was not founded on personal observation could necessarily only guess or conjecture about the matter in dispute. However, today, as well as being used in the above sense, the rule is more often used to justify the exclusion of any conclusion or inference stated by a lay witness, even if such an opinion is based on his personal observation of the facts from which it is drawn. Proposed section 1 codifies the original exclusionary rule; proposed section 2 substantially alters the opinion rule as it is most commonly understood today.

Although the rule that a witness can only testify about matters that he has observed with his own senses is one of the oldest rules of common law evidence, there is little jurisprudence on this requirement. This is probably due to the fact that witnesses are invariably qualified by a preliminary question establishing personal observation and knowledge. However, in spite of the paucity of cases on this rule, and thus the difficulty of establishing its exact content, we believe that subsection 1(1) simply restates the present law. Subsection 1(2) states an obvious proposition, but it is included so as to avoid any misunderstanding that codification of the rule might otherwise lead to.

SECTION 2 - OPINION TESTIMONY

As early as the 14th century, experts with no personal knowledge of the facts in issue were advising the court about matters of science that would be helpful in determining the facts in dispute. When they began in the

17th century to testify as witnesses, their right to express an opinion was regarded as an exception to the rule requiring personal knowledge. To express this exception, text writers and judges used phrases such as, "though witnesses can in general speak only to facts, yet in questions of science persons versed in the subject may deliver their opinions".

The term "opinion", as used by these authorities, referred to a statement not based upon personal knowledge. However, as apparent from dictionaries compiled at the time, in later generations the word acquired an additional usage. It began to be used to refer to inferences or conclusions even when drawn from personally observed facts. Judges, perhaps careless about the origins of the word, consequently created an opinion rule that excluded all opinions stated by a lay witness, regardless of whether or not such opinion was founded on facts perceived by the witness' own senses.

The modern opinion rule has not presented our triers of facts with much difficulty, largely because our courts have not applied it strictly and have created many exceptions to it: for instance, exceptions for questions of distance, speed, size, identity, age, value and the emotional or physical state of a person. This attitude of Canadian courts towards the opinion rule is justified for two reasons. These two reasons led the Evidence Project to the conclusion that the present rule which excludes opinion evidence unless it is absolutely necessary to the witness' narration (a criterion which is illustrated by the exceptions to the rule) should be changed to a rule which excludes opinion testimony only if it is unhelpful to the trier of fact. Firstly, the present rule assumes a distinction between statements of fact and opinions which does not exist since all statements of fact are really opinions; and secondly, in most instances there is no justification for excluding the reasoned conclusion of a witness who has personally observed the event about which he is expressing his opinion.

That the difference between a statement of fact and an opinion is only one of degree, and not a dichotomy, is easy to illustrate. When a witness states that he observed a car approaching he is stating an opinion, and yet such a statement is admissible in every trial. He may be asked to describe in more detail the object approaching him. If he describes it as an object with four wheels, a roof, a windshield and so on, he is still only stating his opinion, and under the present rule a valid objection could be made forcing him to recite in even more detail the make-up of the objects he concluded where wheels. This objection could be made to every statement the witness makes. The confusion in usage has arisen because of the failure to distinguish between facts, and statements about facts. A witness cannot state facts: a statement of a witness is but his opinion,

his personal judgment, based on his perceptions and mental processes, of what in fact occurred. His words cannot reproduce facts. Facts observed by him are digested and adjudicated upon by his mental faculties, conditioned by his previous experiences, and words are chosen by him to represent as closely as possible his beliefs or conclusions as to what happened. Thus, the only difference between what we commonly call statements of fact and opinions is that one is a more specific and concrete description than the other.

As well as being based on the illusory distinction mentioned above, the justifications given for the opinion rule do not bear analysis. Some have said that to receive opinion testimony would permit the usurpation of the jury's function. But, a jury always has the right to determine what evidence it will accept or reject and is never bound to agree with the opinion expressed. The weakness of this justification is seen when we note that we receive opinion testimony from the one class of witness most bound to influence the jury's decision, i.e., the expert. Others have said that opinion testimony is not received because it is irrelevant. But since relevance is a matter not of law but of common sense based on experience, the statement of a reasoned conclusion by a witness who has personally perceived a disputed event has logical probative value to anyone attempting to determine the historical event. An eye witness who testifies, for example, that the road "was treacherous" or that the victim "was obstreperous" or that the accused "was angry" makes a statement that reasonable men would conclude rationally tends to demonstrate the actual state of the road, victim or accused.

Lacking justification in principle, impossible to apply in practice, and at times an interference with a witness' normal manner of describing facts, an opinion rule which would exclude relevant and helpful evidence regardless of the witness' personal knowledge should be repudiated.

For convenience paragraph 2(a) restates the personal knowledge requirement of section 1 because we are not certain where section 1 will be placed in the final draft of the Code.

Proposed paragraph 2(b) would have the effect of changing the present "strict necessity" test for determining the admissibility of opinion testimony of lay witnesses to a test of whether the opinion would be helpful to the trier of fact. This should have the advantage of being a criterion which is capable of application and which will permit witnesses to describe facts not only in a manner in which they are accustomed to speaking, but also in a manner which will be most useful to the trier of fact

in determining the truth. The adversary system itself will provide safeguards against a witness describing facts in terms which are vague and general, since counsel eliciting them will be aware that a more detailed account from his witness will invariably be more persuasive with the trier of fact, and that in so far as he does not bring out the basis for the witness' inferences, the cross-examiner will expose and make the most of any weakness.

SECTION 3 - TESTIMONY BY EXPERTS

Under present law it is sometimes assumed that experts can only testify when the matter about which they are to testify is beyond the understanding of laymen. Section 3 makes it clear that a person qualified as an expert may testify before the trier of fact about knowledge within his area of expertise whenever such evidence would be of assistance to the jury. This will permit the intelligent use of experts, but at the same time exclude their testimony whenever its use would be superfluous and a waste of time. Because of the increased complexity of litigation, and hence the increased reliance on specialized knowledge from all fields, an expert as defined by the rule covers a wide range of possible witnesses. The rule emphasizes that experts can and should testify in specific terms as well as general conclusionary terms.

SECTION 4 - OPINION ON ULTIMATE ISSUE

The rule that a witness is not allowed to express his opinion upon an ultimate issue in the case is in effect only an extension of the rule prohibiting a witness from stating his opinion. The courts, however, in the 19th century developed a separate rule to exclude a witness' opinion that was so general that it embraced the ultimate disposition of the case. The rationale for the rule was said to be that an opinion on the ultimate issue of the case "usurps the function" or at least "invades the province" of the jury. Although described by Professor Wigmore as "one of those impracticable and misconceived utterances which lacks any justification in principle", the rule has proved difficult to extinguish despite valiant judicial attempts.

The rationale of the present rule excluding a witness' opinion upon an ultimate issue ignores the fact that, like any other piece of evidence, an opinion may be rejected as valueless by the trier of fact. Opinion testimony

cannot decide the fact itself, but rather it simply supplies the trier of fact with an additional fact which could assist him in deciding the question. If the opinion is helpful, it should not be excluded.

Besides lacking justification, a broad formulation of an ultimate issue rule is theoretically unworkable. For instance, all evidence led by the prosecutor must be relevant to matters that are necessary to prove the alleged crime. Thus prosecution witnesses must always be testifying to an ultimate issue in the sense that failure of proof with respect to anything necessary to a successful prosecution will yield an acquittal. In theory, then, no witness, bound by the rules of relevancy and materiality, would be permitted to testify to anything under a broad formulation of the ultimate issue rule. In practice, of course, such testimony is received and instances of the application of the ultimate issue rule are truly, on analysis, applications of the general requirement that expressions of opinion must be helpful to the jury.

The only justifiable application of the "ultimate issue rule" is a narrow formulation which forbids expressions of opinion such as "the defendant is guilty" or "the plaintiff was contributorily negligent". These expressions are opinions on questions of law, or questions of mixed fact and law, and can perhaps justifiably be excluded since the application of a legal standard is not the function of a witness. However, even a narrow formulation of the ultimate issue rule is not necessary to forbid these opinions since most of them will fail to meet the criterion of helpfulness, or will be excluded because their probative value is outweighed by the danger of misleading the jury or unduly delaying the proceeding. (We intend to introduce a general provision giving the trial judge a power to exclude evidence when the latter situation occurs.)

The inherent futility of a broad ultimate issue rule has been recognized recently by some of the highest courts in Canada, England and the United States, but express statutory renunciation of it appears advisable to prevent any possibility of resurrection.

SECTION 5 - BASES OF OPINION TESTIMONY BY EXPERTS

It is commonly said that an expert is confined to expressions of opinion based on facts proved at the trial: either proved by the expert's own testimony when he has had the advantage of personally observing the facts in issue, or proved by the testimony of other witnesses. In the latter case the opinion elicited must be based on an assumption that

the other witnesses' testimony is true. Thus the expert's opinion is in effect based on a hypothetical question. When the expert testifies on the basis of information disclosed to him by another prior to the hearing, and this information is proved at the hearing, he is permitted to state what that information was, since that helps to define his area of exploration. His testimony does not violate the hearsay rule since the communications referred to are not tendered for the purposes of proving the truth of the matter stated.

To the general proposition that an expert is confined to expressions of opinion based on facts proved at the trial, there appears to be an attitude developing in the courts that, at least with respect to certain experts, an opinion may be expressed though based on facts not otherwise proved. Two reasons appear to justify this relaxation of the hearsay rule: first, necessity, and second, the presence of circumstances which guarantee the trustworthiness of an out of court report by a third person upon which the expert relies.

To date, in Canada, this relaxation of the hearsay rule appears to have occurred with respect to expert psychiatric evidence and the evidence of witnesses skilled in land valuation. In the former case the relaxation appears to be due mainly to a trust in the professional ability of the psychiatrist to separate truth from fiction. In the latter case, while partly attributed to the expertise of the witness in evaluating reports made to him, the relaxation is mainly a recognition of the impracticability of insisting on the attendance of the large numbers of informants whose individual views contributed to the appraiser's ultimate opinion. In both instances, the expert's validation of the truth of reports made to him is subject to the process of cross-examination, and any weaknesses exhibited will no doubt affect the weight to be given to his opinion by the trier of fact.

Permitting the reception of expert opinion, though based on hearsay, is not novel. An expert testifying to his opinion, since only permitted so to do when he possesses particular knowledge and experience not shared by the trier of fact, must necessarily rely on hearsay. In developing his expertise he must rely on statements of his instructors, on textwriters, as well as on discussions with other persons learned in the same field.

Although the reliability of the hearsay mentioned in the paragraph above is easier to test than hearsay which describes specific facts of the litigation, the Project concluded that all experts should be permitted to found their opinion on hearsay if it is of a type reasonably relied upon by experts in their field. The strongest case can probably

be made for relaxing the existing rule as it applies to medical doctors, since during the course of their practice they must make decisions based on hearsay data compiled often by other experts. However, it would be impracticable to compile a detailed list of experts towards whom this attitude should be displayed together with a list of matters upon which they would be entitled to base their opinion. Most experts in their day-to-day decision making rely to some extent, out of necessity, on hearsay evidence. Moreover, most acquire an expertise in assessing the evidence upon which they rely. Therefore if the courts are to utilize most profitably the experience and assistance of experts, they must be prepared to accept their opinions on the terms in which they are normally expressed.

While the proposed section is a relaxation from the rigours of the existing technical hearsay rule, there are adequate safeguards to assure that the evidence received can be properly weighed. The trial judge has a discretion under the section to reject an expert opinion when in his view the material forming the basis of the opinion was not of a kind reasonably relied upon by experts in that field. He will also be able, if he wishes, to call as a witness any third party upon whom the expert is relying. Moreover, the right of the adversary to probe for and display weaknesses in the expert's validation, and to comment in argument upon it, will assure that the trier of fact is able to view the whole situation in assessing the weight to be given to the expert's opinion.

SECTION 6 - DISCLOSURE OF THE BASIS OF A WITNESS' OPINION

Section 6 deals with the manner in which opinion testimony should be elicited. The principal issue resolved by the section is whether a witness, before stating his opinion, must disclose all the facts and data upon which it is based.

Subsection 6(1) provides that before a witness states his opinion about facts that he has personally observed, the judge may in his discretion require the witness to first disclose the underlying facts or data. By implication such a witness is permitted to testify in terms of opinion or inference without first stating the factual data upon which it is based. Although in most cases it would be a matter of good trial tactics to disclose the basis of a witness' opinion before he stated such an opinion, in some cases this would be a needless gesture. Giving the judge a discretion as to whether to require that a specification of data precede the expression of the

opinion will be a safeguard against any abuses. As well, the adverse party will always be able to elicit the supporting data on cross-examination.

Subsection 6(2) makes it mandatory for an expert witness to first reveal the foundation of his opinion when he does not possess personal knowledge of the underlying facts, that is to say, when he is answering a question in hypothetical form. When an expert has no personal knowledge of the event but relies for his opinion on facts made known to him at the hearing, the opinion's worth rests on the testimony of others and the trier of fact must be sufficiently informed of this so that it is able to properly accept or reject the opinion. A proper consideration of the opinion's worth necessarily involves a consideration of the premises, and since there may be conflicting evidence in the case, the precise evidence relied on by the experts must be shown. Should the trier of fact decide to reject the evidence relied on by the expert it must, of course, reject the opinion based thereon. The hypothetical question is an admirable vehicle for making the clear distinction between premises and opinion and by the proposed section this is preserved. The section also codifies the existing judicial attitude that when the evidence concerning the expert's premises is all one way, and the hypothesis on which the expert is proceeding is apparent to the trier of fact, there is no need for the hypothetical question technique and the trial judge may dispense with the requirement.

SECTION 7 - PRIOR DISCLOSURE OF EXPERT EVIDENCE

The Criminal Procedure Project of the Law Reform Commission is considering the whole question of criminal discovery before trial, including the discovery of expert evidence. Their recommendations may go beyond the limited disclosure of expert evidence proposed by section 7 of this study paper and render this proposed section unnecessary. Nevertheless we thought that it was worthwhile here to raise the issue of prior disclosure of expert evidence intended to be used at trial because such disclosure is an integral part of other proposed sections in this study paper dealing with the receivability of evidence. The issue of discovery in criminal cases in general, including the discovery of all expert information in the possession of the parties, raises much more difficult questions than are here presented.

Under the common law expert witnesses are permitted to testify without disclosing prior to trial the substance of their testimony. This opportunity for surprise at trial weakens the effectiveness of the adversary system. One of

the most important premises of that system of fact finding is that each party in the dispute will be able not only to present his own case in its most favourable light but will also be able to thoroughly challenge his opponent's case. But particularly with expert evidence, which is based on knowledge not possessed by the ordinary lawyer, it is extremely difficult to effectively probe for weaknesses without advance notice of its substance and an opportunity to prepare. If we are to continue to provide expert assistance to the trier of fact by eliciting testimony from experts called by each party, the effectiveness of the adversary system demands prior disclosure. Prior disclosure might also shorten the time spent at trial by permitting early identification of the areas of actual controversy; this should reduce the number of matters of expertise which need to be litigated at the trial and might lead to agreed reports and obviate the necessity for the attendance of expert witnesses at trial.

One objection to prior disclosure in criminal cases might appear to be the privilege against self-incrimination: under the proposed legislation the accused will be required to disclose evidence he intends to introduce at trial prior to the prosecution establishing a *prima facie* case against him. However, the Evidence Project does not believe that the proposal in any way violates the privilege against self-incrimination. The defendant will not be forced to produce any incriminating evidence since he need only produce a report describing expert evidence on which he intends to rely in defence: the information disclosed will perforce be exculpatory. If a prosecutor under the existing system were taken by surprise by expert evidence at trial he would certainly be entitled to an adjournment to permit him time to prepare to meet that evidence, and surely no one would argue that to grant such adjournment would be violative of the privilege against self-incrimination. The proposal simply avoids the requirement of costly and delaying adjournments by requiring the defendant to reveal, at an early stage, that information which he has already decided to disclose at trial. The only advantage lost to the defendant under the proposeal will be the advantage of surprise and the Evidence Project concluded that such was not a value to be promoted in a system designed to produce a fair, orderly ascertainment of truth.

We do not believe that the proposed section will necessitate a great change in the present practice. Many defence counsel and prosecutors under the present law as a matter of practice, or at least when it would for some reason serve their own interests, exchange expert reports. As well, in most provinces, if the defence takes advantage of government forensic departments for expert assistance, a report of the expert's findings is automatically made

available to the prosecution by the forensic department. Interestingly, if such a department provides assistance to the prosecution the information is in many provinces not forwarded to the defence counsel and he must rely on the prosecutor's discretion for disclosure. The important effect of the section will be to make available to all counsel those advantages that now are available only to some.

On the civil side, the recent statutory trend in Canada, England and the United States has been toward requiring mutual disclosure of expert evidence prior to trial. The Evidence Project concluded that prior mutual disclosure of expert evidence, with its elimination of surprise and consequent promotion of efficiency in fact-finding, should improve the reliability of verdicts in criminal cases as well as in civil, and should do so without impairing the fairness of the criminal process.

SECTION 8 - APPOINTMENT OF COURT EXPERTS

One of the most criticized features of the use of expert witnesses is that their testimony is inevitably biased in favour of the party calling them. This criticism should not be directed at the experts themselves, who most often do not choose the role of a witness, but rather at the adversary system, which dictates their appearance as advocates. Each litigant naturally seeks, not the expert who can most objectively and skilfully assess the problem, but rather the expert who will be the best witness for his cause. Also the value of expert opinion when offered by the respective parties is often discredited by the charge that experts can be found to testify as to almost any proposition, if the fee is adequate. Proposed section 8 is a codification of the most frequently suggested proposal for curing this situation - a return to the earlier common law position of court-appointed experts. These experts would not be appointed for the purpose of interpreting for the court other expert evidence but would have a direct input of their own opinions.

Since the section is only permissive, and because the power of the judge to appoint a court expert is only in addition to the power of the parties to call their own experts, the provision, if enacted, will perhaps make little change in the present practice. Indeed, in those jurisdictions which have a similar provision it is little used. However, because if properly used the section could assist the court in reaching the truth by providing an expert witness who was not biased by the desire to satisfy the party calling him, the Evidence Project concluded that such a provision should be included in an Evidence Code.

The section is largely self-explanatory. Therefore, only a few of its more important features, by which the rule ensures fairness to all the parties, will be noted here. The parties are given an opportunity to show cause why a court expert witness should not be appointed, to participate in the appointment of such an expert, and they are assured of the right to cross-examine him on any testimony he gives. The duties that the judge may assign to the expert are multifarious, and are left to the implied powers of the judge.

The fact that an expert witness was appointed by the judge will in most cases be relevant to the weight to be given to his testimony. Subsection 8(2) thus provides that in the appropriate case this fact may be disclosed to the jury.

Subsection 8(5) makes it clear that the rule in no way prevents the parties from calling their own expert. It simply provides an additional method for the calling of expert witnesses. Not only should the possibility of a court-appointed expert curb the over-zealous partiality of partisan experts, but also the possibility that a partisan expert might be called should be sufficient to minimize error on the part of the court-appointed expert.

Subsection 8(6) provides for the payment of a reasonable compensation to a court-appointed expert. If the rules are adopted some provision would, of course, have to be made for the payment of experts in criminal cases.

Selected Reading Bibliography

OPINION AND EXPERT EVIDENCE

The Opinion Rule

A concise statement of the present rule in Canada is found in Evidence secs. 55, 56, 7 C.E.D. (Ont. 2d); Evidence secs. 55, 56, 10 C.E.D. (West. 2d); Popple, Canadian Criminal Evidence 537-540 (2d ed., 1954); Rex v. German, [1947] O.R. 395. See also Phipson, Evidence secs. 1271-1279, 1314-1325 (11th ed., 1970); Cross, Evidence 360-363 (3d ed., 1967). The history and theory of the opinion rule is reviewed in 7 Wigmore, Evidence secs. 1917, 1918 (3d ed., 1940); 2 Wigmore, Evidence sec. 557 (3d ed., 1940); McCormick, Evidence secs. 10, 11 (2d ed., 1972); Evidence sec. 52, 7 C.E.D. (Ont. 2d); Evidence sec. 52, 10 C.E.D. (West 2d); Cross, Evidence 370-371 (3d ed., 1967); Phipson, Evidence secs. 1272-1274 (11th ed., 1970).

A most thorough examination of the working of the opinion rule in one jurisdiction, and its inherent contradictions if carried to an extreme may be found in King and Phillinger, Opinion Evidence in Illinois (1942). That the rule only makes sense if applied loosely is noted in a review of the above book, Landon (1944), 60 Law Q. Rev. 201, and in Cowan and Carter, Some Observations on the Opinion Rule, in Essays on the Law of Evidence 162 at 164 (1956). See also regarding the impossibility of a witness stating facts and consequently the possible future of the rule, R. v. Miller (1959), 125 C.C.C. 8, 24, 25 (B.C.C.A.); 7 Wigmore, Evidence sec. 1919, 1929 (3d ed., 1940).

General discussions of opinion and expert evidence can be found in Maloney and Tomlinson, Opinion Evidence, in Studies in Canadian Criminal Evidence 219 (Salhany and Carter eds. 1972); Tyree, The Opinion Rule (1955), 10 Rutgers L. Rev. 601; Ladd, Expert Testimony (1951-52), 5 Vand. L. Rev. 414; Ladd, Expert and Other Opinion Testimony (1956), 40 Min. L. Rev. 437; Evidence of Opinion and Expert Evidence (1970), Seventeenth Report of the Law Reform Committee.

The Ultimate Issue Rule

English decisions illustrating that no ultimate issue rule existed in the early law of evidence are Beckwith et al. v. Sydebotham (1808), 170 E.R. 897 and Fenwick v. Bell (1844), 174 E.R. 825; see also the editorial note to the latter case at 826 and compare Sills v. Brown (1840), 173 E.R. 974. The change in judicial attitude to persons testifying on the issue to be decided that occurred in the 19th century, is described in British Drug Houses Ltd. v. Battle Pharmaceuticals, [1944] 4 D.L.R. 577 (Exch. Ct.). Professor Wigmore describes the apparent reason for the change as founded in a misinterpretation of an early English case, R. v. Wright (1821), 168 E.R. 895; 7 Wigmore, Evidence sec. 1921 (3d ed., 1940). Recent decisions signalling a return to the earlier position are R. v. Fisher (1961), 34 C.R. 320 (Ont. C.A.), affd, (1961), 35 C.R. 107 (S.C.C.); D.P.P. v. A.B.C. Chewing Gum Ltd., [1968] 1 Q.B. 159 (C.A.); Harried v. U.S. (1934), 293 U.S. 498 at 506 and, R. v. Lupien, [1970] 2 C.C.C. 6 (S.C.C.). For a discussion of the "ultimate issue" doctrine after Lupien see Stenning, Expert Evidence: The hearsay rule and the "ultimate issue" doctrine (1970), 9 C.R.N.S. 181.

Bases of Opinion Testimony by Experts

A recent Canadian article analysing this problem is Hollies, Hearsay as the Basis of Opinion Evidence (1967-68), 10 Crim. L.Q. 288; besides the cases there discussed evidence of the relaxation of the hearsay requirement with respect to expert opinion evidence is provided by the cases of R. v. Lupien, [1970] 2 C.C.C. 6 (S.C.C.) and R. v. Times Square Cinema Ltd., [1971] 3 O.R. 688 (C.A.). Arguments by American scholars for such relaxation may be seen in Maguire and Hahesy, Requisite Proof of Basis for Expert Opinion (1952), 5 Vand. L. Rev. 432; Rheingold, The Basis of Medical Testimony (1962), 15 Vand. L. Rev. 473, and McCormick, Evidence sec. 15 (2d ed., 1972). That hearsay is always indirectly involved in expert evidence, since expertise is developed partly as the result of instruction from others, is described in 3 Wigmore, Evidence sec. 687 (Chadbourn rev. 1970) and 2 Wigmore, Evidence sec. 665 B (3d ed., 1940); the most recent Canadian recognition of this fact is seen in Reference re Sections 222, 224 and 224A of the Criminal Code, (1971) 3 C.C.C. (2d) 243 at 254.

Prior Disclosure of Expert Evidence

Of great worth in this area are the Report of the Ontario Attorney General's Committee on Medical Evidence in Court in Civil Cases (1965), the English Report of the Joint Committee on Medical Evidence in Courts (1962), and the Final Report of the Committee on Supreme Court Practice and Procedure (1953) Cmnd. 8878, para. 352. The recent statutory trend in Canada, England and the United States requiring mutual disclosure of expert evidence prior to trial is seen in The Ontario Evidence Act, R.S.O. 1970, c. 151, s. 52; General Rules and Orders of the Federal Court of Canada, P.C. 1971-L70, Rule 482; Civil Evidence Act 1972, 20-21 Eliz. 11, c. 30 (1972); Fed. Rules Civ. Proc., rule 26, 28 U.S.C.A.; Fed. Rules Crim. Proc., Rule 16, 18 U.S.C.A. Articles of general interest in this area are Clendenning, Expert Testimony (1967), 9 Crim. L.Q. 415; Williams, Advance Notice of the Defence, [1959] Crim. L.R. 548; Traynor, Ground Lost and Found in Criminal Discovery (1964), 39 N.Y.U.L.R. 228, 749; Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma (1965), 53 Cal. L. Rev. 89; Hooper, Discovery in Criminal Cases (1972), 50 Can. B. Rev. 445.

Appointment of Court Experts

The history of court-appointed experts and the development of experts testifying as witnesses is described in Hand, Historical and Practical Considerations Regarding Expert Testimony (1901), 51 Harv. L. Rev. 40; Rosenthal, The Development of the Use of Expert Testimony (1935), 2 Law and Contemporary Problems 403. Descriptions of the court expert in civil law jurisdictions are contained in Hammelman, Expert Evidence (1947), 10 Mod. L. Rev. 32; Ploscowe, The Expert Witness in Criminal Cases in France, Germany and Italy (1935), 2 Law and Contemporary Problems 504; Schroeder, Problems Faced by the Impartial Expert Witness in Court; The Continental View (1961), 34 Temple L.Q. 378.

There has been an extensive accumulation of literature on the whole problem of court-appointed experts. Both Wigmore, 2 Wigmore, Evidence sec. 563 (3d ed., 1940), and McCormick, McCormick, Evidence sec. 17 (2d ed., 1972), advocate use of court-appointed experts, and review the American proposals and legislation. See also a series of articles on expert testimony in 2 Law and Contemporary

Problems 401-527 (1938); and the literature spawned by the New York plan for the use of panels of medical experts for the purpose of providing impartial experts, Report by Special Committee of the Association of the Bar of the City of New York: Impartial Medical Testimony (1956); Note (1959), 63 Yale L.J. 1023; Van Dusen, A United States District Judge's View of the Impartial Expert System (1963), 32 F.R.D. 498. Views critical of court-appointed experts are expressed in DeParcq, Law, Science and The Expert Witness (1956), 24 Tenn. L. Rev. 166; Levy, Impartial Medical Testimony - Revisited (1961), 34 Temple L.Q. 416; Diamond, The Fallacy of the Impartial Expert (1959), 3 Archives of Criminal Psychodynamics 221. Legislation in England and the United States permitting court-appointed experts in addition to experts called by the parties is seen in R.S.C. 1965, Order 40, Rules 1-6 and Fed. Rules Crim. Proc. rule 28, 18 U.S.C.A. A review of the Canadian rules of court permitting a judge to obtain assistance of experts can be found in Schiff, The Use of Out-of-Court Information in Fact Determination at Trial (1963), 41 Can. B. Rev. 335, 367-373; of interest also is the recent decision of Phillips v. Ford Motor Co. of Canada Ltd. (1971), 18 D.L.R. (3d) 641 (Ont. C.A.).

Study Paper #8

LAW REFORM COMMISSION OF CANADA

A Study Paper by the
Law of Evidence Project

BURDENS OF PROOF AND PRESUMPTIONS

POSSIBLE FORUMULATION OF PROPOSED LEGISLATION

Burdens of Proof and Presumptions

Section 1. Burden of Persuasion

Definition
"Burden of Persuasion" means the obligation of a party to persuade the trier of fact to the requisite degree of belief in the existence or non-existence of a fact in issue.

Section 2. Civil Cases

Required Degree of Belief

In civil cases the burden of persuasion on a fact in issue is discharged when the trier of fact is persuaded that the existence of the fact is more probable than its non-existence and believes that the fact exists.

Section 3. Criminal Cases

(1) Required Degree of Belief

In criminal cases the accused is assumed to be innocent unless and until the existence of each element of the offence and the non-existence of a defence, excuse or justification is proved beyond a reasonable doubt. The trier of fact shall draw no inferences of guilt from the accused person's arrest or detention nor from his having been charged with the offence being tried.

(2) Rule in Hodge's Case

Although evidence of the criminal act is substantially circumstantial, the trier of fact need not be instructed that before the accused can be found guilty the circumstances proved in evidence must be not only consistent with the

accused having committed the act, but also inconsistent with any other rational conclusion.

(3) Defence, Excuse or Justification

Subsection (1) does not require disproof of a defence, excuse or justification unless the issue is in the case as a result of evidence sufficient to raise a reasonable doubt on the issue.

(4) Affirmative Defence

Notwithstanding subsection (1) when a statute explicitly designates a defence, excuse or justification as an "affirmative defence" the trier of fact must be persuaded that its existence is more probable than its non-existence and believe that it exists.

Section 4. Burden of Producing Evidence

(1) Definition

"Burden of producing evidence" means the obligation of a party to introduce evidence of a fact sufficient to avoid a ruling by the judge that the existence of the fact cannot be considered by the trier of fact.

(2) Test for Sufficiency of Evidence

(a) Civil Cases. If the proceeding is a civil case, evidence sufficient to avoid a ruling by the judge that the existence of a material fact cannot be considered by the trier of fact will be evidence upon which a reasonable man could be satisfied that the existence of the fact is more probable than its non-existence and that the fact exists.

(b) Criminal Cases. If the proceeding is a criminal case: (i) evidence sufficient to avoid a directed verdict of acquittal will be evidence upon which a reasonable man could be satisfied beyond a reasonable doubt that the accused is guilty; (ii) evidence sufficient to avoid a ruling that an affirmative defence will not be considered by the trier of fact will be evidence upon which a reasonable man could be satisfied

that the existence of the affirmative defence is more probable than its non-existence and that it exists.

Section 5. Presumptions

(1) Definition

"Presumption" is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action.

(2) Effect in Civil Cases

When the basic fact of a presumption has been established, the existence of the presumed fact must be assumed unless and until the trier of fact is persuaded that the non-existence of the presumed fact is more probable than its existence and believes that the presumed fact does not exist.

(3) Effect in Criminal Cases

When the basic fact of a presumption has been established, the existence of the presumed fact must be assumed unless and until evidence has been introduced sufficient to raise a reasonable doubt about the existence of the presumed fact.

Section 6. Limits of Burdens of Proof Falling on the Accused

Subject to statutory provisions creating affirmative defences, and notwithstanding subsection 3(1) of this Part, where any rule of law or enactment imposes upon an accused person in a criminal proceeding the burden of persuasion or the burden of producing evidence on a fact, after evidence has been introduced sufficient to raise a reasonable doubt about the existence of the fact, the trier of fact must be satisfied beyond a reasonable doubt that the fact exists.

COMMENT

Introduction

The present law respecting burdens of proof and the use of presumptions is unsatisfactory. To a large extent this is due to the wide variety of statutory language employed. Therefore, the main purpose of the proposed sections is to provide a uniform vocabulary and an analytical framework for the consideration of problems related to burdens of proof and presumptions. In an area as fundamental as burdens of proof and presumptions there should be no conflict or confusion in the law. However, in this Study Paper we also propose four changes in the present law; firstly, that only one standard of proof apply to all civil cases; secondly, that all presumptions in civil cases should have the effect of shifting to the adverse party the burden of persuasion; thirdly, that the rule in Hodge's Case be abolished; and fourthly, that all presumptions in criminal cases should have the effect of shifting only the burden of producing evidence.

Burdens of Proof

In judicial decisions the term "burden of proof" is often used to refer to either of two distinct responsibilities. Primarily it is used to refer to the responsibility that a party has to persuade the trier of fact of the existence or non-existence of a particular fact. However, the term is also used to refer to the responsibility that a party has to produce some evidence of an asserted fact to avoid a ruling by the trial judge that the existence of the fact cannot be considered by the trier of fact. The proposed legislation labels the former usage "burden of persuasion" and the latter "burden of producing evidence" with the expectation that the avoidance of the latently ambiguous term "burden of proof" will lessen the opportunity for confusion.

SECTION 1 - BURDEN OF PERSUASION

The responsibility of persuading the trier of fact of the existence or non-existence of a material fact has been variously referred to in the judicial decisions as the

"ultimate", "major", "primary", "fixed", "persuasive", or "legal" burden, as well as the "risk of non-persuasion". In the proposed section this responsibility is referred to as the "burden of persuasion" since that term is descriptive of the responsibility and is in common use.

SECTION 2 - CIVIL CASES

In civil cases the usual verbal formula for testing the required measure of persuasion is that there must be a "preponderance of evidence" in favour of the party who has the burden of persuasion before he is entitled to a finding in his favour. No less common is the phrase that a party must establish his case beyond the "balance of probabilities". However, the formula has varied and all of the following have been used: "preponderance of probability", "reasonable probabilities", and "on such a preponderance of evidence as to show that the conclusion the party seeks to establish is substantially the most probable of the possible views of the facts".

Most would agree, and some cases explicitly have held, that the trier of fact must actually believe in the existence of the disputed fact before he can find for the party whose case depends upon the existence of the fact. No one in the course of his everyday affairs acts on the basis of simply weighing evidence mechanically, but rather he requires some degree of belief or conviction in a fact's existence. The difficulty with the above formulations of the burden of persuasion in civil cases is that they suggest that the trier of fact has simply to weigh the evidence in the abstract and determine which side preponderates, rather than be actually persuaded of its existence. That is, they appear to describe the quantum of evidence needed rather than the required state of mind of the trier of fact. Although it is doubtful whether a jury or judge would actually attempt to compare mechanically the probabilities independent of any belief in the reality of the facts, it was thought that the formula suggested in section 2 would be more meaningful and accurate than the older formulations. The section does not emphasize the weight of the evidence; rather it directs the attention of the triers of fact to the degree of belief which the proponent of the proposition must produce in their minds before the proponent is entitled to a finding favourable to him.

Under the present law the "more probable than not" test, however phrased, is not applied to all types of civil actions and to all issues in them. For some claims and contentions the courts have specifically required that a

party produce in the mind of the trier of fact a substantially greater degree of belief. This degree of belief has been expressed as "clear and convincing", "convincing evidence", and in some cases the criminal standard, "proof beyond a reasonable doubt", has been used. This standard requiring a stronger degree of belief was apparently developed to apply to cases in which the claims were inherently subject to fabrication, or rested on allegations impugning character. Although the Canadian cases have been inconsistent in requiring a higher standard of proof, some have held it to be required in disbarment proceedings, claims of fraud, crime, moral dereliction and attempts to vary or change writing, and illegitimacy. The Project had to decide whether there ought to be multiple standards of proof in civil cases, and if so, which causes of action required which standard.

No fault can be found with requiring in some civil cases a higher degree of belief than in others. Some civil suits, in terms of their consequences, are as serious to a party as a criminal action. As in everyday affairs, one would suppose that the degree of belief required to uphold different claims should vary with the seriousness of the allegations. The difficulty is in deciding upon a formula to use to convey to the judge or jury the degree of belief required in each case, and indeed in determining the particular fact situation to which such a formula should be applied. Because the degree of seriousness of civil actions is a continuum, the Project decided that it would be impossible to make a meaningful distinction in civil cases as to what the degree of belief required should be. In practice the actual degree of persuasion required in a civil case probably varies with the seriousness and consequences of the allegations. Thus there will be degrees of belief within any standard articulated for civil cases just as there probably are degrees of belief within the standard in criminal cases. In determining whether they are persuaded that the existence of the fact is more probable than its non-existence and that the fact exists, the trier of fact will consider, as a matter of common intelligence, the nature and consequences, both social and economic, of the facts to be proved.

Therefore, the Project did not think there was any need to articulate more than one standard for civil cases and also believed that the provision of multiple standards would create confusion and arbitrary distinctions. Indeed, because in each case the degree of belief required to discharge the burden of persuasion will probably vary with the consequences that will follow the decision, it has been strongly argued that there should be only one verbal formula to apply to all cases, both civil and criminal. The standard might be that the trier of fact must be "reasonably satisfied", or have an

"intimate conviction", upon all the evidence that the facts alleged exist. Such a standard, it is urged, has sufficient flexibility to cover all cases. As pointed out above, it is true that the same verbal formula can connote different degrees of belief depending on the facts to be proved, and that different people might tend to translate the statutory phrase into different probability statements. However, the Project did feel that the formula suggested does provide a more helpful perspective from which to approach the case than does the phrase "reasonably satisfied". And although we can justifiably, as a general statement, distinguish between criminal and civil cases, for the reasons given below, to distinguish between civil cases is to play games with words.

The Project considered adding a section containing a mandatory instruction to the jury on the burden of persuasion in civil cases. However, we are doubtful whether anything meaningful can be added to the phrase in the section. The phrase is brief and simple and probably understandable to a layman; any explanation might only lead to confusion. After explaining to the jury the facts which the plaintiff must maintain, the judge will simply instruct them to find against the plaintiff unless they are persuaded by the evidence that the truth of the poposition**s** is more probable than their falsity and that the fact exists.

SECTION 3 - CRIMINAL CASES

Subsection 3(1) - Required Degree of Belief

A high standard of proof is now required in criminal cases and is justified by the purposes for which the criminal sanction is used, the seriousness of depriving someone of his liberty, the stigmatization of the accused that results from a criminal conviction, and the other economic and social consequences that a criminal conviction entails.

We concluded that no better formula could be devised than "proof beyond a reasonable doubt" to express the burden of persuasion in criminal cases. Unlike the formula now used in civil cases, "the preponderance of evidence", the phrase correctly directs the fact-finders' attention to the degree of belief they must have in order to find for the prosecution, rather than the amount of evidence that the prosecution must produce. It is a phrase that is well known among laymen and has acquired an important meaning for them. Moreover, by itself the phrase is perfectly intelligible. If the judge explains to the jury that the Crown does not satisfy its burden of proof unless the evidence

convinces them beyond a reasonable doubt of the existence of all the facts the Crown must prove, there would appear to be little danger that the average juror would fail to understand. Reasonable doubt is doubt which is reasonable; it is difficult to see how such a formula could be simplified or amplified to advantage. Indeed, amplifications or paraphrases of it probably only confuse the jury, and on many occasions have led to appeals and reversals.

In addition to the necessary direction concerning "reasonable doubt", a few appellate courts have insisted that the trial judge should instruct the jury that the accused is presumed innocent until proved guilty. The assumption of innocence is specifically mentioned in the section to clarify the meaning of that assumption and to remind the jury and others of its vital importance. The word "assumed" is substituted in the section for the more commonly used word "presumed" in the phrase "presumed to be innocent", since a person's innocence is not "presumed" as that word is properly used in law, i.e., to describe a fact that is inferred from certain basic facts proved at trial. Rather, as a matter of social policy, a person's innocence is "assumed" from the outset of the case.

Professor Wigmore thought that the term "presumption of innocence" was only another way of articulating the burden of proof upon the prosecution, but he did say, "the term does convey a special and perhaps useful hint...in that it cautions the jury to put away from their minds all the suspicions that arise from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." (9 Wigmore, Evidence s. 251 at 507 (3d ed., 1940)). For the reason given by Wigmore, the Project concluded that as an important addition to the charge to the jury, and as a reminder to all persons, the sentence, "The trier of fact shall draw no inferences of guilt from the accused person's arrest or detention nor from his having been charged with the offence being tried.", should be added to the section.

Subsection 3(2) - Rule in Hodge's Case

Under the present law, in criminal trials in which the evidence of the criminal act is substantially circumstantial, the jury must be instructed in accordance with the rule in Hodge's case. That is, they must be instructed that before they can find the accused guilty they must be satisfied that the circumstances proved in evidence are not only consistent with the accused having committed the act, but also that the circumstances were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person. The requirement that the alternative conclusion to guilt be "rational" means that it must be supported by evidence. Canada appears to be the only

jurisdiction in the common law world which requires this additional instruction in criminal cases in which the prosecution relies upon circumstantial evidence.

For the following reasons the Project concluded that this requirement for an additional instruction in criminal cases of circumstantial evidence is a requirement without a purpose and should be abolished:

(1) The instruction on the rule in Hodge's Case adds nothing to a correct instruction on "proof beyond a reasonable doubt". In a case of circumstantial evidence, the jury must, of course, be sure they have no reasonable doubt about the credibility of the testimonial evidence as well as the inferences they draw from it. However, a separate instruction, using a different formula, is not necessary to convey this meaning to them.

(2) Jurymen are undoubtedly familiar in their day-to-day affairs with drawing inferences from circumstantial evidence. They probably understand or are even familiar with the phrase "proof beyond a reasonable doubt". The additional instruction that the rule in Hodge's Case requires must therefore only be confusing to them. Indeed, some jurymen probably incorrectly conclude that it requires a higher standard of proof than does the phrase "beyond a reasonable doubt".

(3) The Canadian courts in recent years have greatly restricted the application of the Rule rendering it even more of an anomaly and more of a trap for technical appeals. It now applies only to the criminal act itself and not to the accused's intent.

Subsection 3(3) - Defence, Excuse or Justification

Although a plea of "not guilty" puts into issue all those matters that might exonerate the accused, the prosecution obviously does not have to disprove the existence of every possible defence that might negate one of the essential elements of the offence. For instance, although intoxication or mistake of fact may negate the existence of the requisite mental element to commit a crime, the cases clearly hold that the Crown does not have to disprove them unless there is some evidence either in the prosecution's presentation or in the case for the defence raising the issue. Under the proposed section the issue must be disproved by the prosecution only if there is "evidence sufficient to raise a reasonable doubt on the issue". Note that the evidence does not have to in fact raise a reasonable doubt on the issue for the Crown to be put on its burden of persuasion, but must only be evidence

sufficient to raise a reasonable doubt. Thus the judge will instruct the jury that the Crown must disprove the issue if the trial judge concludes a reasonable man could have a doubt about the issue. Although other phrases have been suggested for describing the evidence needed to raise a defence, for instance, "a mere scintilla", "slight evidence", a "tittle of evidence", the standard in the proposed section seems preferable since it relates the quantum of evidence needed to the prosecution's standard of proof.

Requiring a specific defence to be raised in the case before the prosecution must disprove it follows from the fact that a conjectural possibility is not sufficient to raise a reasonable doubt; rather it must be a doubt that is reasonable on the whole of the evidence. "Defence" is perhaps an unfortunate name with which to refer to these issues since it seems to imply that the issue must be raised in the case by the defence, when in fact the issue only has to be fairly raised in the case and might, and indeed often is, raised by the prosecution's evidence. However, the word is descriptive and is in common use.

Some issues in a criminal trial which are sometimes called defences are more properly called excuses or justifications, since they do not deny the existence of any of the material elements of the offence but rather are held to justify or excuse, to a greater or lesser extent, that which would otherwise be criminal conduct. For example, duress and provocation are considered capable of absolving or mitigating culpability for wrongful actions. Under the present law the accused is sometimes held to be subject to merely a burden of producing evidence (for example, with respect to the issue of provocation) while in other instances he must discharge a burden of persuasion (for example, sec. 730 of the Criminal Code). Subsection 3(3) provides that if the accused wishes to have a justification or excuse considered by the trier of fact he must ensure that either in the prosecution's case, or as part of his own case, evidence sufficient to raise a reasonable doubt on the issue of the excuse or justification is led. Once such an excuse or justification is raised, the triers of fact must, of course, be satisfied of its non-existence beyond a reasonable doubt before they find against the accused with respect to it. If the excuse or justification is not raised, the trial judge will not consider it nor will he instruct the jury on it. A burden of persuasion on the accused will only exist if the excuse, justification, exemption or qualification is specifically designated an affirmative defence. The task of deciding what issues should be part of the statutory definition of a crime, and what issues should constitute an excuse or justification to an offence, will have to be considered by the General Principles Project of the Law Reform Commission.

Subsection 3(4) - Affirmative Defences

Under the present law the prosecution is often relieved of proving an element of a particular offence beyond a reasonable doubt. The language of a number of Criminal Code provisions clearly places on the accused person the burden of persuasion concerning elements of certain offences.

The Evidence Project believes that requiring the trier of fact to be convinced of the accused's guilt beyond a reasonable doubt is the most important evidentiary rule ensuring that innocent people are not convicted. For this reason, which is discussed more fully in this Study Paper under the heading "Presumptions", the Evidence Project concluded that in a criminal trial the accused should never be obliged to persuade the trier of fact of the non-existence of any element of an offence. However, the allocation of burdens is a matter which the General Principles Project of the Law Reform Commission will have to consider; we regard our task, in the main, as simply providing the most appropriate analytical framework and uniform language. It is conceivable that in some areas divergent views on substantive issues can only be reconciled by casting a burden of persuasion on the accused. If the General Principles Project concludes that this is necessary, the Evidence Project concluded that it would be more honest and much less confusing if this shifting of the burden were done at the outset of the case, and if the element of the offence that the accused must prove were not included in the definition of the offence but instead was designated an Affirmative Defence. For this reason, which is discussed more fully in the next section, we recommend the inclusion of an exception to the reasonable doubt standard labelled "Affirmative Defence".

SECTION 4 - BURDEN OF PRODUCING EVIDENCE

The burden of producing evidence was described earlier in this paper as the responsibility a party has to produce some evidence of a material fact to avoid a ruling by the judge that the existence of the fact cannot be considered by the trier of fact. Because of the ambiguity in the use of the term "burden of proof", subsection 4(1) sets out this definition.

Although the burden of producing evidence is, of course, important in both civil and criminal cases, its importance will be illustrated here by reference to a criminal case. Under the present law, at the close of the case for the prosecution, the accused, before electing whether or not to call evidence, may move for a directed verdict on the grounds

that the prosecution has not satisfied its burden of producing evidence, that is, the Crown has failed to adduce sufficient evidence which could legally support conviction. The absence of sufficient evidence may relate to any matter that is essential to the prosecution's case, such as identity, possession or jurisdiction. This is, of course, a question of law and is decided by the trial judge. If the accused fails in his motion at this point in the trial, he may then elect to call evidence. At the end of the accused's case, and before the case goes to the jury, the accused may again move for a directed verdict on the grounds that there is not sufficient evidence for the case to go to the jury, or to put it in terms of burden of proof, that the prosecution has not satisfied the burden of producing evidence. At this stage in ruling whether there is sufficient evidence to go to the jury, the judge will consider all the evidence in the case, including that introduced by the accused. Although the above description states the procedure followed by most courts on some of the points, the cases are in conflict. The proposed legislation does not, of course, deal with the procedure for directed verdicts, nor the nature of an appeal from a motion for a directed verdict; the above description was put in only to illustrate the importance of the burden of producing evidence.

If there is direct evidence on all the material facts obviously the question of sufficiency causes little difficulty since the testimony of one witness, unless inherently unbelievable, is sufficient. However, if the evidence is circumstantial some courts have felt that the formula for sufficiency ought to reflect the rule in Hodge's Case. The test most frequently employed is that the judge, to leave the case to the jury, must determine that a reasonable jury could "be satisfied not only that the circumstances are consistent with the conclusion that the criminal act was committed by the accused, but also that the facts are such to be inconsistent with any other rational conclusion than that the accused is the guilty person". Since we have suggested that the same verbal formula should be used to describe the burden of persuasion in cases both of direct and circumstantial evidence, obviously the same formula should be used in both cases in describing the burden of producing evidence.

One of the most important purposes of the burden of producing evidence is to provide the judge with a device for containing the jury within the parameters of rationality. Therefore logically the quantum of evidence needed to satisfy the burden of producing evidence should reflect the burden of persuasion. Thus, in civil cases in which the burden of persuasion is whether the existence of the fact is more probable than its non-existence, the relevant question in testing the sufficiency of evidence is whether a reasonable man could, on the evidence adduced, be satisfied that the

existence of the fact is more probable than its non-existence. In criminal cases in which the prosecution must persuade the jury beyond a reasonable doubt, the test for a directed verdict of acquittal should logically be whether the evidence could satisfy reasonable men beyond a reasonable doubt; the test for determining whether a defence or excuse should be left to the jury should be whether the evidence is such that a reasonable jury could have a reasonable doubt respecting its existence.

It is important to realize that the trial judge in a criminal case, whether sitting with a jury or without, does not, in assessing sufficiency, perform the function of a trier of fact. For example, when an application for a directed verdict is made, the trial judge does not assess the credibility of the witnesses and does not ask himself if he is satisfied beyond a reasonable doubt. He is entitled to perform these functions only when sitting alone and when all the evidence in the case is in, for example, when the accused moves for a directed verdict of acquittal and signifies by his election that he will not be calling any evidence. The trial judge, ruling on sufficiency of the evidence, a question of law, whether sitting with a jury or without, asks himself whether a trier of fact properly instructed could reasonably, on the basis of the evidence led by the prosecution, find that the guilt of the accused is proved beyond a reasonable doubt. If, and only if, the trial judge concludes that the trier of fact could properly find guilt proved beyond a reasonable doubt, is he entitled to refuse the motion. If there is to be some judicial control minimizing the opportunity for convicting the innocent the trial judge must measure the sufficiency of the evidence in relation to the ultimate standard of proof. If the trial judge does anything less he will be delivering to the trier of fact, and to the possibility of a conviction, an accused person about whom he cannot say that a trier of fact acting reasonably could convict!

SECTION 5 - PRESUMPTIONS

The term "presumption" is used in statutes and by judges and writers to label several different situations involving proof of specific facts in issue. It is therefore often difficult in a particular case to determine who has the burden of producing evidence on the facts and who has the burden of persuasion. One of the purposes of these proposed sections is to restrict and thus clarify the use of the term presumption and to ensure that presumptions achieve the policies that they are invoked to achieve. Since the policies to consider in allocating the burdens of proof are different

in criminal cases than in civil cases, subsection 5(3) describes their effect in the former, while subsection 5(2) describes their effect in the latter.

The Use of the Term Presumption

The term presumption has been used in at least four different senses:

1. The word presumption is sometimes used as a label for the situation in which when certain basic facts are established, the designated presumed fact is taken as conclusively proved and all contradictory evidence is inadmissible. For instance, the courts have said that if it is proven that a boy is only fourteen, then at common law it is conclusively presumed that he could not be guilty of rape as a principal in the first degree. This principle is restated in the same presumptive terms in section 147 of the Criminal Code which reads, "No male person shall be deemed to commit an offence under section 144 while he is under the age of fourteen years."

Most writers agree that this usage is improper, and that this so-called presumption is nothing more than a rule of substantive law expressed in presumptive form. For instance, the common law presumption mentioned above is simply a substantive law decision that children under the age of fourteen will not be held criminally responsible for committing certain offences, and would be better said in that straightforward form. To say, as in subsection 180(2) of the Criminal Code, that "a place that is found to be equipped with a slot machine shall be conclusively presumed to be a common gaming house", would be more clearly expressed by providing that "a place that is found to be equipped with a slot machine is a common gaming house". Rather than saying, as in subsection 159(8) of the Criminal Code, that "any publication a dominant characteristic of which is the undue exploitation of sex...shall be deemed to be obscene" it would be better to use simply a definition and say "an obscene publication is a publication a dominant characteristic of which is the undue exploitation of sex". We would therefore recommend that all those sections in the Criminal Code, for instance sections 147, 159(8), 180(2), 314(2), 379(2), 392(2) and 517, that use a presumptive device to state a rule of substantive law or to define an ingredient of a crime, be redrafted in the most direct manner, and that the phrase conclusive presumption, which is not only unnecessary but also a contradiction in terms, be purged from our legal language.

2. The word presumption is sometimes used as a label for the situation in which when certain basic facts are proven the designated presumed fact may, but need not, be found to exist by the trier of fact. Under the present law the

following sections in the Criminal Code provide that certain facts are "in the absence of any evidence to the contrary, proof" of some other matter: sections 180(1), 195(2), 197(4), 233(3), 240(6), 298(2), 299(4), 306, 307(2), 322(2), 354(2), 372, 379(1) and 402. Other sections provide that certain facts are "evidence" of other facts. A number of cases have held that these phrases should be interpreted as meaning that proof of the basic facts is sufficient evidence to satisfy the prosecution's burden of producing evidence. The jury is instructed that if they find the basic facts to exist they may, but need not, convict the accused.

We concluded that a presumptive device should never have this effect. Since the trier of fact may, but need not, find the presumed fact, the only effect of such a presumption is to ensure that once the Crown has adduced sufficient evidence of the basic facts they can then avoid a ruling of a directed verdict on the presumed fact. If there is a rational connection between the basic facts and the presumed fact then, of course, such a presumptive device is unnecessary since if there is sufficient evidence of the basic facts a jury acting reasonably could find the presumed fact and the Crown could avoid a ruling of a directed verdict without the assistance of presumption. Thus the presumption could only be significant when there is no rational connection between the basic facts and the presumed fact. However, if there is no rational connection between the basic fact and the presumed fact, and a jury is advised that it may, but need not, find the presumed fact to exist, the reasonable jury will not find the presumed fact to exist. A presumptive device having this second effect therefore forces the trial judge to abdicate his traditional role of ensuring that on all the evidence a trier of fact acting reasonably could find the accused guilty. That is, the presumption has an effect only in a case in which the trial judge in ruling on the sufficiency of evidence concludes that on the evidence adduced no rational person could infer the presumed fact from the basic facts, but because of the presumption he must leave it to the jury and instruct them that they may do so. We cannot rationalize with any notion of due process a device which would permit, indeed encourage, juries to act irrationally. Therefore we recommend that in criminal cases no presumptive device be created that only has the effect of assisting the Crown to avoid a ruling of directed verdict.

3. The word presumption is sometimes used as a label for the situation in which when certain basic facts are proven the designated presumed fact must be found unless the trier of fact is persuaded otherwise.

Although at one time the provincial Courts of Appeal appeared split on this question, it has now been settled by the Supreme Court of Canada that those sections in the

Criminal Code which state that the accused must "prove", "establish", or "show" something, shift to the accused the burden of persuasion on that particular issue. In Canadian jurisprudence the standard of persuasion in these instances has always been understood to be the civil standard of proof. Over sixty sections in the Criminal Code contain one of these operative words, or a phrase similar to them. The following list illustrates the diverse and hence potentially confusing language that is used to create this presumptive device. It also illustrates the pervasiveness of the modification of the "proof beyond a reasonable doubt" standard in Canadian criminal law. Very minor variations have not been noted.

"Until the contrary is proved, be presumed", section 16(a); "without lawful excuse, the proof of which lies upon him", sections 58(3), 80, 133(1)(b), 173, 197(2), 307(1), 309(1), 310, 334(1)(b)(c); "without lawful authority, the proof of which lies upon him", sections 102(3), 114(c), 258(a), 375(1)(2), 377; "without lawful authority or excuse, the proof of which lies upon him", sections 327, 363; "without lawful justification or excuse, the proof of which lies upon him", sections 408, 409, 416, 417; "unless the accused establishes", sections 50(1)(a), 94, 352(1); "the onus is on the accused to prove", section 106; "unless he has consent, the proof of which lies upon him", section 110 (1)(b)(c); "no accused shall be convicted...where he proves", sections 139(2), 243(2), 253(2), 367(2), 386(2); "the burden of proving...is upon the accused", 139(3), 179(3), 298(3), 299(5), 341(2), 730(2); "no person shall be convicted...if he establishes", sections 159(3), 378(2), 415(3); "shall be deemed to have committed...unless he proves", sections 193(4), 267(1); "shall be deemed to have committed...unless he establishes", sections 237(1), 254(4); "is not a defence unless the accused proves", section 347(3); "no person shall be deemed...where he proves", section 275; "it shall be presumed...unless the court is satisfied", section 320(4); "no person shall be convicted...where, to the satisfaction of the court or judge, he accounts...and shows", section 360(2); "the burden of proof of which lies upon the accused", section 396.

Of course, many sections in other Acts in the Revised Statutes of Canada contain these operative words. The best known are section 8 of the *Narcotics Control Act* and section 33 of the *Food and Drugs Act*. Although all of these sections have not, of course, been interpreted in the courts, they would all appear to place the burden of persuasion on the accused since the cases, in interpreting the words of the various sections, have not distinguished between the purpose of the section or whether the section required the accused to assert a positive or negative averment.

We recommend that a presumption should never be created or interpreted so as to shift to the accused the burden of persuasion on one of the elements of the offence. Thus all of the above presumptions should either be abolished or their effect reduced to that stated in subsection 5(3) and explained below.

Not only would this change greatly clarify and simplify the present law but also it would effect an important change of policy. As mentioned earlier, we think that requiring the trier of fact to be satisfied of the accused's guilt beyond a reasonable doubt is our greatest safeguard against the conviction of innocent persons. Any procedural device which modifies this high standard of proof may have the effect of permitting an innocent person to be convicted. Indeed, in some recent cases trial judges have admitted that they have had a reasonable doubt about the accused's guilt, but were constrained to convict him because he had not persuaded them of the non-existence of a material element of the crime, the proof of which was upon him pursuant to a reverse onus clause in the Criminal Code.

Moreover, we think that any purpose achieved by casting on the accused a burden of persuasion can be equally accomplished by casting upon him a burden of producing evidence, which is the effect of the presumption described in subsection 5(3) and discussed below. Reverse onus clauses are created for reasons of social policy - the need for strict law enforcement, fairness - the accused has greater access to the evidence, or probability - the non-existence of the element of the crime is so improbable that it would be a waste of time to require the Crown to disprove it in every case. All of these purposes can be accomplished by the creation of a presumption that shifts only the burden of producing evidence.

Although we invite comment on our above conclusion, the decision of whether a burden of persuasion should ever be placed upon the accused is more properly a decision for the Law Reform Commission Project on General Principles, whose task it is to define prohibited conduct. We do suggest, however, that if the policy reasons for relieving the Crown of the proof of a particular element of the crime are compelling and necessary in order to reconcile some competing interests, the presumption is not the appropriate device for accomplishing this purpose. The effect of using a presumption that shifts the burden of persuasion with respect to a particular element of the crime to the accused, is that the accused may end up being punished for a crime although the trier of fact is not satisfied beyond a reasonable doubt as to the existence of each material element of the crime as defined in the Code. For instance, by section 234 of the Criminal Code a person is said to be guilty of a crime if he

has the care or control of a motor vehicle while his ability to drive is impaired by alcohol or drugs. On a prosecution for that offence the prosecution may prove only that the accused while impaired occupied the seat ordinarily occupied by the driver, and if the accused cannot persuade the trier of fact that he "did not enter or mount the vehicle for the purpose of setting it in motion", "he shall be deemed to have had care or control" by section 237(1), and will be convicted. Ostensibly he is being convicted of being in care or control while impaired; in reality he is being convicted of being in the driver's seat while impaired. The use of a presumptive device in this way is then deceiving. Thus, if the legislature decides that the accused should have the burden of persuading the trier of fact of the non-existence of one of the elements of the crime, it would be more honest and straightforward to label such an element an "affirmative defence" as described above in the paper on Burden of Proof. Thus, if the legislature wishes to retain the present allocation of proof for the conduct described in section 234 an offence would be created of being impaired and occupying the seat ordinarily occupied by the driver of a motor vehicle. A subsection would provide that it would be an affirmative defence to this crime if the defendant shows that he did not enter or mount the vehicle for the purpose of setting it in motion. Although some may regard this suggestion as simply playing with words, we think that it is important in our political process that the legislature act in a manner that is as honest and straightforward as possible. It is wrong and misleading to assert that a person is guilty of the crime of being impaired while in care and control of an automobile when the trier of fact was not persuaded beyond reasonable doubt that the accused was indeed in care and control.

4. The word presumption is sometimes used as a label for the situation in which when certain basic facts are proven the designated presumed fact must be found unless the party against whom it is found produces some evidence of its non-existence.

Although we are not happy with the effect of even this type of presumption because it might sometimes result in a directed verdict against the accused, we recognize that in some instances it might be needed for the reasons mentioned above. Therefore, since it appears to be the minimum rational effect that can be given to a presumption, it is the only effect that we recommend presumptions have in criminal cases. See subsection 5(3).

The amount of evidence that is needed to dispel the presumption so that it has no effect in the case is the same as that required to raise a "defence", that is, evidence sufficient to raise a reasonable doubt.

Subsection 5(2) - Civil Cases

A presumption is defined in subsection 5(1) to include only those assumptions of fact that the law requires to be made from another fact established in the action. That is to say, we have defined presumption as limited to what is now described by our courts as a presumption of law. Thus any device producing a lesser effect would not be referred to as a presumption but would be called simply an inference. For example, the doctrine of *res ipsa loquitur* would not be affected by section 5. The courts have usually interpreted that doctrine as a presumption of fact creating only a permissive inference. From the basic facts that give rise to the doctrine, the trier of fact may or may not draw the necessary inference of negligence.

Under present law for most presumptions in civil cases it is unclear what effect they have on the allocation of the burden of proof. The two legal effects they might have are either shifting the burden of producing evidence or shifting the burden of persuasion.

We decided that for clarity, simplicity and reasons of policy, all presumptions in civil cases should have the effect of shifting the burden of persuasion. If the presumption has only the effect of shifting the burden of producing evidence then once any evidence is introduced rebutting the presumed fact the presumption is without effect. The problem with this type of presumption is that it does not take into account fully the reasons why presumptions are created in civil cases. Presumptions in civil cases are created for the same reasons that determine the initial allocation of burden of proof. That is, they are created for reasons of social policy, fairness and probability. We think that if those considerations are sufficiently strong to warrant the creation of a presumption, such a presumption ought not to be defeasible simply on the introduction of some evidence to the contrary. Since the policy considerations mentioned above in criminal cases do not apply to civil cases there is no reason why presumptions in civil cases should not have this effect.

SECTION 6 - LIMITS OF BURDENS OF PROOF FALLING ON THE ACCUSED

Section 6 alters the effect of existing legislation to give effect to the policies expressed in the other sections of this Part.

Selected Reading Bibliography

BURDENS OF PROOF

The distinction between the burden of persuasion and the burden of producing evidence is now well known and has been explicitly made in a number of Canadian cases. For a citation to some of these cases, and a discussion of burdens of proof in general see Evidence sec. 103, 7 C.E.D. (Ont. 2d); Evidence sec. 103, 10 C.E.D. (West. 2d); Popple, Canadian Criminal Evidence 101, 416 (2d ed. 1954); Morton, Presumptions, in [1955] L.S.U.C.S.L. 137; Morton, Burdens of Proof and the Doctrine of Recent Possession (1959-60), 2 Crim. L.Q. 183; Chitty, Recent Possession (1959-60), 2 Crim. L.Q. 183; Jarvis, Primary and Secondary Burdens of Proof in Criminal Law (1963), 5 Crim. L.Q. 425. See also Cross, Evidence ch. IV (3d ed. 1967); Phipson, Evidence secs. 91-96 (11th ed. 1970); 9 Wigmore, Evidence secs. 2485-89 (3d ed. 1940); McCormick, Evidence sec. 335 (2d ed. 1972); Denning, Presumptions and Burdens (1945), 61 L.Q.R. 379.

There are a number of excellent discussions on the standards of proof, comparing the degree of belief required to satisfy the burden of persuasion in civil with criminal cases, and discussing the verbal formula used. Fridman, Standards of Proof (1955), 33 Can. B. Rev. 665; Cohen, Allegations of Crime in a Civil Action: Burden of Proof (1962), 20 Fac. L. Rev. 20; Graburn, Burdens of Proof and Presumptions, in Studies in Canadian Criminal Evidence 41 (Salhany and Carter eds. 1972); Cross, Evidence ch. V (3d ed. 1967); McCormick, Evidence secs. 339-341 (2d ed. 1972); Ball, The Moment of Truth: Probability Theory and Standards of Proof (1961), 14 Vand. L. Rev. 807; McBaine, Burden of Proof: Degrees of Belief (1944), 32 Calif. L. Rev. 242; Walls, What is "Reasonable Doubt"? A Forensic Scientist Looks at the Law (1971), Crim. L. Rev. 458.

For a discussion of the English experience in abandoning the phrase "proof beyond a reasonable doubt" see Cowen and Carter, Essays on the Law of Evidence 242-249 (1956); Blom-Cooper, The Quantum of the Burden of Proof in a Criminal Trial (1969), 32 Mod. L. Rev. 217; Cross, Evidence 87-89 (3d ed. 1967); Graburn, Burdens of Proof and Presumptions, in Studies in Canadian Criminal Evidence 41 (Salhany and Carter eds. 1972).

The rule in Hodge's Case has been criticized in Scott, Hodge's Case: A Reconsideration (1965), 8 Crim. L.Q. 17; see also Hooper, The Burden of Proof in Careless Driving (1966), 9 Crim. L.Q. 47, 50; R. v. John (1970), 15 D.L.R. (3d) 692, 719 (S.C.C.); Gans, Hodge's Case Revisited (1973), 15 Crim. L.Q. 127. The absence of the rule in its "birthplace" has recently been noted in McGreevy v. D.P.P., [1973] 1 All E.R. 503 (H.L.).

An excellent article on directed verdicts in Canadian criminal cases is Pomerant, The "Submission of No Case" in Canadian Criminal Cases (1972) 15 Crim. L.Q. 52. For articles describing what quantum of proof required to satisfy the burden of producing evidence in criminal cases ought to be see Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure (1960), 69 Yale L.J. 1149; McNaughton, Burden of Production of Evidence: A Function of the Burden of Persuasion (1955), 68 Harv. L. Rev. 1382; Wood, Submission of No Case to Answer in Criminal Trials - The Quantum of Proof (1961), 77 L.Q.R. 491. For an excellent article on the burden of producing evidence in civil cases see James, Sufficiency of the Evidence and Jury - Control Devices Available Before Verdict (1961), 47 Va. L. Rev. 48.

PRESUMPTIONS

A number of articles in Canadian journals review the cases on presumptions and the policies: Black, Comment on R. v. Appelby, [1972] U.B.C. Law Rev. 107; Crouse, Presumptions as Affecting the Proof of Criminal Charges (1935), 13 Can. B. Rev. 734; Comment, Section 92, Criminal Law Amendment Act (1970), 12 Crim. L.Q. 3; Graburn, Burdens of Proof and Presumptions in Studies in Canadian Criminal Evidence 41 (Salhany and Carter eds. 1972); Jabour, Onus of Proof in Narcotics Case (1961), 4 Can. B.J. 4; Levy, Reverse Onus Clauses in Canada: An Overview (1970), 35 Sask. L. Rev. 40; Mandel, The Presumption of Innocence and the Canadian Bill of Rights (1972), 10 Osgoode Hall L.J. 450; Martin, The Burden of Proof as Affected by Statutory Presumptions of Guilt (1939), 17 Can. B. Rev. 37; Morton, Presumptions, in [1955] L.S.U.C.S.L. 137; Schultz, The Statutory Onus of Proof in Criminal Cases (1967), 10 Can. B.J. 429.

The various usages of the words prima facie and presumption are illustrated in an annotation by Chasse, Presumptions and Inferences (1968), 3 C.R.N.S. 290.

In the U.S. there are over 100 lead articles on presumptions. The following are excellent recent articles on the principle or theory of presumptions: Ashford and Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A theoretical Overview (1969), 79 Yale L.J. 165; Abrams, Statutory Presumptions and the Federal Criminal Law: A Suggested Analysis (1969), 22 Vand. L. Rev. 1135; Comment, Statutory Presumptions: Reconciling the Practical with the Sacrosanct (1970), 18 U.C.L.A.L. Rev. 157; Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Courts (1968), 77 Yale L.J. 880; Christie and Pye, Presumptions and Assumptions in the Criminal Law: Another View, [1970] Duke L.J. 919.

The effect of presumptions in civil cases has been the subject of a classic debate among American evidence scholars. The theory that in civil cases a presumption should only shift the burden of producing evidence was advocated in Thayer, Preliminary Treatise on Evidence ch. 8 (1898); 9 Wigmore, Evidence sec. 249(2); Laughlin, In Support of the Thayer Theory of Presumptions (1953), 52 Mich. L. Rev. 195. The view that a presumption in civil cases should have the effect of shifting the burden of persuasion is most persuasively urged by Morgan, Instructing the Jury Upon Presumptions and Burden of Proof (1933), 47 Harv. L. Rev. 59, 82; Cleary, Presuming and Pleading: An Essay in Juristic Immaturity (1959), 12 Stan. L. Rev. 5