Report No. 37A

THE UNIFORM EVIDENCE ACT 1981: A BASIS FOR UNIFORM EVIDENCE LEGISLATION

INSTITUTE OF LAW RESEARCH AND REFORM

EDMONTON, ALBERTA

June 17, 1982

THE UNIFORM EVIDENCE ACT 1981: A BASIS FOR UNIFORM EVIDENCE LEGISLATION 1

Table of Contents 1

INSTITUTE OF LAW RESEARCH AND REFORM

The Institute of Law Research and Reform was established January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Its office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 432-5291.

The members of the Institute's Board of Directors are W.E.Wilson ,Q.C. (Chairman); J.W. Beames, Q.C.; W.F. Bowker, Q.C.; Professor C.R.B. Dunlop; George C. Field, Q.C.; Emile Gamache, Q.C.; W.H. Hurlburt, Q.C.; Professor J.C. Levy; D. Blair Mason, Q.C.; Thomas W. Mapp; and R.M. Paton.

The Institute's legal staff consists of W.H. Hurlburt, Q.C., Director; John L. Dewar, Allison Dunham, Baz Edmeades, George C. Field, Q.C., M. Deborah MacNair, Thomas W. Mapp, and Margaret A. Shone, Counsel.

THE UNIFORM EVIDENCE ACT 1981: A BASIS FOR UNIFORM EVIDENCE LEGISLATION

1. INTRODUCTION

a. Reasons for Institute Reports

1.1 In 1981 the Uniform Law Conference of Canada completed and adopted a new Uniform Evidence Act. Our first reason for issuing this report is that we believe that it is desirable in the public interest that Parliament and the Legislatures enact uniform evidence legislation based upon it. In our opinion such legislation would make the rules of evidence simpler and more comprehensible than they now are, and would contribute to the efficiency of the judicial process. It would also promote the uniformity of the rules of evidence across Canada, which we believe to be desirable. We will return to these subjects in paragraphs 3.1 to 3.8 of this report and will make a recommendation based upon them in paragraph 3.9.

1.2 We have however a second reason for making this report. We believe that it is also desirable in the public interest that the balance which the criminal rules of evidence contained in the Uniform Evidence Act strike between the interests of the state and the interests of the individual be reviewed in order to ensure that the uniform evidence legislation will take both interests sufficiently into account. We will return to this subject in paragraphs 3.10 to 3.26 and will make a recommendation accordingly in paragraph 3.27.

1.3 We do not think that the Alberta Legislature should, without more, enact the Uniform Evidence Act word for word. One reason for that view is that the Uniform Evidence Act is a composite Act which contains some provisions which are appropriate only for federal legislation. A second reason is that it would not fit in with existing Alberta legislation. A third reason is that we think that a few changes of substance should be made in it. For these reasons we are issuing a companion report, "Evidence and Related Subjects: Specific Proposals for Alberta Legislation", in which we make detailed recommendations for Alberta evidence legislation. We will confine the discussion in this report to the major issue of policy, that is, the adoption of uniform evidence legislation.

b. Outline of this Report

1.4 We will first refer briefly to the present state of the law of evidence and to the reform proposals which precipitated the evidence project of the Uniform Law Conference of Canada (paras. 2.1 to 2.5).

1.5 We will then describe the structure of the Conference and the procedure which it followed in preparing and adopting the Uniform Evidence Act (paras. 2.3 to 2.22), and the extent of the participation in the process by persons outside government (paras. 2.23 to 2.28). We will then describe the Uniform Evidence Act itself (paras. 2.29 to 2.34). We will go on to make our recommendations and to give reasons for them (paras. 3.1 to 3.32). Our recommendations may be summarized as follows:

(1) that Parliament and the Legislatures enact uniform

evidence legislation based on the Uniform Evidence Act (para. 3.9).

(2) that the Senate or a committee of the Senate review the rules of evidence which the Uniform Evidence Act would apply to criminal proceedings, and that, if it finds the balance between the interests of the state and the interests of the individual has not been properly struck, it make the changes necessary to strike a proper balance (para. 3.27).

(3) that in adapting the Uniform Evidence Act for use in a province, changes which would substantially derogate from uniformity of legislation be made only sparingly and with strong reason (para. 3.29).

(4) that the federal government and the provincial governments, by consultation, make arrangements for the introduction of legislation based upon the Uniform Evidence Act into Parliament and the Legislatures as soon as is practicable (para. 3.32).

1.6 The reader may wonder at the length of the description of the process by which the Uniform Evidence Act was prepared and adopted (paras. 2.3 to 2.22). We think that the description is necessary. It will demonstrate the national and co-operative character of the process and the massive amount of work done, which enter into our recommendation for adoption of uniform evidence legislation based upon it. It will show our grounds for thinking that there was one deficiency in the process, the predominance in it of lawyers associated with governments and the

lack of adequate participation by others, and our perception of that deficiency is important to our recommendation for a review of the rules of criminal evidence.

1.7 We attach to this report as Appendix C the Uniform Evidence Act as it appears in 1981 ULC Proc. 332-458 which we understand to be the official text; since we are issuing this report only in English we include only the English version of the Uniform Act. We attach as Appendix A the Uniform Law Conference's 1977 resolution providing for a Task Force to prepare a draft Uniform Evidence Act, and we attach as Appendix B its 1979 resolution giving further directions to the Task Force.

2. HISTORY AND DESCRIPTION OF THE UNIFORM EVIDENCE ACT

a. Sources of existing rules of evidence

2.1 Because the rules of evidence were developed in the course of litigation they were and are primarily judge-made. Federal and provincial legislation and rules of court have varied them and added to them.

2.2 The Alberta Evidence Act is the principal Alberta statute on the subject. It was first enacted in 1910 (though it has of course been frequently amended since). It bears a strong resemblance both to evidence statutes enacted by a number of other provinces and to the Uniform Evidence Act which the Uniform Law Conference of Canada adopted in 1941. The Canada Evidence Act is the principal federal statute on the subject (though the Criminal Code of Canada contains important evidentiary rules as well); although the present Canada Evidence Act is much expanded,

many of the provisions of its 1893 prototype can be traced into it, and many of them are similar to or identical with their counterpart provisions in the Alberta Evidence Act. Section 37 of the Canada Evidence Act applies provincial evidence laws to proceedings under federal law unless the provincial laws are in conflict with federal legislation. Legislation has not seriously detracted from the substantial uniformity of the rules of evidence federally and in the common law provinces.

b. Evidence Project of the Uniform Law Conference of Canada

(1) Inception

2.3 The rules of evidence have become technical and complex. Some which were appropriate in earlier times and different legal contexts are not suitable today. Many suggestions have been made for change. Major codifications have emerged in the United States, and very substantial legislative reforms have been made in England. Two major reform proposals have been made in Canada and are of particular importance because they led to the evidence project of the Uniform Law Conference of Canada.

2.4 In December 1975, the Law Reform Commission of Canada recommended that Parliament adopt an Evidence Code which, the Commission thought, would supplant the common law with simple and rational rules of evidence and which would be supplemented, where necessary, by reason and experience. A few months later the Ontario Law Reform Commission recommended substantial changes in the rules of evidence. Its proposals were different in important

respects from the Law Reform Commission of Canada's recommendations and it rejected the notion of a comprehensive evidence Code.

2.5 The receipt by the federal and Ontario governments of conflicting recommendations created the prospect that the federal and provincial evidence systems would become very different and the further prospect that the provincial evidence systems would become very different among themselves. Dr. Richard Gosse, the Deputy Attorney General of Saskatchewan, viewed those prospects with alarm. He accordingly recommended to the Uniform Law Conference that it undertake the preparation of a Uniform Evidence Act which all Canadian jurisdictions, including the federal and Ontario governments, could use as a basis for uniform evidence legislation. At its 1977 annual meeting the Conference agreed with his recommendation and adopted a resolution which appears at 1977 ULC Proceedings 65, and which is appended to this report as Appendix A.

(2) Conference structure

2.6 The Uniform Law Conference is composed of three sections, the Uniform Law Section, the Criminal Law Section and the Legislative Drafting Section. Previously only the Uniform Law Section had adopted Uniform Acts; the Criminal Law Section is a place for discussion of matters of criminal law and procedure by senior lawyers from the federal and provincial governments and by members of the defence bar, and the Legislative Drafting Section is a place for discussion by legislative drafters of matters of general interest in the field of parliamentary

drafting, though the Section also provides drafting assistance to the Uniform Law Section. Each Section does its substantive work in separate Section meetings.

2.7 The Conference, however, dealt with its evidence project in plenary meetings of the three Sections. It adopted this unique procedure because the law of evidence affects both civil proceedings, which are the concern of the Uniform Law Section, and criminal proceedings, which are the concern of the Criminal Law Section.

(3) Conference procedure

(a) Summary

2.8 The usual practice of the Uniform Law Section is to ask one, two, or occasionally three, of the jurisdictions which participate in its work (the "jurisdictions" being the provinces, the territories, and the federal government) to prepare for consideration by the Section a draft Uniform Act, or a report which would lead to the preparation of a draft Uniform Act, or both. The members of the Section who are appointed by the designated jurisdiction or jurisdictions usually do the work themselves, though in recent years money has been available to retain consultants for research and advice. The Conference recognized, however, that it would be impractical to ask its members to donate the time and services which would be necessary for such a massive undertaking as the preparation of a Uniform Evidence Act. It therefore established a Task Force to prepare a report and a draft Uniform Evidence Act. When the Task Force made its report in 1981, the Conference considered its

recommendations at special plenary meetings of the Conference held in April, May and June of 1981, and at plenary sessions of the Conference's 1981 annual meeting. At the conclusion of its deliberations the Conference adopted a Uniform Evidence Act which was based upon the Task Force's recommendations but which made many important departures from them. We will now describe at somewhat greater length the process which we have summarized.

(b) The Task Force

(i) Appointment and composition of the Task Force

2.9 The resolution of the Uniform Law Conference which appears in Appendix A called for the appointment of a Task Force by those jurisdictions which wished to become "participating jurisdictions". The participating jurisdictions and the persons whom they appointed were as follows:

Canada

E.A. Tollefson, Q.C.
Department of Justice
(Chairman of Task Force and Coordinator of Research)

E.G. Ewaschuk, Q.C.
Director, Criminal Law Amendments Section
Department of Justice

D. Solberg, (alternate member)
Counsel, Policy Planning Section
Department of Justice

British Columbia

The Honourable Mr. Justice G.L. Murray
Supreme Court of British Columbia

Professor A.F. Sheppard
Faculty of Law
University of British Columbia

Alberta

Barinder Pannu
Crown Counsel
Alberta Department of the Attorney-General

M.A. Shone
Counsel
Institute of Law Research and Reform

Ontario

J. Cassells, Q.C.
Crown Attorney
Ontario Ministry of the Attorney General

P. Lockett
Crown Counsel (Civil)
Ontario Ministry of the Attorney-General

Quebec

Me F. Handfield
Crown Prosecutor
Quebec Department of Justice

Me G. Letourneau
Acting Assistant Director General, Legislative Affairs
Quebec Department of Justice

Me. L. LeBlanc (alternate member)
Research Counsel
Quebec Department of Justice

Nova Scotia

G. Walker, Q.C.
Legislative Counsel

W. MacDonald
Senior Legislative Solicitor
Office of Legislative Counsel

Member at Large

K. Chasse
Director of Research
Ontario Legal Aid

(Mr. Chasse was originally a member of the Canada delegation. He was the first chairman of the Task Force and served in that capacity until his departure from the public service. Mr. Tollefson then became chairman and served until the completion of the project.)

The following persons also participated in the meetings of the Task Force from time to time: R.F. Gosse, Q.C., Deputy Attorney-General for Saskatchewan; R.M. McLeod, Q.C., Assistant

Deputy Attorney-General (Criminal Law), J.D. Takach, Q.C., Director of Criminal Law, J. Polika, Q.C., Director of the Crown Law Office (Civil), J.D. Watt, Q.C., Senior Crown Counsel and J. Casey, Counsel, all of the Ontario Ministry of the Attorney-General; and D.G. Gibson, Special Adviser, Criminal Law Amendments, Federal Department of Justice.

2.10 It will be seen that Alberta named two members of the Task Force, Barinder Pannu of Crown Counsel and Margaret A. Shone of Institute Counsel. Mrs. Shone was appointed by arrangement between the Institute, which had already taken an interest in the subject, and the Deputy Attorney General. Except for Mr. Justice Murray, Professor Sheppard and Mrs. Shone, the members of the Task Force were lawyers employed by the governments of the participating jurisdictions.

(ii) Terms of Reference of the Task Force

2.11 The terms of reference put forward by the Task Force pursuant to the resolution of the Uniform Law Conference (App. A, para. 1(a)) and accepted by the Conference were as follows:

> To attempt to bring about uniformity among the provincial and federal rules of evidence by,
>
> (1) stating the present law, and
>
> (2) surveying the Report on Evidence of the Law Reform Commission of Canada, the Report on the Law of Evidence of the Ontario Law Reform Commission, the reports of the other provincial law reform commissions on various subjects in the law of evidence, the major codifications of the law of evidence in the United States and the major reports on the law of evidence from England and the other Commonwealth countries, for the purposes of,
>
> (a) setting out the alternative solutions for the various problems in the law of evidence, and

(b) recommending the preferred solutions amongst those alternatives.

2.12 Members of the Task Force held divergent views about the extent to which the rules of evidence should be legislated. The Uniform Law Conference at its 1979 annual meeting gave the Task Force a limited mandate in favour of legislated rules by the statement which appears at 1979 ULC Proc. 49 and which is Appendix B to this report.

(iii) Work method of the Task Force

2.13 The Task Force commenced its work soon after its appointment, its first meeting having been held on November 9, 1977. It met almost monthly, for two or three days at a time, until mid-1980, when its principal discussions were concluded. For the remainder of 1980 it held meetings and telephone conferences to complete its report. Its members prepared research papers on assigned topics. It retained Professor A.F. Sheppard of the Faculty of Law, University of British Columbia, as a consultant for six months on a full time basis and thereafter on a part-time basis, and Professor Sheppard produced several research papers. The Task Force made its decisions by voting after arduous research and lengthy and strenuous debate.

2.14 Initially all members of the Task Force worked on a part-time basis. However, the Uniform Law Conference decided at its 1979 annual meeting that additional resources must be put at the disposal of the Task Force in order to enable it to meet the agreed timetable. Thereafter Ontario and Quebec each made one

member available to the Task Force on a full time basis, and the federal Department of Justice made the chairman available. Alberta and British Columbia provided part-time research assistance.

(iv) The Report and Draft Act of the Task Force

2.15 The Task Force prepared interim reports which appear at 1978 ULC Proc. 283 and 1979 ULC Proc. 308. It also reported progress and advised of the imminence of its final report by a statement which appears at 1980 ULC Proc. 86. In early 1981 it delivered its final report of 581 pages comprising 37 chapters, in which it made detailed recommendations for the content of a Uniform Evidence Act covering all civil and criminal proceedings under federal and provincial law in all Canadian courts. The report contains a summary of the extensive research which the Task Force conducted.

2.16 The Uniform Law Conference had asked the Task Force to prepare draft legislation (App. A, para. 1(c)), and the Task Force accordingly delivered a draft Uniform Evidence Act along with its report. H.B. Schaffer of the federal Department of Justice drafted the English version. R. Tremblay of the Quebec Department of Justice drafted the French version. They also prepared further drafts from time to time, and the Uniform Evidence Act itself.

(c) Conference deliberations

2.17 The Uniform Law Conference's customary annual meeting provides five days for concurrent meetings of the Uniform Law

Section and the Criminal Law Section and two half days for plenary business sessions. It was clear that the time available at an annual meeting would be inadequate for the review and discussion of the massive report and draft Act which the Task Force had prepared. The Conference therefore decided to hold special plenary sessions at which it hoped to make the tentative decisions necessary to settle the contents of a Uniform Act for adoption at its 1981 annual meeting. The special plenary sessions occupied nine days of meetings in April, May and June of 1981, and the work done at them was completed by a further special plenary session in July, which concerned itself with drafting matters. The Conference also held a plenary session of 1 1/2 days at its annual meeting. At the end of that plenary session the Conference adopted the present Uniform Evidence Act, though some of the drafting changes necessary to give effect to the decisions made at that meeting had to be made later.

(d) Composition of the Conference

2.18 The federal, provincial and territorial governments appoint the members of the Uniform Law Conference. They customarily appoint to the Uniform Law Section legislative drafters, lawyers from the civil sides of the departments of the Attorneys General, (sometimes including Deputy Attorneys General), senior members of the federal and provincial law reform agencies, and some academic and practising lawyers. Lawyers associated with government are in the majority, but there is a substantial number of others.

2.19 The governments customarily appoint to the Criminal Law Section the Deputy Attorneys General and senior lawyers from the criminal law side of their departments. They also appoint members of the criminal defence bar, but these represent a smaller proportion of those in attendance than do the non-government members of the Uniform Law Section.

2.20 The 1981 annual meeting of the Conference was composed along the usual lines. Criminal defence counsel took part, including Mr. Edward Greenspan of Toronto, who attended as a member of the Federal delegation. Mr. Greenspan had had some opportunity to consider the draft Uniform Evidence Act as it stood after the Conference's special plenary meetings, and he made substantial submissions which persuaded the Conference to make some changes of substance in it.

2.21 The special plenary meetings made special demands on those who participated in them and special arrangements therefore had to be made for them. For practical reasons most of the governments did not appoint to the plenary sessions many of the non-governmental lawyers who usually attend the annual meetings. Alberta was exceptional in that the Deputy Attorney General appointed the Institute's Chairman and Director. The result was that the special plenary meetings which made the major decisions were predominantly composed of government lawyers many of whom were associated with the criminal sides of their departments.

2.22 Nothing in what we have said or will say implies criticism of the appointments to the special plenary meetings or to the 1981 annual meeting, which were made in accordance with

standard institutional practices and the unusual exigencies of the project. The composition of the Conference at the 1981 meetings, however, leads to the concern which we will express in paragraphs 3.10 to 3.19.

(4) Institute Participation

2.23 The Institute has participated throughout in the Uniform Law Conference's evidence project. As we have already mentioned, Margaret A. Shone of Institute Counsel, by arrangement with the Deputy Attorney General, was a member of the Task Force throughout. The Institute's Board spent much of its energy in late 1980 and early 1981 considering the evolving draft Act and made substantial comments upon it. Our Chairman and our Director, as well as Mrs. Shone, attended the special plenary meetings of the Conference and the special plenary sessions of the 1981 annual meeting at which the Uniform Evidence Act was considered and adopted. That involvement is the foundation for the opinions which we express in this report and for our decision to issue it.

(5) Alberta Advisory Committee

2.24 At an early stage of the Uniform Law Conference's project the Deputy Attorney General and the Institute established a joint Advisory Committee to advise the Alberta members of the Task Force, the Institute and the Attorney General, about the subjects discussed by the Task Force. The late Mr. Justice W.G. Morrow acted as the chairman of the Committee until his withdrawal for reasons of health, when he was succeeded by Mr. Justice W.A. Stevenson, who is a former member, and former

Chairman, of the Institute's Board. James C. Robb, now of the University of Alberta's Faculty of Law but then a criminal defence lawyer, acted as a member of the Advisory Commmittee throughout, without remuneration and therefore at substantial cost to himself. Professor J.C. Levy of the University of Calgary's Faculty of Law (now a member of the Institute's Board) also acted without remuneration. Michael Funduk and his successor, R. Neil Dunne, served the Advisory Committee as members from the civil law side of the Attorney General's Department. Jack Watson served as a member from the criminal law side. Regrettably we were not able to find a member of the civil litigation bar to serve on the Committee. The advice which the Committee gave to the Alberta representatives on the Task Force, and their thorough and careful discussions, were important elements in the substantial and well-considered contributions which Alberta made to the work of the Task Force.

(6) Non-governmental participation

2.25 We have described the Institute's participation in the Uniform Law Conference's evidence project, and we have referred to the participation of the Alberta Advisory Committee. We will now describe briefly the other ways in which persons outside government took part in the project. These descriptions lead to the concern which we will express in paragraph 3.11.

2.26 The Hon. Mr. Justice George Murray of British Columbia participated as a member of the Task Force throughout. So did Professor A.F. Sheppard.

2.27 The Chairman of the Law Reform Commission of Canada attended the special plenary meetings of the Conference, and its 1981 annual meeting. An academic lawyer and one or two practitioners attended the special plenary meetings. As we have previously stated, the usual non-governmental members attended the special plenary sessions at the Conference's 1981 annual meeting which considered a number of questions about the draft Uniform Act as it then stood and made some changes in it.

2.28 In July of 1981 the federal Department of Justice consulted a group of judges and lawyers about the draft Act as it then stood and conveyed their views to the 1981 annual meeting of the Conference. That was a valuable and responsible initiative. It was, however, somewhat limited in its effect because of time constraints, the special plenary sessions having concluded late in June and the consultation having to be finished by early August. The Uniform Law Conference considered some of the group's suggestions at special plenary sessions of the Conference at the annual meeting, but was precluded by time constraints at that meeting and the advanced stage which the process had reached, from giving exhaustive consideration to their views.

c. Description of the Uniform Evidence Act

(1) Scope

2.29 The Uniform Law Conference asked the Task Force to prepare a draft Uniform Evidence Act which could apply to proceedings under federal law and also to proceedings under provincial law; which could apply to proceedings in all courts, including courts established by the provinces and staffed by

provincially appointed judges, including the superior, district and county courts of the provinces, and including the federally created courts; and which could apply to civil proceedings and also to criminal and quasi-criminal proceedings. The Conference recognized that the inclusion of both civil and criminal rules of evidence in one statute made the task greater and more complex. It recognized that a statute designed to cover such a great diversity of court proceedings would have to lay down some special rules for some special kinds of proceedings. The Conference thought, however, that one statute could come closer to achieving order and simplicity than could two or more. Anyone who evaluates the Uniform Evidence Act must bear in mind the great variety of proceedings which it is designed to cover.

2.30 Some limitations upon the scope of the Uniform Evidence Act should also be borne in mind:

(a) in criminal matters it applies only to preliminary inquiries, trials and appeals, and accordingly does not apply to such proceedings as the laying of informations, bail hearings and sentencing hearings (UEA s. 3(2); however, the privileges conferred by Part V do apply).

(b) it does not apply to examinations for discovery or examinations on affidavits (UEA s. 3(1); again the Part V privileges do apply.)

(c) it gives the court a discretion whether or not to apply the Act in a proceeding "to determine or protect the interests of a person who needs the protection of the court by reason of his age or physical or mental condition"; such proceedings would include neglect and wardship proceedings involving minors, and waivers of juvenile matters to adult courts (UEA s. 4).

(d) it applies only to proceedings before, or for the purposes of, "courts", and therefore does not apply to proceedings before administrative tribunals and other bodies unless they are designated as courts by the Governor in Council or the Lieutenant Governor in Council under UEA s. 1(h).

2.31 In summary, the Uniform Evidence Act is intended to prescribe rules of evidence to be applied in adversarial trials and hearings before every court in the country, but not in preliminary proceedings in which judges and other judicial officers are not involved, and not necessarily in "best interests" cases or in sentencing. It is intended to apply in both civil and criminal matters. It is not intended to apply to proceedings other than in courts.

(2) Extent to which rules of evidence are legislated

2.32 The mandate which the Uniform Law Conference gave to the Task Force (App. B) was to prepare a comprehensive legislative statement of the rules of evidence. The mandate was subject to three principles or cautions: the Task Force should not prepare legislation for rules better left to common law rules and precedent; it should aim for comprehensibility but should remember that some rules of evidence may be too complex and technical to express simply; and it should avoid preparing legislation which would provide for wide and ill-defined judicial discretions.

2.33 In accordance with that mandate, the Task Force prepared a draft Act which reduced to legislative form many rules which are presently covered by the common law, and the Uniform Law Conference did not make significant changes in its scope. The Uniform Evidence Act sets out, for example, rules about character evidence, the hearsay rule and its exceptions, the res gestae rules (though fortunately not under that name), and the best evidence rule. It also includes provisions covering most of

the subjects now covered by existing provincial and federal evidence legislation. Evidence legislation based upon the Uniform Evidence Act would therefore substitute its provisions for much of the existing body of evidence rules.

2.34 The Uniform Evidence Act, however, does not attempt to set out all the laws of evidence or of the related subjects which it touches. For example, although it deals with some statutory privileges (UEA s. 161-185) it does not deal with the solicitor-client privilege; although it declares that relevant evidence is admissible in the absence of a specific exclusion (UEA s. 22(1)) it does not say what is and is not relevant; it leaves the courts power to create new exceptions to the hearsay rule (UEA s. 49); and, although it requires that a witness take an oath or affirm before testifying (UEA s. 95), it leaves it to other laws to prescribe the form and manner in which he is to do so. Although it includes many more of the rules of evidence than does existing evidence legislation, the Uniform Evidence Act is not a code or even a comprehensive statute.

3. THE UNIFORM EVIDENCE ACT AS A BASIS FOR LEGISLATION

a. Recommendation for acceptance in principle

(1) Uniformity of law

3.1 Litigation arising in Alberta may be governed by Alberta law or by federal law. If federal law lays down rules of evidence for litigation under federal law which differ substantially from the rules of evidence which are laid down for litigation under provincial law, Alberta judges and lawyers will

have to be masters of both, and some litigants will encounter both. The result will be added cost, inefficiency and confusion; and it is likely that one set of rules will be inferior to the other. Uniformity of evidence legislation under federal and Alberta law will avoid the unnecessary costs involved in the application, for reasons having nothing to do with function, of two different systems of evidence to contemporaneous litigation in the same geographical area. Further, law schools can fit lawyers better to practise under one set of country-wide uniform rules than under divergent sets of rules, and the courts can develop jurisprudence more effectively about one set of country-wide uniform rules than about divergent sets of rules. Finally, a common effort is likely to achieve better rules of evidence than is the individual effort of one government.

3.2 Lawyers and litigants frequently have interests in more than one province and will be obliged to conduct litigation under more than one provincial evidence system, and considerations of cost and efficiency suggest that provincial rules of evidence should also be uniform, as do the other considerations we have mentioned. We think that the maintenance and advancement of uniformity of rules of evidence among the provinces would be highly beneficial.

3.3 There is at present a substantial degree of uniformity between federal and provincial rules of evidence. Adoption by Parliament and the Legislatures of evidence legislation based on the Uniform Evidence Act would increase that degree of uniformity. A more important consideration, however, is the danger of losing the degree of uniformity which now exists. That

is the consideration which caused the Uniform Law Conference to undertake its evidence project. We think that the only practicable course of action which Canadians can follow in order to avoid that highly undesirable eventuality is to agree upon a common set of rules of evidence and to enact them. We think also that the Uniform Evidence Act, being the product of a long and expensive co-operative process, represents the only practicable basis for agreement. This is the first reason for our recommendation that Parliament and the Legislatures enact evidence based upon the Uniform Evidence Act.

(2) Suitability

3.4 The extent to which the rules of evidence should be set out in legislation is a subject of controversy. We think, however, that the present rules are often difficult for the average lawyer, to say nothing of litigants, to find, and that it would be desirable to have most of them put into one statute. We think that some of the rules, when found, are obscure and of doubtful authority, and that it is desirable to state them as clearly as language can state them. We think that the existing rules, having evolved incrementally from case to case, are sometimes technical and often unsystematic, and that they should be considered as a whole to ensure that they are not more technical and unsystematic than the exigencies of the fact-finding process require them to be. We think that, on the whole, the Uniform Evidence Act is useful because in one place it states the rules of evidence more clearly and systematically than does the present law. That is our second reason for recommending the adoption of uniform evidence legislation based upon the

Uniform Evidence Act.

3.5 One objection which is raised to setting out the rules of evidence in legislation is that a statute will confine them in a strait-jacket and will prevent the courts from molding and developing them to meet the changing needs of changing times. We think that there are three points to be made about that objection. The first point is that there is already a strait-jacket, which consists of the great mass of past decisions, many of which were made in very different times, and which the courts, by reason of the litigation process and the doctrine of precedent, find it difficult to test in a systematic way against the policies which should underly them. The second point is that the courts will interpret and apply any evidence legislation which is adopted and will therefore have a substantial ability to mold and develop the rules contained in legislation. The third is that uniform evidence legislation can be kept up-to-date, either by the continuation of the co-operative process which has produced the Uniform Evidence Act, or by the individual initiatives of individual jurisdictions which, if successful, are likely to be adopted by others. For these reasons, while we recognize the force of the objection, we do not think that it should preclude the enactment of uniform evidence legislation.

3.6 As we have pointed out (para. 2.32), the Uniform Law Conference's 1979 resolution gave the Task Force a qualified mandate in favour of a comprehensive legislative statement of the rules of evidence. While we ourselves might well have framed the mandate differently, we are in general agreement with it; and,

while we ourselves might have recommended some differences in the rules chosen for enactment and omission, we are in general agreement with those chosen for enactment by the Task Force and accepted by the Uniform Law Conference. We are therefore in general agreement with the extent to which the Uniform Evidence Act sets out the rules of evidence in legislative form, which we have already described in paragraphs 2.32 to 2.34. This is our third reason for recommending the adoption of uniform evidence legislation based upon it.

3.7 We do not think that it would be fruitful for us to discuss in detail the content of the rules of evidence contained in the Uniform Evidence Act; those who want a discussion of the subjects which the Act deals with should read the Act itself and the Task Force's Report. We propose to make a brief general comment.

3.8 The Uniform Evidence Act would make substantial changes in the rules of evidence (it would, for example, make first-hand hearsay evidence available in civil proceedings whenever the original witness is "unavailable" for the reasons set out in UEA s. 52). However, except in criminal matters, it would not make radical changes, and we think that it is properly characterized as a moderate and almost conservative reform of the rules of evidence. In general we think that the enactment by Parliament and the Legislatures of uniform evidence legislation based upon the Uniform Evidence Act would make the rules of evidence simpler and more comprehensible than they now are, and would contribute to the efficiency of the judicial process. This is our fourth reason for our recommendation that Parliament and the

Legislatures enact such legislation.

(3) Recommendation

3.9 Recommendation No. 1

We recommend that Parliament and the Legislatures enact uniform evidence legislation based upon the Uniform Evidence Act.

b. Recommendation for Review of Criminal Evidence Rules

(1) Assessment of Process

3.10 In paragraphs 2.3 to 2.28 we described the process by which the Uniform Evidence Act was prepared and adopted. The process was one of co-operation of institutions from every part of the country in undertaking and carrying through to completion a project of importance to every part of the country. The preparation and completion of a Uniform Evidence Act of high quality within a period of four years is a tour de force which could not have been accomplished without that co-operation.

3.11 In retrospect, however, we think that the process suffered from one deficiency, which was the obverse side of its virtues. That deficiency was the lack of adequate participation by individuals and groups outside government. We speak here with the conscious benefit of hindsight, and we appreciate that it is doubtful that the exigencies of completing the project within a reasonable time would have permitted a more broadly based effort. We therefore do not speak critically of the participants or of their decisions. However, we think that the deficiency in outside participation should be recognized.

3.12 The conjunction of two circumstances causes us concern about the rules of criminal evidence. The first is that, because of the deficiency in participation by individuals and groups outside government which we have described, lawyers professionally involved with the prosecution of criminal offences dominated the Conference's discussion of those rules. The second is that the Conference made important changes in the Task Force's draft Act, the cumulative effect of which we think was to make the position of accused persons on the whole more difficult and to make the position of the prosecution on the whole easier than the Task Force's draft had made them.

3.13 We do not suggest, and we do not think, that the members of the Conference did not act properly. The contrary is true. They set themselves conscientiously to the task of devising the best and most just rules of evidence. Their decisions embodied their view of the public interest, and they would not have acted honestly if they had done otherwise than what they did.

3.14 Our concern is based upon two propositions which we believe to be correct. One is that, other things being equal, persons associated with one side of an issue are likely to give less weight than would others to the values regarded as important by those associated with the other side of the issue. The second proposition is that even the right-thinking persons affected by the rules of evidence, including the right-thinking members of bench and bar, are likely to think rules unfair if the membership of the body which devised them was predominantly associated with one side of the issue.

3.15 Our concerns are reinforced by representations made to us by the Criminal Trial Lawyers Association ("CTLA"), an organization of responsible criminal defense lawyers in Edmonton. We had asked the Association for its views before the 1981 annual meeting of the Uniform Law Conference, but, under the time constraints which then existed, the Association was unable to formulate them until after that meeting. Later, it expressed to us strong concerns along the lines we have mentioned and also its strong objections to several specific provisions of the Uniform Evidence Act.

3.16 The CTLA is of course a group with a special interest. We do not say that we agree with all of its views, or indeed with any of them, and we do not suggest that the views of its members should necessarily prevail. We think however that it is likely that because of the circumstances we have mentioned other responsible segments of the legal profession and the public are likely to hold similar views, and we will accordingly give an extensive summary of those of the CTLA.

3.17 The CTLA says that the cumulative effect of the provisions of the Uniform Evidence Act, especially the changes made by it in the existing law, would be to derogate from many of the traditional protections given to persons accused of crimes. It also makes a number of specific representations, which we will set out in skeleton form. These are as follows:

(a) That the court should warn the jury that an accused should not be convicted on circumstantial evidence unless the evidence is inconsistent with any other

verdict. UEA s. 14 would remove this protection.

(b) That the defence should be able to admit facts without the Crown's consent, and that the Crown would be sufficiently protected against tricky admissions by its right to bring in evidence of an admitted fact despite the admission. UEA s. 17(2) would preclude an admission without the other party's consent in criminal (though not in civil) proceedings.

(c) That there should be provision for the exclusion of illegally obtained evidence, such as that made by the Canadian Charter of Rights and Freedoms, in cases in which the court is satisfied that the admission of the evidence would bring the administration of justice into disrepute. UEA s. 22 would allow evidence to be admitted however it is obtained, with only a much more restricted exception. (The advent of the Charter may well, of course, bring about an almost automatic review of the section.)

(d) That UEA s. 24 would make utterly inadmissible, with no power to relax the rule for good excuse or where there is no prejudice, evidence which the accused may wish to adduce about his disposition or character in the community (other than by way of rebuttal of prosecution evidence), unless he gives notice to the court, the prosecutor and any co-accused 7 days before the opening of the trial. No such burden would be imposed on anyone else, and it should not be imposed upon an

accused.

(e) That there are circumstances under which a trait of a complainant's character may be relevant although the accused did not know of the trait at the time of the offence and although the "similar facts" rule does not apply. UEA s. 28 would not allow the accused to adduce evidence of the trait.

(f) That UEA ss. 31-34 would deprive the accused of the right to adduce evidence to show a pattern of conduct of the complainant which might be relevant to the issue of consent in a trial for a sexual offence, and that UEA s. 34 would deprive the accused of his present right of calling the complainant at the in camera hearing which would determine the admissibility of the evidence.

(g) That UEA s. 35 would perpetuate a century old anachronism, and, in effect, would allow evidence of bad character, by permitting the prosecutor to adduce evidence to show that a person accused of receiving stolen goods has had other stolen goods in his possession or has been convicted of receiving in the past.

(h) That under UEA s. 50, evidence would be admissible that a witness who could not identify an accused at trial did identify him in the past. The CTLA says that this provision would allow hearsay evidence, without the usual safeguards, in an area where error is

particularly likely to happen.

(i) That police officers' notes are often made in expectation of a trial and are sometimes distorted, so that they should not be admitted without the police officer being present to testify and to be cross-examined. UEA s. 55(2) would make the notes of a police officer admissible even if made in anticipation of imminent litigation, though all other statements recorded in the course of duty would, under those circumstances, be inadmissible in the absence of the declarant.

(j) That UEA s. 58(2), which would empower the court to exclude hearsay evidence of a statement made against penal interest (for example, an admission by another person that he committed the crime with which the accused was charged) unless there is other evidence implicating the other person, would have the effect of requiring the accused, who will often have no resources, to find other evidence that the other person committed the crime. It says that the evidence should be admitted and given whatever weight the circumstances suggest, and that the UEA s. 58(2) would prejudice an accused person. (It should be noted in passing that in Lucier v. R [1982] 2 W.W.R. 289 (SCC), The Supreme Court of Canada decided that a statement against penal interest which inculpates an accused person is inadmissible. UEA s. 58(2) would make such a statement admissible and would therefore change the law as it has

now been declared so as to disadvantage accused persons.)

(k) That UEA s. 61(2), by making a co-accused's statement admissible against an accused if there is other evidence of their common purpose, would go far beyond the existing law, which allows only a co-conspirator's statement to be put in. The CTLA considers this provision gravely prejudicial to the accused.

(l) That UEA s. 65 discriminates unfairly against the accused. It would allow hearsay evidence of spontaneous statements of any other person describing or explaining an observed event, and it would allow hearsay evidence of a similar statement by the accused if it is harmful to him but exclude the accused's statement if it is helpful.

(m) That UEA s. 66, by defining the word "voluntary" in terms of "fear of prejudice or hope of advantage" would treat as "voluntary", and therefore admissible, confessions which the courts under the present law would exclude in order to control police tactics.

(n) That although it is in accordance with the present law, UEA s. 73 should not make admissible confessions obtained by trickery.

(o) That UEA s. 88, by making alibi evidence inadmissible if proper notice is not given and "cause" cannot be shown to the court, would in some cases exclude

evidence which should be admissible subject to comment.

(p) That making an accused's spouse a competent and sometimes compellable witness against the accused would be a radical change in the law and that UEA s. 91 and s. 92 should be reconsidered.

(q) That UEA s. 94, which would allow the court and prosecution to comment on the accused's failure to testify in a criminal proceeding would be a serious derogation from the protection now given to an accused. The CTLA says that the protection which UEA s. 124 would confer on the accused against cross-examination on his convictions, which is the offsetting benefit which the Uniform Evidence Act would confer, is almost nugatory because of the exceptions with which it is riddled; an accused or his lawyer may inadvertently make some statement which can be construed as a reference to a trait of his own character or that of the complainant and thereby open his whole character up to attack however irrelevant the reference or his character may be (UEA ss. 26, 29, 30), and giving evidence about the complainant as foundation for a plea of self-defence would inevitably do so. It points out that UEA s. 98 would do away with the dock statement, which is a safeguard allowed by the English model upon which s. 94 is based. It points out also that the English model allows only the court to comment; allowing the prosecutor, as would UEA s. 94, to do so would be an important additional derogation from the

protection of the accused.

(r) That UEA s. 103(2), by requiring a party to be able to "substantiate" any fact which he alleges or assumes upon cross-examination, would go far beyond the ethical rule that a barrister should not ask an assertive question unless he has reasonable grounds to believe the facts asserted. The defence would often be unable to comply with this provision even in connection with perfectly proper questions and the accused would be prejudiced. We note in passing that we ourselves recommend deletion of UEA s. 103(2) in any event: see Evidence and Related Subjects: Specific Proposals for Alberta Legislation, paragraphs 2.45-2.48.

(s) That the "recent complaint" rule is an anachronism and should not be preserved in UEA s. 120(2).

(t) That UEA s. 165 would allow the Crown to claim privilege for inconsistent statements made by or to a police officer and is too broad.

3.18 We repeat what we have already said above. Our anxiety is to see that the process which was necessary for the expeditious production of a Uniform Evidence Act does not stultify itself by providing a reasonable basis for opposition to the enactment of uniform evidence legislation based on the Uniform Evidence Act or by generating disrespect for the law if such legislation is enacted. We turn now to a suggestion for a procedure which we hope would at once achieve the enactment throughout Canada of uniform evidence legislation based upon the

Uniform Evidence Act and ensure that upon enactment it would be perceived as even-handed and just.

3.19 The concerns which we have expressed arose because those who made the decisions about the rules of criminal evidence at the special plenary sessions of the Uniform Law Conference were predominantly associated with one side of the issues involved. We think that those concerns could be sufficiently allayed by a review of the rules in the course of which both sides of the issues are considered, and we will therefore recommend that such a review be undertaken.

(2) A Review Procedure

3.20 We will first state what we think the purpose of the review should be. It should be to ensure that the rules of criminal evidence strike a proper balance among a number of apparently conflicting interests. One is the interest of society in the identification and punishment of criminal conduct. A second is the interest of society in protecting its members against wrongful conviction. The third is the interest of the individual in not being wrongfully convicted. A fourth is the interest of society and accused persons in the fairness of the judicial system as between the state and the accused.

3.21 We now turn to the characteristics of the body which should conduct the review. The body should be chosen to ensure that the review will be fair and will be seen to be fair, and to ensure that its recommendations will be implemented. The body must command respect. It must be seen to be impartial as between prosecution and defence. It must have the time and resources to

conduct a thorough review. It must provide a forum in which competing views will be, and will be seen to be, weighed on their merits. It should if possible be able to fit its procedures into the legislative process without unduly delaying it.

3.22 One way to have legislation reviewed is to have a bill introduced and to have it considered by the appropriate Committee of the House of Commons or a Legislature. That procedure would have two disadvantages. One is that a government which introduces a bill is likely to feel some commitment to it merely because it has introduced it, a feeling which may make it difficult for a Committee of the House or of a Legislature to take a detached view of the bill. The second is that Committees of the House and of Legislatures tend to be under great pressures of time and to have difficulty in maintaining continuity of members in attendance over the substantial period of time which would be necessary for a review of the rules of criminal evidence.

3.23 A further point to be considered in determining how the review should be carried out is that most of the points of contention which we have mentioned would arise only in criminal proceedings under the jurisdiction of Parliament, and that even those points which would also arise in prosecutions under provincial law will be most important in federal criminal proceedings.

3.24 These considerations suggest that the Senate, or a Committee of the Senate, might, if it saw fit, usefully undertake the review. The review could be a review of the rules of

evidence which the Uniform Evidence Act would apply in criminal proceedings, or at least a review of the particular provisions to which objection is taken. If the Uniform Evidence Act were introduced as a Senate bill, there would be time for unhurried consideration by a body which is part of the legislative process, which is not especially connected with either side of the criminal justice process, and which has facilities for providing the equal forum for competing ideas which we have suggested. Finally, Senate hearings could fit themselves into a reasonable legislative programme and should not cause undue delay in the implementation of that programme. If upon such a review the rules of criminal evidence as set out in the Uniform Evidence Act were to be found satisfactory, the fact that the review had been carried out would greatly add to their legitimacy; if it were found that the balance needs to be changed somewhat, the review would have had a beneficial effect upon the resulting statute. In either event, it is likely that the resulting bill would then go through the legislative process without attracting an undue degree of opposition, and achievement of the objectives of uniformity and reform of the rules would be advanced.

3.25 There would be a danger that the reviewing body would become bogged down in a consideration of the technicalities and intricacies of the rules of criminal evidence. We think, however, that it could avoid doing so if the stated purpose of the review is to consider whether the proposed rules strike the proper balance between the conflicting interests. The reviewing body would be able to identify and deal with those interests upon the basis of expert advice and upon the basis of representations

made to it in support of the conflicting interests.

3.26 A suggestion that one of the Houses of Parliament review legislation which could have some effect upon provincial as well as federal prosecutions might be considered invidious from the point of view of the provinces. We think the suggestion appropriate, however, because it is in connection with prosecutions for serious crimes that concerns of the kinds we have expressed will create the greatest problems and will be most keenly felt. It would not militate in any way against a provincial government or Legislature conducting its own review. Nor would it imply that a province would be in any way bound by the outcome of a Senate review; we would hope, however, that the Senate's views would be found persuasive and that the desirability of uniformity would also be a persuasive consideration in any provincial consideration of them.

(3) Recommendation

3.27 Recommendation No. 2

We recommend:

(a) that the rules of evidence which the Uniform Evidence Act apply to criminal proceedings be reviewed,

(b) that the review be conducted by the Senate or a Committee of Senate or some other body which will be recognized as having legitimacy, and

(c) that, if the reviewing body finds that the balance between the interests of the state and the interests of the individual has not been correctly struck, it make the necessary changes.

c. Recommendation for adaptations of Uniform Evidence Act

3.28 We have recommended in principle that Parliament and the Legislatures enact uniform evidence legislation based upon the Uniform Evidence Act (para. 3.9) subject to a review of the rules of criminal evidence (para. 3.27). We have however (para. 1.3) pointed out that the Uniform Evidence Act is a composite Act which contains some provisions which are appropriate only for federal legislation; that the Uniform Evidence Act would not fit in with existing Alberta legislation as it now stands; and that we think that a few changes of substance should be made in it. Much the same considerations will apply to other jurisdictions contemplating the enactment of evidence legislation based upon it. Changes will be necessary, but we think that the desirability of uniformity of evidence legislation is so great that changes which would result in a substantial departure from uniformity of federal and provincial laws should be made sparingly and only for strong reason.

3.29 Recommendation No. 3

> We recommend that, in adapting the Uniform Evidence Act for use federally or in a province, changes which would substantially derogate from uniformity of evidence legislation be made only sparingly and for strong reason.

d. Recommendation as to procedure

3.30 Bringing the Uniform Law Conference project to its initial fruition in the Uniform Evidence Act has required the active co-operation of the federal and provincial governments. Bringing it to its final fruition in the enactment of uniform

evidence legislation based upon it requires their continued co-operation; if only one or a few of the jurisdictions in Canada enact such legislation there will be a derogation from, rather than a promotion of, uniformity of evidence laws. Our understanding is that the Minister of Justice of Canada proposes, subject to Cabinet approval, to bring forward appropriate legislation. We presume that the subject has been raised with the provincial governments at ministerial level and that it is recognized that a federal initiative is the appropriate beginning of the process of enactment of uniform evidence legislation across the country. So that the process will not falter, our first recommendation is that the federal and provincial governments proceed in consultation with each other to arrange for introduction of uniform evidence legislation into Parliament and the Legislatures within some time period which is within the range of practicability but which reflects the importance of an early disposition of the subject. A federal initiative, if acceptable to the provinces, will be an important contribution to the process, but it will not be sufficient by itself.

3.31 The review of rules of criminal evidence which we have proposed could be dealt with during the course of the government consultation. Presumably the Legislatures would not want to proceed to the final enactment of evidence legislation until they have had an opportunity to consider any views which the reviewing body may formulate with respect to any of the criminal evidence rules which apply to proceedings for breaches of provincial statutes. It would still, however, be quite useful for the governments and Legislatures of the provinces to commence to

examine the Uniform Evidence Act and to consider what changes should be made in provincial laws in order to accommodate new evidence legislation based upon it. Our companion report (para. 1.3) is intended to assist the Alberta government in its examination and consideration.

3.32 Recommendation No. 4

> We recommend that the federal government and the provincial governments, by consultation, make arrangements for the introduction of legislation based upon the Uniform Evidence Act into Parliament and the Legislatures as soon as is practicable.

4. CONCLUSION

4.1 We have recorded our admiration for the achievement by the Task Force and the Uniform Law Conference in carrying through to completion a massive and important work in the interest of the people of Canada. Our concern about the criminal evidence rules, which arises from circumstances that the constraints upon the Uniform Law Conference made unavoidable, does not detract from that admiration. We hope that the governments and the bench and bar of Canada, and indeed anyone with an interest in the administration of justice in Canada, will recognize the value of uniform legislation, and will take early and effective action to

achieve uniform evidence legislation throughout the country.

J.W. BEAMES
W.F. BOWKER
C.R.B. DUNLOP
GEORGE C.FIELD
EMILE GAMACHE
W.H. HURLBURT
J.C. LEVY
THOMAS W. MAPP
D. BLAIR MASON
R.M. PATON
W.E. WILSON

CHAIRMAN

DIRECTOR

June 17, 1982

APPENDIX A

RESOLUTION

of the Uniform Law Conference of Canada
(1977 ULC Proc. 65)

RESOLVED that the matter of the Federal-Provincial Uniform Legislation Project on Evidence be referred to Canada and Ontario, and such other jurisdictions as indicate an intention to participate to the Executive Secretary of the Conference on or before 24 September 1977, with the following directions:

1. The delegates of the jurisdictions to which the matter has been referred (herein referred to as "the participating jurisdictions"), jointly appoint a Task Force with the following functions:

   (a) to recommend to the participating jurisdictions the terms of reference for the project;

   (b) to recommend to the participating jurisdictions the order in which particular subjects in the law of evidence should be dealt with by the Task Force, and to recommend a time-table for dealing with those subjects;

   (c) to proceed with the drafting of the uniform legislation; and

   (d) to prepare a draft report for presentation to the 1978 annual meeting of the Conference by the participating jurisdictions, and similar draft reports at subsequent annual meetings until the project is completed.

2. Before the Task Force proceeds with the drafting of uniform legislation, the participating jurisdictions approve or, if desirable, alter the terms of reference, the priorities and time-table recommended by the Task Force.

3. The Task Force to consist of one person appointed by each of the participating jurisdictions and such other members as

the participating jurisdictions authorize.

4. Insofar as it is possible, the Task Force to be a full-time working body, with power to consult such persons or groups as the participating jurisdictions authorize.

5. The Task Force to report progress regularly to the participating jurisdictions for their approval.

6. The Task Force to keep the non-participating jurisdictions informed of the development of their proposals and invite comment at appropriate stages in their development.

7. (a) To the extent that all participating jurisdictions approve the annual draft report of the Task Force, the draft report shall constitute a joint report of the participating jurisdictions.

   (b) To the extent, if any, that a participating jurisdiction does not approve the report of the Task Force, the participating jurisdiction may make as an addendum to the joint report, a separate report, giving its reason for disapproval, or if a participating jurisdiction wishes to make independent comments without necessarily indicating disapproval, such comments also may be made in an addendum.

APPENDIX B

RESOLUTION

of the Uniform Law Conference of Canada
(1979 ULC Proc. 49)

"A. Principles

The ultimate objective of the exercise is the development of as comprehensive a legislative statement of the rules of evidence as may be consistent with the following principles:

1. Legislative statement of the law is desirable wherever possible, but there may be areas of the law of evidence where it is better not to attempt to legislate but rather rely on common law evolution and precedent.

2. The rules of evidence should be as understandable as possible to the practicing bar and the judiciary, but it should be recognized that some of the rules of evidence may be complex and to a certain extent technical areas of the law not admitting of a simple statement.

3. Although legislative statement can assist in making the law of evidence more understandable and more certain, provisions which create wide discretions in the trial judge, especially with respect to admissibility, can reduce, rather than increase, the very certainty and uniformity that are rationales of legislating. For example, broad exclusionary rules requiring an individual trial judge to decide what an "abuse of process" is, or what "brings the administration of justice into disrepute", without further legislative guidelines, may create more uncertainty and lack of uniformity than is desirable. The Task Force should therefore strive to avoid submitting model sections creating wide unfettered judicial discretion.

B. Procedure (with respect to each area of the law of evidence)

1. State the law as it is;

2. Indicate whether it should be changed and if so why;

3. Indicate whether the law can, and should be, in statutory form;

4. Draft model section(s) for all areas where the Task Force feels that the law can and should be in statutory form (whether or not any change in the law itself is recommended);

5. The final report can include any minority or dissenting view."

APPENDIX C

Uniform Law Conference of Canada

Uniform Evidence Act

UNIFORM EVIDENCE ACT
TABLE OF CONTENTS

(Note - This table of contents is inserted for convenience of reference only and does not form part of this Act.)

PART I

INTERPRETATION AND APPLICATION

Interpretation

Interpretation

1. In this Act,

"adduce" "adduce", in relation to evidence, means to offer or elicit evidence by way of one's own or other witnesses;

"adverse witness" "adverse witness" has the meaning set out in section 105;

"complainant" "complainant" means the person against whom it is alleged that an offence was committed;

"court" "court", except where otherwise provided, means

(*a*) the Supreme Court of Canada,

(*b*) the Federal Court of Canada,

(*c*) the court of appeal of a province,

(*d*) a superior court, district court or county court of a province or a court of general or quarter sessions of the peace,

(*e*) the provincial court of a province, family court, juvenile court or court presiding over surrogate, probate or chancery matters,

(*f*) a judge of any court referred to in paragraphs (*a*) to (*e*),

(*g*) a provincial magistrate, police magistrate, stipendiary magistrate or justice of the peace, and

(*h*) any other tribunal, body or person that the Governor in Council or Lieutenant Governor in Council may by order designate as a court for the purposes of this Act or any of its provisions;

(Note - For the purposes of a uniform provincial Act, this definition, except for the purposes of sections 77 to 82, would be restricted to courts in a province and the Supreme Court of Canada.)

"criminal proceeding" "criminal proceeding" means a prosecution for an offence and includes a proceeding to impose punishment for contempt of court;

"hearsay" means a statement offered in evidence to prove the truth of the matter asserted but made otherwise than in testimony at the proceeding in which it is offered;

"offence" means an offence under an enactment of Canada or a province;

"record" means the whole or any part of any book, writing, other document, card, tape, photograph within the meaning of section 130 or other thing on, in or by means of which data or information is written, recorded, stored or reproduced;

"statement" means an oral or a recorded assertion and includes conduct that could reasonably be taken to be intended as an assertion.

Application

General rule

2. Subject to section 3, this Act applies to every proceeding and stage of a proceeding within the jurisdiction of the (Parliament of Canada) (Legislature or National Assembly) that is before a court or that is held for the purpose of taking evidence pursuant to a court order.

Application to civil proceedings

3. (1) Parts I to IV and VI to VIII do not apply to the following civil proceedings:

(*a*) an examination for discovery;

(*b*) an examination on an affidavit; or

(*c*) an examination on the pleadings.

Application to criminal proceedings

(2) Parts I to IV and VI to VIII apply only to the following criminal proceedings and appeals in connection with those proceedings:

(*a*) a preliminary inquiry;

(*b*) a trial prior to the rendering of a verdict as to guilt;

(*c*) a proceeding under the *Criminal Code* in respect of a dangerous offender; and

(*d*) the taking of evidence on commission for the purposes of any proceeding referred to in paragraphs (*a*) to (*c*).

(Note - Paragraphs (2)(*a*) and (*c*) and the reference to them in paragraph (2)(*d*) are for inclusion in the federal Act only.)

Exception for protective jurisdiction

4. A court is not required to apply this Act in a proceeding to determine or protect the best interests of a person who needs the protection of the court by reason of his age or physical or mental condition.

Application of provincial law

5. Except to the extent that they are inconsistent with this Act or any other Act of the Parliament of Canada, the laws of evidence in force in the province where a proceeding is taken apply to the proceeding.

(Note - This provision is for inclusion in the federal Act only.)

Application to Crown

6. This Act is binding on Her Majesty in right of (Canada) (Province).

PART II

RULES OF PROOF

Legal and Evidential Burden

Interpretation

7. In sections 8 to 13,

"evidential burden"

"evidential burden" means the onus to adduce sufficient evidence of a fact in issue to warrant the trier of fact to consider the evidence;

"legal burden"

"legal burden" means the onus to persuade the trier of fact of the existence of a fact in issue.

Evidential burden in civil proceeding

8. The evidential burden in a civil proceeding is discharged if the court, without assessing the credibility of the witnesses, concludes that the trier of fact, properly instructed, reasonably could be satisfied on a balance of probabilities that the fact in issue has been established.

Legal burden in civil proceeding

9. The legal burden in a civil proceeding is on the claimant with respect to every fact essential to the claim and that burden is discharged by proof on a balance of probabilities.

Evidential burden on prosecution in criminal proceeding

10. (1) Where the evidential burden in a criminal proceeding is on the prosecution, it is discharged if the court, without assessing the credibility of the witnesses, concludes that the trier of fact, properly instructed, reasonably could find that the fact in issue has been established beyond a reasonable doubt.

Evidential burden on accused in criminal proceeding

(2) Where the evidential burden in a criminal proceeding is on an accused, it is discharged

(*a*) where the accused does not have the legal burden, if the court, without assessing the credibility of the witnesses, concludes that the trier of fact, properly instructed, reasonably could find that sufficient evidence has been adduced to raise a reasonable doubt as to the existence of the fact in issue; or

(*b*) where the accused also has the legal burden, if the court, without assessing the credibility of the witnesses, concludes that the trier of fact, properly instructed, reasonably could be satisfied on a balance of probabilities that the fact in issue has been established.

Legal burden in criminal proceeding

11. (1) The legal burden in a criminal proceeding is on the prosecution with respect to every essential element of the offence charged and that burden is not discharged except by proof beyond a reasonable doubt.

Legal burden respecting insanity

(2) Where the issue of insanity at the time of the act is raised in a criminal proceeding, the legal burden with respect to that issue is on the proponent and that burden is discharged by proof on a balance of probabilities.

Where onus reversed

(3) Where an enactment expressly imposes a legal burden on an accused to prove or establish any fact in issue in a criminal proceeding, that burden is discharged by proof on a balance of probabilities.

Legal burden respecting excuse, exception, etc.

12. (1) The legal burden in a criminal proceeding with respect to any excuse, exception, exemption, proviso or qualification

operating in favour of an accused, other than a defence of general application, is on the accused and that burden is discharged by proof on a balance of probabilities.

No burden on prosecution

(2) The prosecution is not required, except by way of rebuttal, to negate the application of anything operating in favour of an accused that is referred to in subsection (1).

Burden as to fitness

13. Where there is a real issue, on the ground of insanity, as to the fitness of an accused to stand his trial, the prosecution has the legal burden of satisfying the court on a balance of probabilities that the accused is fit to stand his trial.

Circumstantial evidence

14. In a criminal proceeding, the court is not required to give the trier of fact any special direction or instruction on the burden of proof in relation to circumstantial evidence.

Presumptions

Interpretation

15. A presumption is an inference of fact that the law requires to be made from facts found or otherwise established.

Effect in criminal proceeding

16. In a criminal proceeding, a presumption that operates against the accused may, subject to subsection 11(2), be rebutted by evidence sufficient to raise a reasonable doubt as to the existence of the presumed fact.

Formal Admissions

Formal admissions

17. (1) A party to a proceeding may admit a fact or matter for the purpose of dispensing with proof thereof, including a fact or matter that involves a question of law or mixed law and fact.

Exception

(2) In a criminal proceeding, no admission shall be received under subsection (1) unless it is accepted by the opposing party.

Adducing evidence respecting admitted fact or matter

(3) Nothing in this section prevents a party to a proceeding from adducing evidence to prove a fact or matter admitted by another party, but in a civil proceeding if the court is of the opinion that such evidence does not materially add to or clarify the fact or matter admitted, it may order the party who adduced the evidence to pay, as costs, an amount the court considers appropriate.

Judicial Notice

Judicial notice of enactments

18. Judicial notice shall be taken of the following without production or proof:

(*a*) Acts of the Parliament of Canada;

(*b*) Acts or ordinances of the legislature of any province or colony that forms or formed part of Canada;

(*c*) Acts of the Parliament of the United Kingdom or any former kingdom of which England formed part that apply in the territorial jurisdiction of the court;

(*d*) regulations, orders in council, proclamations, municipal by-laws and rules of pleading, practice or procedure published in the *Canada Gazette* or the official gazette of a province; and

(*e*) unpublished municipal by-laws relevant to a criminal proceeding, unless the court is satisfied that proof of any of them should be made in the ordinary manner.

(Note - Each jurisdiction may consider whether to include paragraph (*e*).)

Judicial notice of other matters

19. Judicial notice may be taken of the following without production or proof:

(*a*) decisional law of federal courts, and of the courts of a province, that would otherwise be required to be proved as a fact;

(*b*) facts so generally known and accepted that they cannot reasonably be questioned; and

(*c*) facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Hearing

20. Before taking judicial notice of any matter, the court shall afford the parties an opportunity to be heard on the question whether judicial notice should be taken.

Effect of judicial notice

21. (1) A matter judicially noticed shall be deemed to be conclusively proved, except that the court may change its decision where it is satisfied that the taking of judicial notice was based on an error of fact.

Appeal

(2) The decision to take judicial notice is a question of law that is subject to appeal.

PART III

RULES OF ADMISSIBILITY

General Rule

General rule

22. (1) Relevant evidence is admissible unless it is excluded pursuant to this Act or any other Act or law, and evidence that is not relevant is not admissible.

Exception

(2) The court may exclude evidence the admissibility of which is tenuous, the probative force of which is trifling in relation to the main issue and the admission of which would be gravely prejudicial to a party.

General character

23. Evidence as to the general character of an accused is not admissible in a criminal proceeding.

Evidence of accused as to his character traits

24. (1) An accused may adduce evidence of a trait of his character by way of expert opinion as to his disposition or by way of evidence as to his general reputation in the community.

Prior notice required

(2) Evidence of witnesses as to the general reputation of the accused in the community shall not be received under subsection (1) unless the accused, at least seven days prior to the commencement of the trial, has given notice in writing to the court, the prosecutor and any co-accused of his intention to call witnesses for the purpose of adducing that evidence.

Evidence of prosecution as to character traits of accused

25. (1) Subject to subsection (2), the prosecution shall not adduce evidence of a trait of an accused's character for the sole purpose of proving that the accused acted in conformity with that trait.

Scope of evidence

(2) Where an accused has adduced evidence under section 24, the prosecution may, on examination-in-chief, cross-examination of defence witnesses or rebuttal, adduce evidence of any trait of the accused's character, whether or not the accused has adduced evidence of that trait.

Manner of adducing evidence

(3) The prosecution may adduce evidence under subsection (2) by way of

(*a*) expert opinion as to the disposition of the accused;

(*b*) the general reputation of the accused in the community; or

(*c*) any previous finding of guilt or conviction of the accused of an offence.

Saving

26. Nothing in section 25 prevents the prosecution from adducing evidence of any trait of an accused's character

(*a*) for any purpose other than proving that the accused acted in conformity with that trait; or

(*b*) that is admissible under the rule known as the "similar acts" or "similar facts" rule.

Use of evidence

27. Evidence adduced under section 24, 25, 28 or 29 may be considered not only in relation to the character traits but also in relation to the credibility of an accused or a complainant, as the case may be.

Evidence as to character traits of complainant

28. An accused may adduce evidence of a character trait of the complainant where

(*a*) the trait was known to the accused at the time the offence is alleged to have been committed; or

(*b*) the evidence would be admissible, if the complainant were a party, under the rule known as the "similar acts" or "similar facts" rule.

Rebuttal evidence

29. (1) Where an accused adduces evidence under section 28, the prosecution may adduce evidence of the character traits of the complainant by way of rebuttal, including evidence as to the general reputation of the complainant in the community if the complainant is deceased or unfit to testify by reason of his physical or mental condition.

Self-defence

(2) For the purposes of subsection (1), evidence adduced by an accused tending to establish self-defence shall be deemed to be evidence of a character trait of the complainant adduced by the accused under section 28.

Application of section 25

30. Where an accused has adduced evidence of a character trait of the complainant, or evidence tending to establish self-defence, the prosecution may, if the court concludes that the accused has thereby put his own character in issue, adduce evidence of any trait of the accused's character in accordance with section 25.

No evidence of sexual conduct of complainant

31. In a criminal proceeding, evidence relating to the sexual conduct of the complainant with a person other than the accused

shall not be adduced by or on behalf of the accused.

Exceptions

32. Notwithstanding section 31, the accused may adduce

(*a*) evidence of specific instances of the complainant's sexual conduct tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge, where the court is satisfied that the probative value of the evidence outweighs its prejudicial nature; or

(*b*) evidence tending to rebut evidence of the complainant's sexual conduct or absence of sexual conduct that was previously adduced by the prosecution.

Notice and hearing

33. Evidence referred to in paragraph 32(*a*) shall not be received unless

(*a*) reasonable notice has been given to the prosecutor by or on behalf of the accused of his intention to adduce that evidence, together with particulars of the evidence, and a copy of the notice has been filed with the court; and

(*b*) the court, after holding a hearing *in camera* in the absence of the jury, if any, is satisfied under that paragraph that the evidence may be adduced.

Complainant not compellable

34. (1) The complainant is not a compellable witness for the purposes of a hearing referred to in section 33.

Prohibition

(2) A notice referred to in section 33 and the evidence taken, the information given and the representations made at a hearing referred to in that section shall not be broadcast or published.

Evidence of possession

35. (1) Where an accused is charged with an offence under section 312 or paragraph 314(1)(*b*) of the *Criminal Code*, evidence is admissible to show that property other than the property that is the subject-matter of the proceedings was found in the possession of the accused and was stolen within twelve months before the proceedings were commenced.

Evidence of previous finding of guilt or conviction

(2) Where an accused is charged with an offence under section 312 or paragraph 314(1)(*b*) of the *Criminal Code* and evidence is adduced that property that is the subject-matter of the proceedings was found in his possession, evidence is admissible to show that the accused, within five years before the proceedings were commenced, was found guilty or convicted of one or more such offences.

Application

(3) Neither subsection (1) nor (2) applies where an accused is charged with an additional count other than a count in respect of theft or in respect of an offence under paragraph 306(1)(*b*), section 312 or paragraph 314(1)(*b*) of the *Criminal Code*.

Notice to accused

36. (1) Evidence shall not be received under section 35 unless the proponent gives notice in writing of the proposed evidence to the accused at least seven days before the commencement of the trial, identifying the property and the person from whom it is alleged to have been stolen or the offence of which the accused was found guilty or convicted, as the case may be.

Use of evidence

(2) Evidence received under section 35 may be considered for the purpose of proving that the accused knew that the property that is the subject-matter of the proceedings was unlawfully obtained.

(Note - Sections 31 to 36 are for inclusion in the federal Act only.)

Opinion Evidence and Experts

General rule

37. Subject to this Act, no witness other than an expert may give opinion evidence.

Non-expert opinion evidence

38. A witness who is not testifying as an expert may give opinion evidence where it is based on facts perceived by him, and the evidence would be helpful either to the witness in giving a clear statement or to the trier of fact in determining an issue.

Handwriting comparison

39. Comparison of a disputed handwriting with another handwriting may be made by witnesses, and such handwritings and the evidence of witnesses with respect to them may be submitted to the trier of fact as proof of the genuineness or otherwise of the handwriting in dispute.

Opinion evidence on an ultimate issue

40. A witness may give opinion evidence that embraces an ultimate issue to be decided by the trier of fact where

(*a*) the factual basis for the evidence has been established;

(*b*) more detailed evidence cannot be given by the witness; and

(*c*) the evidence would be helpful to the trier of fact.

Statement of expert opinion

41. (1) In a civil proceeding, a statement in writing setting out the opinion of an expert is admissible without calling the expert as a witness or proving his signature if it is a full statement of the opinion and the grounds of the opinion and if it includes the expert's name, address, qualifications and experience.

Copy of statement to be furnished

(2) Except with leave of the court, neither a written statement of expert opinion nor the expert's testimony as to his opinion shall be received by way of a party's evidence in chief in a civil proceeding unless, at least ten days before the commencement of the trial, a copy of the statement has been furnished to every party adverse in interest to the proponent.

Proof by affidavit

(3) The furnishing of a copy of an expert's statement may be proved by affidavit.

Attendance of expert

42. (1) Where a written statement of an expert is adduced under section 41, any party may require the expert to be called as a witness.

Costs

(2) Where an expert has been required to give evidence under subsection (1), and the court is of the opinion that it was not reasonable to require the expert to testify, the court may order the party that required the testimony of the expert to pay, as costs, an amount the court considers appropriate.

Maximum number of expert witnesses

43. Except with leave of the court, no more than seven witnesses may be called by a

party to give expert opinion evidence in a proceeding.

Court appointed expert

44. (1) On the application of a party or on its own motion, the court at any stage of a civil proceeding may, if it considers it necessary for a proper determination of the issues, by order appoint an expert to inquire into, and submit a report on, any question of fact or opinion relevant to a matter in issue.

Parties to agree

(2) The expert shall, wherever possible, be appointed and instructed in accordance with the agreement of the parties.

Further orders

(3) The court may make any further orders it considers necessary to enable the expert to carry out his instructions, including orders for the examination of any party or property, for the making of experiments and tests and for the making of further or supplementary reports.

Report admissible in evidence

45. The report of an expert appointed under section 44 is admissible in evidence.

Production of report

46. The expert shall file any report he is ordered to make with the court in the manner the court may direct and the appropriate official of the court shall furnish copies of the report to the parties.

Examination of expert

47. Any party may cross-examine an expert appointed under section 44 on any report made by him and may call another expert to give evidence as to any question of fact or opinion reported on, but a party shall not call more than one other expert except with leave of the court.

Saving

48. Nothing in section 44 prevents a court from appointing an expert in a criminal proceeding.

General Rule

Hearsay rule

49. (1) Subject to this or any other Act, hearsay is not admissible.

Exception for consent

(2) Hearsay is admissible if the parties agree and the court consents to its admission.

Power of court to create exceptions

(3) A court may create an exception to the rule in subsection (1) or paragraph 59(*a*) that is not specifically provided for by this Act if the criteria for the exception sufficiently guarantee the trustworthiness of the statement.

Question of law

(4) The question whether the criteria for an exception referred to in subsection (3) sufficiently guarantee the trustworthiness of a statement shall be deemed to be a question of law that is subject to appeal.

Exceptions Where Declarant Available

Previous identification

50. Where a declarant has made a statement containing an eye-witness identification of a person, that statement of identification is admissible for all purposes in any proceeding in which the declarant is called as a witness.

Past recollection recorded

51. (1) A record admissible under section 112 as past recollection recorded is admissible for all purposes.

Previous statements

(2) A previous statement of a witness that is admissible under section 117 or 118 is admissible for all purposes if it was made under oath or solemn affirmation and the witness was subject to cross-examination when making it.

Exceptions Where Declarant or Testimony Unavailable

Interpretation

52. (1) In a civil proceeding, a declarant or his testimony shall be considered to be unavailable only if the declarant

(*a*) is deceased or unfit to testify by reason of his physical or mental condition;

(*b*) cannot with reasonable diligence be identified, found, brought before the court or examined out of the court's jurisdiction;

(*c*) despite a court order, persists in refusing to take an oath or to make a solemn affirmation as a witness or to testify concerning the subject-matter of his statement; or

(*d*) is absent from the hearing and the importance of the issue or the added reliability of his testimony does not justify the expense or inconvenience of procuring his attendance or deposition.

Cross-examination of absent declarant

(2) Where paragraph (1)(*d*) applies, the court, on application, may order the attendance of an absent declarant for cross-examination at the expense of the applicant.

Interpretation

(3) In a criminal proceeding, a declarant or his testimony shall be considered to be unavailable only if the declarant is deceased or unfit to testify by reason of his physical or mental condition.

Civil proceeding

53. In a civil proceeding in which the declarant or his testimony is unavailable, a statement is admissible to prove the truth of the matter asserted if it would have been admissible had the declarant made it while testifying.

Criminal proceeding—statement in expectation of death

54. (1) In a criminal proceeding in which a declarant or his testimony is unavailable, a statement made by him as to the cause and circumstances of his death or injuries is admissible to prove the truth of the matter asserted on a charge for his murder or manslaughter, for criminal negligence resulting in his death or injuries, for an attempt to commit murder or for any other charge arising out of the transaction leading to his

death or injuries that is joined with the main charge.

Admissibility

(2) A statement is not admissible under subsection (1) unless the declarant would have been a competent witness if called to testify at the time he made the statement and unless at the time the statement was made the declarant had a settled hopeless expectation of almost immediate death arising from the transaction leading to his death or injuries.

Criminal proceeding—statement in course of duty

55. (1) In a criminal proceeding in which a declarant or his testimony is unavailable, a statement made by him in the course of duty is admissible to prove the truth of the matter asserted or any collateral matter where the declarant had a duty to record or report his acts, the statement was made at or about the time the duty was performed, the declarant made the statement without motive to misrepresent and the statement was not made in anticipation of imminent litigation.

Saving

(2) Notes or other records made by a police officer performing a public duty shall not be excluded under subsection (1) by reason only that they were made in anticipation of imminent litigation.

Criminal proceeding—statement as to family history

56. In a criminal proceeding in which a declarant or his testimony is unavailable, a statement made by him that concerns a question of his family history, including relationship by blood, marriage or adoption, is admissible to prove the truth of the matter asserted where the statement was made before the commencement of any actual or legal controversy involving the matter and, according to evidence from a source other than the declarant himself, the declarant is a member of the family in question.

Criminal proceeding—statement as to testamentary document

57. In a criminal proceeding in which a declarant or his testimony is unavailable, a statement made by him that concerns the contents or proposed contents of a testamentary document made by him is admissible to prove the truth of the matter asserted where

the testamentary document has been lost or destroyed.

Criminal proceeding—statement against interest

58. (1) In a criminal proceeding in which a declarant or his testimony is unavailable, a statement made by him that asserts a matter against his pecuniary, proprietary or penal interest is admissible to prove the truth of the matter asserted and any collateral matter where the statement viewed in its entirety was to the declarant's immediate prejudice at the time it was made and the declarant, when making the statement, had personal knowledge of the matter asserted and knew it to be against his interest.

Exclusion

(2) The court may exclude a statement offered in evidence under subsection (1) as a statement against the penal interest of the declarant where there is no other evidence tending to implicate the declarant in the matter asserted or there is evidence tending to establish collusion between an accused and the declarant in the making of the statement.

Condition of admissibility

59. A statement is not admissible under sections 53 to 58 where

(*a*) it is tendered by a witness other than one who has firsthand knowledge that the declarant made the statement; or

(*b*) the unavailability of the declarant or his testimony was brought about by the proponent of the statement for the purpose of preventing the declarant from attending or testifying.

Exceptions Where Availability of Declarant or Testimony is Immaterial

Statements made, adopted or authorized

60. A statement is admissible against a party to prove the truth of the matter asserted if he made it in his personal capacity, if he expressly adopted it or it is reasonable to infer that he adopted it, or if it was made by a person he authorized to make a statement concerning the matter.

Statement by co-conspirator

61. (1) A statement made by a co-conspirator of a party in furtherance of a conspir-

acy is admissible against the party to prove the truth of the matter asserted if it is established by evidence from a source other than the declarant that the party was a party to the conspiracy.

Statement by person engaged in common unlawful purpose

(2) A statement by a person engaged with a party in a common unlawful purpose, made in furtherance of that purpose, is admissible against the party to prove the truth of the matter asserted if it is established by evidence from a source other than the declarant that the party was engaged in that common unlawful purpose.

Statement made in representative capacity

62. In a civil proceeding, a statement made by a trustee, executor or administrator of an estate or any other person in a representative capacity is admissible against the declarant and the party represented to prove the truth of the matter asserted without having to establish that the declarant made the statement as part of the exercise of his representative capacity.

(Note - Each jurisdiction may consider whether to include a next friend, guardian *ad litem*, tutor or curator in this provision.)

Rule respecting privity abrogated

63. The rule whereby a statement is admissible against a party if made by a person in privity with the party in estate or interest or by blood relationship is abrogated.

Statement of agent or employee

64. (1) Subject to subsection (2), in a civil or criminal proceeding, a statement by an agent or employee of a party, made during the existence and concerning a matter within the scope of the agency or employment is admissible against the party to prove the truth of the matter asserted.

Proceedings by way of indictment

(2) In a criminal proceeding by way of indictment, a statement by an agent or employee of an accused concerning a matter within the scope of the agency or employment is admissible against the accused to prove the truth of the matter asserted if the agent or employee exercised managerial authority at the time the statement was made

and it related to a matter within the scope of that authority.

Directing mind of corporation

(3) In a criminal proceeding, where a party is a corporation, a statement by a person who was a directing mind of the corporation at the time the statement was made is admissible against the corporation.

(Note - Subsections (2) and (3) are for inclusion in the federal Act only.)

Other exceptions

65. (1) The following statements are admissible to prove the truth of the matter asserted:

(*a*) a statement contained in a marriage, baptismal or similar certificate purporting to be made at or about the time of the act certified, by a person authorized by law or custom to perform the act;

(*b*) a statement contained in a family Bible or similar family record concerning a member of the family;

(*c*) a statement of reputation as to family history, including reputation as to the age, date of birth, place of birth, legitimacy or relationship of a member of the family;

(*d*) a statement contained in a formally executed document purporting to be produced from proper custody and executed twenty years or more before the time it is tendered in evidence;

(*e*) a statement concerning the reputed existence of a public or general right, made before the commencement of any actual or legal controversy over the matter asserted and, in the case of a general right, made by a declarant having competent knowledge of the matter asserted;

(*f*) a statement as to the physical condition of the declarant at the time the statement was made, including a statement as to the duration but not as to the cause of that condition;

(*g*) a statement, made prior to the occurrence of a fact in issue, as to the state of mind or emotion of the declarant at the time the statement was made;

(*h*) a spontaneous statement made in direct reaction to a startling event perceived or apprehended by the declarant;

(*i*) a statement describing or explaining an event observed or an act performed by the declarant, made spontaneously at the time the event or act occurred;

(*j*) a statement of reputation that may be adduced under this Act; and

(*k*) a statement contained in a business record within the meaning of section 152.

Self-serving statements

(2) Where a statement referred to in paragraph (1)(*i*) is a self-serving statement made by an accused, it shall be received in evidence on behalf of the accused only if he testifies, and he shall not adduce it by way of cross-examination.

Statements of Accused

Interpretation

66. In this section and sections 67 to 73,

"person in authority"

"person in authority" means a person having authority over the accused in relation to a criminal proceeding or a person whom the accused could reasonably have believed had that authority;

"voluntary"

"voluntary", in relation to a statement, means that the statement was not obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority.

Statements of accused

67. A statement, other than one to which paragraph 65(1)(*f*), (*g*), (*h*) or (*i*) applies, that is made by an accused to a person in authority is not admissible at the instance of the prosecution at a trial or preliminary inquiry unless the prosecution, in a *voir dire*, satisfies the court on a balance of probabilities that the statement was voluntary.

No question as to truth

68. In a *voir dire* held under section 67, the accused shall not be questioned as to the truth of his statement by the court or any adverse party.

Statutory compulsion irrelevant

69. Statutory compulsion of a statement shall not be considered in the determination of whether the statement was voluntary.

Contents may be considered

70. In determining whether a statement was voluntary, the court may consider the contents of the statement.

Admission that statement was voluntary

71. The accused may make an admission that his statement was voluntary for the purpose of dispensing with a *voir dire*.

Where statement not receivable

72. (1) A statement otherwise admissible under section 67 shall not be received in evidence where the physical or mental condition of the accused when he made the statement was such that it should not be considered to be his statement.

Burden of proof

(2) The prosecution is not required to establish that a statement referred to in subsection (1) should be considered to be that of the accused unless the accused has discharged an evidential burden within the meaning of section 7 with respect to his physical or mental condition when he made the statement.

Where accused unaware

73. Where an accused in making a statement was unaware that he was dealing with a person in authority, the statement shall be treated as having been made to a person other than a person in authority.

Preliminary inquiry

74. Where a statement is admitted in evidence at a preliminary inquiry, the evidence adduced by the prosecution at the *voir dire* shall, without further proof, form part of the evidence in the preliminary inquiry.

Confirmation by real evidence

75. A statement ruled inadmissible under section 67 is not rendered admissible in whole or in part by the subsequent finding of confirmatory real evidence within the meaning of section 160, but evidence is admissible to show that the real evidence was found as a result of the statement or that the accused knew of the nature, location or condition of the real evidence.

Credibility of Declarant

Challenging credibility

76. (1) The party against whom hearsay is admitted in evidence may call the declarant as a witness and with leave of the court may examine him as if he were an adverse witness.

Where declarant unavailable

(2) Where the declarant is unavailable, his credibility may be challenged in the same manner as if he were a witness, and it may be supported by any evidence that would have been admissible for that purpose if the declarant had testified as a witness.

Previous Court Proceedings

General rule

77. Subject to this Act and the rules respecting the enforcement of judgments, the finding of another court is not admissible for the purpose of proving a fact in issue.

Interpretation

78. In sections 79 to 82,

"conviction"

"conviction" includes a conviction in respect of which a pardon other than a free pardon was granted by law;

"finding of guilt"

"finding of guilt" includes a finding of guilt of an offence, and a plea of guilty to an offence, made by or before a court that makes an order directing that the accused be discharged for the offence absolutely or on the conditions prescribed in a probation order;

"offence"

"offence" includes a contravention in respect of which a court martial is held pursuant to the *National Defence Act*.

Application

79. Sections 80 to 82 do not apply to a finding of guilt or conviction or to a finding of adultery while there is a right of appeal from it.

Admissibility in civil proceeding

80. (1) Where a court has found a person guilty or convicted him of an offence, or in a matrimonial proceeding has found him to

have committed adultery, and the commission of the offence or adultery is relevant to a matter in issue in a civil proceeding, evidence of the finding or conviction is admissible in the civil proceeding for the purpose of proving that the offence or adultery was committed by that person, whether or not he is a party to the civil proceeding.

Defamation proceeding

(2) In a civil proceeding for libel or slander in which the commission of an offence or adultery is relevant to a fact in issue, proof that a person was found guilty or convicted of the offence or found to have committed adultery is conclusive proof that he committed the offence or adultery.

Theft and possession

81. (1) Where an accused is charged with possession of any property obtained by the commission of an offence, evidence of the finding of guilt or conviction of another person of theft of the property is admissible against the accused and in the absence of evidence to the contrary is proof that the property was stolen.

Accessory after the fact

(2) Where an accused is charged with being an accessory after the fact to the commission of an offence, evidence of the finding of guilt or conviction of another person of the offence is admissible against the accused and in the absence of evidence to the contrary is proof that the offence was committed.

Recorded proof and notice

82. (1) On proof of the identity of a person as the offender and subject to any notice required under section 139, a conviction or a finding of guilt or adultery may be proved by

(*a*) a memorandum, minute or other record of the conviction or the finding of guilt or adultery; or

(*b*) a certificate containing the substance and effect only, omitting the formal part, of the charge and the conviction or finding of guilt.

Proof of signature or official character

(2) Where a certificate or record referred to in subsection (1) purports to be signed by the judge or an appropriate clerk or officer of the court, it is proof, in the absence of evidence to the contrary, of the facts it asserts

without proof of the signature or official character of the person appearing to have signed it.

Alibi Evidence

Interpretation

83. In sections 84 to 88, "alibi evidence" means evidence tending to establish that an accused is not guilty of an offence with which he is charged on the ground that he was not present at the place where the offence is alleged to have been committed at the time it is alleged to have been committed.

Notice of alibi evidence

84. (1) An accused shall, at the first reasonable opportunity, give notice of alibi evidence in writing to the prosecutor or a law enforcement officer or authority acting in relation to the accused, indicating the whereabouts of the accused at the time the offence is alleged to have been committed and the names and addresses of the witnesses in support of the alibi.

Further notice

(2) Where changes occur in the names or addresses of the witnesses mentioned in a notice under subsection (1) or new witnesses are found, the accused shall, at the first reasonable opportunity, give further notice to any person to whom notice was originally given.

Notice by prosecutor

85. Where the prosecutor receives notice under section 84, he shall provide a copy of the notice to any co-accused and, after the alibi has been investigated, he shall, at the first reasonable opportunity, give notice in writing of the results of the investigation to the accused and any co-accused.

Adverse comment

86. Where a party fails to comply with section 84 or 85, the court and any party adverse in interest may comment on the weight to be given to the evidence of that party in relation to the alibi.

Determining the first reasonable opportunity

87. In determining when the first reasonable opportunity occurred for the purposes of

section 84 or 85, the court shall consider all the circumstances and, in particular, with respect to an accused, shall consider when the accused became aware of the time and place of the alleged offence and when he retained or was provided with counsel.

Proceedings by way of indictment

88. (1) In a criminal proceeding by way of indictment in which a preliminary inquiry is held, where the accused has not complied with section 84 and has failed to give notice of alibi evidence within seven days after being committed for trial, alibi evidence is not admissible on his behalf at the trial without the consent of the prosecution unless the court for cause shown orders otherwise and, on committing the accused for trial, the court shall warn him accordingly.

Adverse comment where applicable

(2) Where alibi evidence is received under subsection (1), a comment in respect of that evidence may be made under the conditions and in the manner provided by section 86.

(Note - This section is for inclusion in the federal Act only.)

PART IV

KINDS OF EVIDENCE

Testimony

Competence and Compellability

General rule

89. Subject to this Act and any other law, every person is competent and compellable to testify in a proceeding.

Presiding officer

90. (1) The person presiding at a proceeding is not a competent witness in that proceeding.

Members of jury

(2) A juror sworn and empanelled for a proceeding who is called as a witness in that proceeding, other than on a *voir dire* to determine whether the jury is properly discharging its duties or whether there has been interference with the jury, cannot continue as a juror in that proceeding.

Accused

91. (1) An accused is not a competent witness for the prosecution in a proceeding against him.

Persons jointly tried

(2) A person who is jointly tried for an offence with any other person is a competent but not a compellable witness for that other person.

Spouse

92. (1) The spouse of an accused is a competent but not a compellable witness for the prosecution.

Spouses of persons jointly tried

(2) Where two or more persons are jointly tried for an offence, the spouse of any one of them is a competent but not a compellable witness for any of the others.

Spouse as witness for prosecution

93. The spouse of an accused is a competent and compellable witness against the accused or any co-accused where the offence charged

(*a*) is high treason or treason punishable by imprisonment for life;

(*b*) is against the person or property of the spouse;

(*c*) is against a person under the age of fourteen years; or

(*d*) is under section 33 or 34 of the *Juvenile Delinquents Act* or sections 143 to 146, 148 to 157, 166 to 168, 195, 197, 200, 216, 218 to 222, 226, 227, 248 to 250, 255 to 257 or 289 of the *Criminal Code* or paragraph 423(1)(*c*), 688(*a*) or 688(*b*) of the *Criminal Code* or is an attempt to commit an offence under section 146 or 155 of the *Criminal Code*.

(Note - Paragraphs (*a*) and (*d*) are for inclusion in the federal Act only.)

Comment on failure to testify

94. The court and the prosecution may comment on the failure of an accused to testify on his own behalf but may not comment on the failure of the spouse of the accused to testify.

Oath or Solemn Affirmation

Oath or solemn affirmation

95. Every witness shall be required, before giving evidence, to identify himself and to take an oath or make a solemn affirmation in the form and manner provided by the law that governs the proceeding.

Witness whose capacity is in question

96. (1) Where a proposed witness is a person of seven or more but under fourteen years of age or is a person whose mental capacity is challenged, the court, before permitting that person to give evidence, shall conduct an inquiry to determine whether, in its opinion, that person understands the nature of an oath or a solemn affirmation and is sufficiently intelligent to justify the reception of his evidence.

Burden as to capacity of witness

(2) A party who challenges the mental capacity of a proposed witness of fourteen or more years of age has the burden of satisfying the court that there is a real issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

Where witness does not qualify

97. A person under seven years of age or a person who cannot give evidence under section 96 shall be permitted to give evidence on promising to tell the truth if, in the opinion of the court after it has conducted an inquiry, that person understands that he should tell the truth and is sufficiently intelligent to justify the reception of his evidence.

Evidence to be under oath or solemn affirmation

98. An accused shall not testify or make a statement at a trial or preliminary inquiry without taking an oath, making a solemn affirmation or promising to tell the truth under section 97, as the case may be.

(Note - The reference to a preliminary inquiry is for inclusion in the federal Act only.)

Calling and Questioning Witnesses

Presenting evidence

99. Subject to the power of the court to exercise reasonable control over a proceeding, to protect witnesses from harassment and to avoid prolixity, the parties to a proceeding shall determine the manner in which they present the evidence and examine witnesses.

Questions by court

100. The court may ask a witness any question it considers useful and for that purpose may recall a witness, and a witness so questioned may be cross-examined by an adverse party and re-examined by the party who called him.

Court's power to call witnesses

101. Subject to section 44 and any other enactment, the court shall not call a witness in a civil proceeding but may do so in a criminal proceeding where it appears to the court to be in the interests of justice, and any witness called by the court may be cross-examined by the parties.

Leading questions on examination-in-chief or re-examination

102. (1) On examination-in-chief or re-examination, a party shall not ask a witness a leading question unless

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

(*b*) the court gives leave to ask the question in order to elicit the testimony of the witness.

Interpretation

(2) A leading question is one that assumes the existence of a fact in issue or that suggests an answer, but a question is not leading by reason only that it directs the attention of the witness to a subject-matter or is in hypothetical form.

Leading questions on cross-examination

103. (1) A party may cross-examine any witness not called by him on all facts in issue and on all matters substantially relevant to the credibility of the witness, and on cross-examination may ask the witness leading questions.

Alleged facts

(2) A party shall not allege or assume facts on cross-examination unless he is in a position to substantiate them.

Directing attention of witness

(3) Where a party cross-examining a witness intends to contradict the witness on a fact in issue, the party shall direct the attention of the witness to that fact.

Power to comment or take other measures

(4) Where a party has adduced evidence in contravention of subsection (2) or (3), the court may comment on the weight to be given to that evidence and may take any other appropriate measure provided by law.

Adverse witness

104. A party calling a witness may contradict him by other evidence but shall not cross-examine him unless the court finds him to be an adverse witness, in which case he may be cross-examined as if he were a witness not called by the party.

Interpretation

105. An adverse witness is a witness hostile or contrary in interest to the party calling him, but a witness is not adverse by reason only that his testimony is unfavourable to the party calling him.

Re-examination

106. A party may re-examine a witness called by him on any new matter elicited on cross-examination of the witness or to explain or clarify any answer given by the witness on cross-examination or any inconsistency between an answer given by the witness on cross-examination and an answer given by him on examination-in-chief.

Exclusion of witness other than a party

107. (1) The court on its own motion may, or at the request of a party shall, by order exclude from the courtroom any witness who has not yet testified, other than a party to the proceeding, in order to prevent the witness from hearing the evidence of other witnesses.

Exception

(2) Where the court is satisfied that the presence of a witness would materially assist in the presentation of the evidence, it may, notwithstanding subsection (1), permit the witness to remain in the courtroom, subject to any conditions it considers appropriate.

Where witness not excluded

(3) In a proceeding before a jury, where a witness has not complied with an exclusion

order under subsection (1) or testifies after being permitted to attend under subsection (2), the court may comment as to the weight to be given to his testimony.

Where accused confirms earlier evidence

108. An accused may call witnesses in any order he wishes, but where he testifies after calling a witness and by his testimony confirms the evidence of the witness, the court may comment as to the weight to be given to his confirmatory testimony.

Order not to discuss evidence

109. The court may order any person not to discuss evidence given in a proceeding with any witness who is to testify in the proceeding.

Refreshing memory

110. (1) Where a witness is unable to recall fully a matter on which he is being examined, a party may ask him any question or require him to examine or consider any writing or object for the purpose of refreshing his memory, but the court may require the party, before doing so, to establish that the question, writing or object will tend to refresh the memory of the witness rather than lead him into mistake or falsehood.

Rights of adverse party

(2) Where any writing or object is used for the purpose of refreshing the memory of a witness

(*a*) in court, an adverse party is entitled to have it produced, to inspect it and to cross-examine the witness on it; or

(*b*) out of court, the court may order it to be produced for inspection and use in cross-examination by an adverse party.

Admissibility

111. Any writing used solely for the purpose of refreshing the memory of a witness is admissible only to challenge or support his credibility.

Past recollection recorded

112. Where a witness is unable to recall a recorded matter of which he once had knowledge, the record is admissible for all purposes, in the same manner as his testimony would be, if

(*a*) he made or verified the record while the matter was fresh in his mind; or

(*b*) it is a transcript of testimony given by him on a prior occasion under oath or

solemn affirmation when he was subject to cross-examination.

Examination by court and production

113. (1) After examining any record used for the purpose of refreshing the memory of a witness or admissible under section 112, the court shall excise any portion that is unrelated to the matters in issue or privileged or otherwise not subject to production, order production of the remainder and order the preservation of the unproduced portions for the purposes of any appeal.

Introduction of record

(2) A record admitted in evidence under subsection (1) shall be introduced as an exhibit and is evidence of the facts stated in it.

Previous Statements

Cross-examination on a previous inconsistent statement

114. Where the party calling a witness alleges that the witness previously made a statement that is inconsistent with his present testimony and where, in the opinion of the court, the inconsistency is relevant to a matter in issue, the party may cross-examine the witness on the previous statement without proof that the witness is adverse.

Requirements before cross-examination

115. (1) A party intending to cross-examine a witness on a previous inconsistent statement shall, prior to the cross-examination,

(*a*) furnish the witness with sufficient information to enable him reasonably to recall the form of the statement and the occasion on which it was made and ask him whether he made the statement; and

(*b*) where the witness was called by that party and is not an adverse witness, attempt to refresh his memory if the court so requires.

Attention to relevant parts of statement

(2) If it is intended to contradict a witness by reason of a previous inconsistent statement, his attention shall be drawn to those

parts of the statement that are to be used for that purpose.

Statement to person in authority

116. (1) The prosecution may cross-examine an accused on a previous inconsistent statement made to a person in authority within the meaning of section 66 if it first establishes that the statement was voluntary within the meaning of that section.

Determining voluntariness

(2) The question whether a statement referred to in subsection (1) was voluntary may be determined in a *voir dire* held during cross-examination of the accused.

Proof of statement

117. If, after being questioned, the witness denies or does not distinctly admit that he made a previous inconsistent statement and it is relevant to a matter in issue, the proponent may prove the statement.

Previous consistent statement

118. Subject to section 120, a statement made previously by a witness that is consistent with his present testimony is not admissible unless his credibility has been challenged by means of an express or implied allegation of recent fabrication or by means of a previous inconsistent statement.

Production of statement

119. The court may require the production of the whole or any part of a written or recorded statement used in cross-examining a witness or admitted under section 118.

Rule respecting recent complaint abrogated

120. (1) Subject to subsection (2), the rule that permits a previous consistent statement of a complainant to be admitted in evidence as a recent complaint is abrogated.

Evidence of a complaint

(2) In a proceeding for an offence in which lack of consent is an essential element, the complainant may give evidence of the making of a complaint concerning the conduct of the accused, but no evidence may be given of the particulars of the complaint unless the accused has challenged the credibility of the complainant on the basis of recent fabrication or previous inconsistent statement relating to the conduct of the accused.

Direction not required

(3) The court in a proceeding referred to in subsection (2) is not required to give the trier of fact any direction respecting the absence of a complaint concerning the conduct of the accused.

(Note - Section 120 and the reference to it in section 118 are for inclusion in the federal Act only.)

Use of statement

121. Where a previous statement of a witness is received in evidence, it may be used only for the purpose of challenging or supporting the credibility of the witness, except in the following cases where it may be used for all purposes:

(*a*) where it is adopted by the witness;

(*b*) where it was made under oath or solemn affirmation and the witness was subject to cross-examination; or

(*c*) where it is a previous inconsistent statement of a party, other than one adduced by the prosecution under subsection 116(1).

Credibility of Witnesses

Reputation evidence

122. Subject to section 27, evidence of reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of a witness.

Examination as to character and mode of life

123. Subject to section 124, an accused shall not be cross-examined, solely for the purpose of challenging his credibility, as to his character, antecedents, associations, mode of life or participation in crimes, except where it is directly relevant to proving the falsity of the accused's evidence.

No cross-examination on previous record

124. (1) An accused shall not be questioned by the court or any adverse party as to whether he has been found guilty or convicted of an offence other than an offence with which he is charged unless

(*a*) the evidence to be adduced by means of the question is otherwise admissible to

show that the accused is guilty of the offence with which he is charged; or

(*b*) the accused has given evidence against a co-accused.

Exception

(2) Notwithstanding subsection (1), the accused may be cross-examined as to whether he has been found guilty or convicted of perjury or giving contradictory evidence in a judicial proceeding or as to whether, at any time within seven years prior to the date of the present charge against him, he has been found guilty or convicted of an offence involving an element of fraud.

No corroboration or warning

125. (1) Subject to subsection (2), no corroboration of evidence is required and no warning concerning the danger of acting on uncorroborated evidence shall be given in any proceeding.

Caution required

(2) The court shall instruct the trier of fact on the special need for caution in any case in which it considers that an instruction is necessary, and shall in every case give the instruction with respect to

(*a*) the evidence of a witness who has testified without taking an oath or making a solemn affirmation;

(*b*) the evidence of a witness who, in the opinion of the court, would be an accomplice of the accused if the accused were guilty of the offence charged;

(*c*) the evidence of a witness who has been convicted of perjury; or

(*d*) a charge of treason, high treason or perjury where the incriminating evidence is that of only one witness.

(Note - Paragraph (*d*) is for inclusion in the federal Act only.)

Interpreters and Translators

Evidence of mute

126. A witness who is unable to speak may give his evidence in any manner in which he can make it intelligible.

Provision of interpreter or translator

127. (1) Where it appears to the court that a witness does not understand or speak the language in which a proceeding is conducted or does not understand the language of any document to be used in the proceeding, an interpreter or a translator shall be provided.

Oath or solemn affirmation

(2) Where the court is satisfied as to the qualifications of a person who is to serve as an interpreter or a translator in a proceeding, that person shall take an oath or make a solemn affirmation to give a true interpretation or translation of the evidence.

Verifying translation prepared out of court

128. (1) Except where the parties agree otherwise, a translation prepared out of court shall not be received in evidence without calling the translator as a witness unless it is accompanied by the document translated and an affidavit or a statutory declaration of the translator setting out his qualifications as a translator and verifying that the translation is a true translation.

Copy to be provided

(2) Except with leave of the court, no translation shall be received in evidence under subsection (1) unless the proponent has provided each party adverse in interest with a copy of the translation, in a civil proceeding at least ten days, or in a criminal proceeding at least seven days, before the commencement of the hearing in which the translation is to be used.

Attendance of translator

129. (1) Where a party tenders in evidence a translation verified by affidavit or statutory declaration of the translator, any other party may require the attendance of the translator for the purposes of cross-examination.

Where translator not made available

(2) Where the translator is not made available for cross-examination, the court may refuse to admit the translation if it is satisfied that in the circumstances it would be practicable for the translator to attend.

Costs

(3) In a civil proceeding, where a translator has been required to give evidence under subsection (1) and the court is of the opinion that the evidence does not materially add to the information in the affidavit or statutory declaration of the translator or materially clarify the translation, the court may order

the party who required the attendance of the translator to pay, as costs, an amount the court considers appropriate.

Recorded Evidence

Interpretation

Interpretation

130. In this section and sections 131 to 159,

"duplicate"

"duplicate" means a reproduction of the original from the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction or by other equivalent technique that accurately reproduces the original;

"original"

"original" means

(*a*) in relation to a record, the record itself or any facsimile intended by the author of the record to have the same effect,

(*b*) in relation to a photograph, the negative and any print made from it, and

(*c*) in relation to stored or processed data or information, any printout or intelligible output shown to reflect accurately the data or information;

"photograph"

"photograph" includes a still photograph, photographic film or plate, microphotographic film, photostatic negative, x-ray film and a motion picture.

Best Evidence Rule

Best evidence rule

131. Subject to this Act, the original is required in order to prove the contents of a record.

Admissibility of duplicates

132. A duplicate is admissible to the same extent as an original unless the court is satis-

fied that there is reason to doubt the authenticity of the original or the accuracy of the duplicate.

Admissibility of copies

133. Where an admissible duplicate cannot be produced by the exercise of reasonable diligence, a copy is admissible in order to prove the contents of a record in the following cases:

(*a*) the original has been lost or destroyed;

(*b*) it is impossible, illegal or impracticable to produce the original;

(*c*) the original is in the possession or control of an adverse party who has neglected or refused to produce it or is in the possession or control of a third person who cannot be compelled to produce it;

(*d*) the original is a public record or is recorded or filed as required by law;

(*e*) the original is not closely related to a controlling issue; or

(*f*) the copy qualifies as a business record within the meaning of section 152.

Other evidence

134. Where an admissible copy cannot be produced by the exercise of reasonable diligence, other evidence may be given of the contents of a record.

Voluminous records

135. (1) The contents of a voluminous record that cannot conveniently be examined in court may be presented in the form of a chart, summary or other form that, to the satisfaction of the court, is a fair and accurate presentation of the contents.

Examination and copies

(2) The court may order the original or a duplicate of any record referred to in subsection (1) to be produced in court or made available for examination and copying by other parties at a reasonable time and place.

Written explanation

136. (1) Where a record is in a form that requires explanation, a written explanation by a qualified person accompanied by an affidavit setting forth his qualifications and attesting to the accuracy of the explanation is admissible in the same manner as the original.

Examination of person making explanation

(2) A party, with leave of the court, may examine or cross-examine a person who has given a written explanation under subsection (1) for the purpose of determining the admissibility of the explanation or the weight to be given to it.

Testimony, deposition or written admission

137. The contents of a record may be proved by the testimony, deposition or written admission of the party against whom they are offered without accounting for the non-production of the original or a duplicate or copy.

Condition of admissibility

138. The court shall not receive evidence of the contents of a record other than by way of the original or a duplicate where the unavailability of the original or a duplicate is attributable to the bad faith of the proponent.

Notice

Notice and production

139. (1) No record other than a public record to which section 146 applies and no exemplification or extract of such a record or affidavit relating to such a record shall be received in a party's evidence in chief unless the party, at least seven days before producing it, has given notice of his intention to produce it to each other party and has, within five days after receiving a notice for inspection given by any of those parties, produced it for inspection by the party who gave the notice.

Notice and production in civil proceeding

(2) In a civil proceeding, the provisions of subsection (1) apply only to a business record within the meaning of section 152 or a record to which section 82, 147, 149, 150 or 151 applies.

(Note - Each jurisdiction may consider whether to include reference to sections 147, 149, 150 or 151.)

Authentication

Authentication

140. The proponent of a record has the burden of establishing its authenticity and that burden is discharged by evidence capable of supporting a finding that the record is what its proponent claims it to be.

Self-authentication

141. There is a presumption of authenticity in respect of the following:

(*a*) a record bearing a signature purporting to be an attestation or execution and bearing a seal purporting to be a seal mentioned in the *Seals Act* (Canada) or a seal of a province or political subdivision, department, ministry, officer or agency of Canada or a province;

(*b*) a record purporting to bear the signature in his official capacity of a person who is an officer or employee of any entity described in paragraph (*a*) that has no seal, if a public officer having a seal and official duties in the same political subdivision certifies under seal that the person has the official capacity claimed and that the signature is genuine;

(*c*) a copy of an official record or report or entry in it, or of a record authorized by law to be recorded or filed in a public office, including a compilation of data, purporting to be certified as correct by the custodian or other person authorized to make a certification;

(*d*) a publication purporting to be issued by any person, body or authority empowered to issue the publication by or pursuant to an enactment;

(*e*) a formally executed document purporting to be produced from proper custody and executed twenty years or more before the time it is tendered in evidence;

(*f*) any printed material purporting to be a newspaper or periodical;

(*g*) any inscription, sign, tag, label or other index of origin, ownership or control purporting to have been affixed in the course of business;

(*h*) a document purporting to be attested or certified under oath, solemn affirma-

tion, affidavit or declaration administered, taken or received in (Canada) (Province) by a person authorized to do so;

(*i*) a document purporting to be executed in a state other than Canada by a person authorized to do so and purporting to bear the seal of the appropriate minister of that state or his lawful deputy or agent;

(*j*) a document purporting to be executed or attested in his official capacity by a person authorized to do so by the laws of a state other than Canada, accompanied by a certification under section 143.

Persons authorized to administer oaths, etc.

142. For the purposes of paragraph 141(*h*), the following persons are authorized to administer, take or receive oaths, solemn affirmations, affidavits or declarations in (Canada) (Province) :

(*a*) a judge or the registrar of the Supreme Court of Canada, Federal Court of Canada or a superior court of the province;

(*b*) a provincial court judge, provincial magistrate, police magistrate, stipendiary magistrate or justice of the peace;

(*c*) a commissioner for taking affidavits or notary public in the province; or

(*d*) a commissioned officer of the Canadian Forces on full-time service.

Certification

143. An official within the meaning of subsection 200(2) may certify the signature and official character of the person who executed or attested any document referred to in

paragraph 141(*j*) or who certified the signature or official character of that person.

Dispensing with certification

144. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of a document described in paragraph 141(*j*), the court may order that the document be treated as presumptively authentic without certification, or may permit the document to be evidenced by an attested summary with or without certification.

Public Records

Interpretation

145. In sections 146 to 148, "public record" means any Act, ordinance, regulation, order in council, proclamation, official gazette, journal, treaty or other record issued by or under duly constituted legislative or executive authority.

Proof of public records of Canada or United Kingdom

146. The existence and the whole or any part of the contents of a public record of Canada or a province or a public record of the United Kingdom that is applicable in Canada may be proved by

(*a*) the production of a copy of the *Canada Gazette* or official gazette of a province or of any Act of the Parliament of Canada or legislature of a province purporting to contain a copy of the public record, an extract from it or a notice of it, or

(*b*) the production of a copy of the public record or an extract from it purporting to be

(i) printed by, for or by the authority of the Queen's Printer or other official printer for Canada or a province,

(ii) certified as a true copy or extract by the minister or head or deputy minister or deputy head of any department or ministry of the appropriate government,

(iii) certified as a true copy or extract by the custodian of the original record or the public records from which the copy or extract purports to be made, or

(iv) an exemplification of the public record under the Great Seal or other official seal of the appropriate government.

Proof of foreign public records

147. The existence and the whole or any part of the contents of a public record of any state or political division of a state not provided for under section 146 may be proved by the production of a copy of the public record or an extract from it purporting to be

(*a*) printed by, for or by the authority of the legislature, government, government printer or other official printer of that state or political division;

(*b*) certified as a true copy or extract by the minister or head or deputy minister or deputy head of any department or ministry of government of that state or political division;

(*c*) certified as a true copy or extract by the custodian of the original record or the public records from which the copy or extract purports to be made; or

(*d*) an exemplification of the public record under the Great Seal or other official seal of that state or political division.

Matters not subject to proof

148. Where any copy or extract of a public record is produced under section 146 or 147, it is not necessary to prove the signature or official character of the person by whom it purports to be certified or the authority or status of the legislature, government, printer or custodian by whom it purports to be authorized, made, printed or kept.

Court Records

Evidence of court proceeding or record

149. (1) Evidence of any proceeding or record of, in or before any court in or out of Canada or before any coroner in any prov-

ince of Canada may be given by the production of an exemplification or a certified copy of the proceeding or record purporting to be under the seal of the court or under the hand and seal of the presiding officer of the court or coroner, as the case may be, without proof of the authenticity of the seal or of the signature or official character of the officer or coroner.

Where no seal

(2) A certified copy of a proceeding or record may be produced under subsection (1) without a seal where the court or person whose seal would otherwise be required certifies that there is no seal.

Other Public Records

By-laws, regulations, rules, etc.

150. (1) Where the original of any by-law, regulation, rule, proceeding or other record referred to in subsection (2) is admissible, a copy or an extract or exemplification of the original, purporting to be certified under the hand of the appropriate presiding officer, clerk or secretary and under the appropriate seal, is admissible without any proof of the authenticity of the seal or of the signature or official character of the person purporting to have made the certification.

Application

(2) Subsection (1) applies in respect of any by-law, regulation, rule, proceeding or other record of

(*a*) a municipal or other corporation created by charter or by or under an enactment of Canada or a province; or

(*b*) a tribunal, body or person having power to compel the production of evidence.

Where no seal

(3) A copy or an extract of an original is admissible under subsection (1) without a seal where the tribunal, body or person whose seal would otherwise be required certifies that there is no seal.

Notarial acts in Quebec

151. A record, purporting to be a copy of any notarial act or instrument certified by a Quebec notary as a true copy of an original in his possession, is admissible and has the

same effect as the original would have if produced and proved, but that evidence may be rebutted by evidence impugning the accuracy of the copy or the authenticity of the original or its validity as a notarial act under Quebec law.

Business and Government Records

Interpretation

152. In this section and sections 153 to 158,

"business"

"business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government or any department, ministry, branch, board, commission or agency of any government or any court or other tribunal or any other body or authority performing a function of government;

"business record"

"business record" means a record made in the usual and ordinary course of business;

"financial institution"

"financial institution" means the Bank of Canada, the Federal Business Development Bank and any institution incorporated or established in Canada that accepts deposits of money from its members or the public and includes any branch, agency or office of any such Bank or institution.

Business records

153. (1) A business record is admissible whether or not any statement contained in it is hearsay or a statement of opinion, subject, in the case of opinion, to proof that the opinion was given in the usual and ordinary course of business.

Parts of record

(2) Where part of a business record is produced in a proceeding, the court, after examining the record, may direct that other parts of it be produced.

Inference from absence of information

154. (1) Where a business record does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in the record if the matter occurred or existed, the court may admit the record in evidence for the purpose of establishing the absence of that information and the trier of fact may draw the inference that the matter did not occur or exist.

Financial institutions and government records

(2) In the case of a business record kept by a financial institution or by any government or any department, branch, board, commission or agency of any government under the authority of an enactment of the (Parliament of Canada) (Legislature or National Assembly), an affidavit of the custodian of the record or other qualified witness stating that after a careful search he is unable to locate the information is admissible and, in the absence of evidence to the contrary, is proof that the matter referred to in subsection (1) did not occur or exist.

Examination of record

155. (1) For the purpose of determining whether a business record may be admitted in evidence under this Act, or for the purpose of determining the probative value of a business record admitted in evidence under this Act, the court may examine the business record, receive evidence orally or by affidavit, including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

Evidence respecting record

(2) Where evidence respecting the authenticity or accuracy of a business record is to be given, the court shall require the evidence of the custodian of the record or other qualified witness to be given orally or by affidavit.

Affidavit evidence

(3) Where evidence under subsection (2) is offered by affidavit, it is not necessary to prove the signature or official character of the affiant if his official character purports to be set out in the body of the affidavit.

Examination on record

156. Any person who has or may reasonably be expected to have knowledge of the making or contents of any business record or duplicate or copy of it produced or received

in evidence may, with leave of the court, be examined or cross-examined by any party.

Business records of financial institutions

157. (1) A business record of a financial institution is, in the absence of evidence to the contrary, proof of any matter, transaction or account contained in the record.

Compellability

(2) Unless the court for special cause orders otherwise, a financial institution or its officer is not compellable, in any proceeding to which the institution is not a party, to produce any of its business records or to appear as a witness concerning any matter, transaction or account contained in its business records.

Inspection and copies

158. (1) On application by a party to a proceeding, the court may allow the party to examine and copy any business record of a financial institution for the purposes of the proceeding.

Notice

(2) Notice of an application under subsection (1) shall be given to any person to whom the business record to be examined or copied relates at least two days before the hearing of the application and, where the court is satisfied that personal notice is not possible, the notice may be given by addressing it to the appropriate financial institution.

Probative Force of Records

Where probative force not indicated

159. Where an enactment other than this Act provides that a record is evidence of a fact without anything in the context to indicate the probative force of that evidence, the record is proof of the fact in the absence of evidence to the contrary in any proceeding to which this Act applies.

(Note - Each jurisdiction may consider whether to include this provision.)

Real Evidence

General rule

160. (1) The trier of fact may draw all reasonable inferences from real evidence.

Interpretation

(2) In this section, "real evidence" means evidence that conveys a firsthand sense impression to the trier of fact, such as a physical object or a site, the demeanour or physical condition of a person or a visual or auditory presentation, but does not include testimony, admissible hearsay or a record offered in lieu of testimony.

PART V

STATUTORY PRIVILEGES

Protection Against Use of Previous Testimony

No right to withhold answer

161. (1) A witness shall not be excused from answering a question on the ground that the answer may tend to criminate him or establish his liability to a civil proceeding at the instance of the Crown or any person.

Protection against use of answer

(2) If at the time a witness is asked a question, he claims protection under this Act or an Act of the (Legislature or National Assembly) (Parliament of Canada) in any proceeding before a court, tribunal, body or person having power to compel his testimony, the answer shall not be receivable in evidence or used against him for any purpose in any subsequent proceeding, other than a subsequent proceeding in the same cause or a prosecution for perjury, or giving contradictory evidence, in that cause or in any other proceeding.

Corporations not protected

162. (1) The protection provided by subsection 161(2) applies only to natural persons and does not prevent the reception or use of evidence against a corporation.

Single claim sufficient

(2) Where a witness claims the protection provided by subsection 161(2) with respect to any answer, that protection applies with

respect to all subsequent answers of that witness without the necessity of making a further claim for protection.

Exception for previous inconsistent statement

163. Notwithstanding section 161, a statement made previously by a witness that is relevant to a fact in issue and is inconsistent in a material particular with his present testimony may be received in evidence for the sole purpose of challenging his credibility.

Privilege respecting records abrogated

164. Subject to any other Act, any privilege whereby a witness may refuse to produce a record on grounds that its production would tend to criminate him or establish his liability to a civil proceeding at the instance of the Crown or any person is abrogated.

Government Privilege

Interpretation

165. In this section and sections 166 to 175,

"Attorney General"

"Attorney General", in relation to a claim of government privilege by the Government of Canada, means the Attorney General of Canada, and in relation to a claim of government privilege by the government of a province, means the Attorney General of the province and includes the lawful deputy of either Attorney General if that deputy is expressly authorized to act in respect of that claim of government privilege;

"Cabinet"

"Cabinet" means the members of the Queen's Privy Council for Canada or the Privy Council or Executive Council of a province, or the members of a committee of that Council, who are Ministers of the Crown at the material time;

"confidence of Cabinet"

"confidence of Cabinet" means a Cabinet decision, a discussion in Cabinet, a recommendation to Cabinet by a member of Cabinet and material prepared exclusively for the purpose of discussion in Cabinet;

"court"

"court" means any court, tribunal, body or person having power to compel the production of evidence;

"government privilege"

"government privilege" means the right under this Act of the Government of

Canada or the government of a province to refuse production or disclosure of information on grounds of high policy or any other ground of public interest;

"high policy" "high policy", in relation to a claim of government privilege, means any of the following grounds:

(*a*) international relations,

(*b*) national defence or security,

(*c*) a confidence of Cabinet, or

(*d*) subject to section 119, a confidential communication, made by or to a law enforcement officer or authority, relating to the investigation or prosecution of an offence.

Notice to Attorney General

166. (1) Where a claim of government privilege arises in a proceeding in which the Attorney General is not a party, he shall be given notice as soon as possible by the party seeking to establish the claim or, in default of that notice, by the court.

Notice by court

(2) Where a claim of government privilege has not arisen in a proceeding but there is a real possibility that production or disclosure of information in that proceeding would be contrary to the public interest, the court, in the absence of notice by a party, shall give notice to the appropriate Attorney General in order that he may determine whether to claim government privilege.

Claiming privilege

167. (1) To claim government privilege, the Attorney General shall certify to the court, orally or in writing, that he has personally examined or heard the information in respect of which the privilege is claimed and has concluded that production or disclosure of the information would be contrary to the public interest on grounds of high policy or any other ground of public interest.

Matters to be specified in certification

(2) Where the Attorney General claims government privilege

(*a*) on grounds of high policy, he shall specify those grounds; or

(*b*) on grounds other than high policy, he shall specify the public interest that he considers would be harmed by production or disclosure of the information in question

and the manner in which that harm would occur.

Decision of court

168. (1) On a claim of government privilege the court, without examining, hearing or inquiring into the information in question, shall grant the claim

(*a*) where it is based on grounds of high policy, if the Attorney General has complied with section 167; or

(*b*) where it is based on grounds other than high policy, if the court is satisfied that production or disclosure of the information would be contrary to the public interest.

Opportunity to certify further particulars

(2) Where the court is not satisfied under paragraph (1)(*b*) that a claim of government privilege should be granted, it shall give the Attorney General a reasonable opportunity to certify further particulars in support of the claim.

Where further particulars not certified

169. (1) Where the Attorney General fails to certify further particulars pursuant to subsection 168(2), the court shall order that the information in question be produced or disclosed to it for its consideration in private.

Where further particulars certified

(2) Where the Attorney General certifies further particulars pursuant to subsection 168(2), the court, if satisfied that production or disclosure of the information in question would be contrary to the public interest, shall grant the claim of government privilege, and if not so satisfied shall order that the information be produced or disclosed to it for its consideration in private.

Consideration in private

(3) Where, after consideration in private under subsection (1) or (2), the court concludes that production or disclosure of the information in question would be contrary to the public interest, it shall grant the claim of government privilege and, if it concludes otherwise, it shall reject the claim.

Factors to be considered by court

170. In determining whether the production or disclosure of any information would be contrary to the public interest, the court shall consider the following factors:

(*a*) the reasons given for not disclosing the information in respect of which the privilege is claimed;

(*b*) the nature, age and currency of the information;

(*c*) the nature of the proceeding;

(*d*) the necessity for and relevance of the information;

(*e*) the extent to which and persons by whom the information has been circulated within and outside the government concerned; and

(*f*) the harm to the public interest and to the party seeking production or disclosure of the information.

Orders of court

171. Where the court grants or rejects a claim of government privilege, it shall make an order, subject to any conditions it considers appropriate, prohibiting or requiring production or disclosure of the information in question.

Further or other order

172. Where the court makes an order granting a claim of government privilege and it considers that a party other than the Attorney General who made the claim has been or may be deprived of material evidence by reason of the order, it may make any further or other order it considers to be required in the interests of justice.

No secondary or other evidence

173. Where the court makes an order prohibiting production or disclosure of information in any proceeding on grounds of government privilege, no secondary or other evidence of that information is admissible.

Claims before lower courts

174. Where government privilege is claimed before a court other than a superior court, the Attorney General or any party to the proceeding may, at any time before the claim is determined, require the court to refer the claim for determination in accordance with sections 168 to 173 to

(*a*) the trial division or trial court of the superior court of the province within which

the court before which the claim was first made exercises its jurisdiction; or

(*b*) the Federal Court - Trial Division, where the court before which the claim was first made is not a court established by or under an enactment of a province.

(Note - Each jurisdiction may specify the superior courts included for the purposes of this section.)

Appeals

175. (1) An appeal lies from an order under section 171 or 172 to

(*a*) the court of appeal of a province, from an order of a trial division or trial court of a superior court of a province; or

(*b*) the Federal Court of Appeal, from an order of the Federal Court - Trial Division.

Time limit for appeals

(2) An appeal under subsection (1) shall be taken within ten days after the date of the order appealed from or within such further time as the court before which the appeal is taken considers appropriate in the circumstances.

Appeals to Supreme Court of Canada

(3) Notwithstanding any other Act,

(*a*) an application for leave to appeal to the Supreme Court of Canada from a judgment pursuant to an appeal under subsection (1) shall be made within ten days after the date of the judgment or within such further time as the court to which the application is made considers appropriate in the circumstances; and

(*b*) where leave to appeal to the Supreme Court of Canada is granted, the appeal shall be taken in the manner set out in subsection 66(1) of the *Supreme Court Act* but within the time specified by the court that grants leave to appeal.

(Note - Paragraphs 174(*b*) and 175(1)(*b*) are for inclusion in the federal Act only.)

Privilege for Psychiatric Assessment

Psychiatric assessment

176. Any statement communicated by an accused to a qualified medical practitioner

during the course of a court-ordered psychiatric observation, examination or assessment is privileged and, unless the accused has first put his mental condition in issue, no evidence of or relating to that statement is admissible against the accused in any proceeding before a court, tribunal, body or person having power to compel the production of evidence, other than a hearing to determine the fitness of the accused to stand trial or conduct his defence.

Privileges Relating to Marriage

Interpretation

177. In sections 178 to 184, "spouse" means spouse at the time a statement was made.

Privilege

178. In a proceeding before a court, tribunal, body or person having power to compel the production of evidence, a person is entitled to claim a privilege against production or disclosure by himself or his spouse of a statement made in confidence by him to his spouse.

Duration

179. The privilege under section 178 subsists for the lifetime of the declarant, notwithstanding any subsequent dissolution of the marriage.

Presumption

180. Unless the court is satisfied otherwise, a statement made by a declarant to his spouse shall be presumed to have been made in confidence.

Who may make claim

181. (1) A claim under section 178 may be made by the declarant or his spouse on his behalf, whether or not the declarant is a party to the proceeding in which the claim is made.

Presumed authority of spouse

(2) Unless the court is satisfied otherwise, the spouse of the declarant shall be presumed to be authorized to make a claim under section 178 on behalf of the declarant.

Exception in civil proceedings

182. (1) No claim under section 178 may be made in a civil proceeding between the declarant and his spouse.

Further exception

(2) A claim under section 178 may be denied in a civil proceeding in which the

court is satisfied that the denial is necessary in order to protect the interests of a child.

Exceptions in criminal proceedings

183. No claim under section 178 may be made in a criminal proceeding against the declarant in respect of

(*a*) an offence set out in section 93, whether the declarant's spouse is called as a witness for the prosecution or defence; or

(*b*) an offence against a third person that is alleged to have been committed by the declarant in the course of committing an offence against his own spouse.

Loss of privilege

184. The right to claim a privilege under section 178 is lost if the declarant or anyone with his authority voluntarily produces or discloses or consents to the production or disclosure of any significant part of the privileged statement, unless the production or disclosure is made in circumstances that give rise to a privilege.

Former privileges abolished

185. No privilege bars evidence

(*a*) tending to show that a person did or did not have sexual intercourse with his spouse at any time before or during their marriage; or

(*b*) tending to show that a person has or has not committed adultery.

PART VI

DECISION MAKING POWERS

Implied terms in contracts

186. The trier of fact shall determine whether a contract contains an implied term.

Actions for malicious prosecution

187. In an action for malicious prosecution, the trier of fact shall determine whether there was reasonable and probable cause for instituting the prosecution.

Foreign law

188. (1) Foreign law shall be determined by the court as a question of fact.

Expert evidence

(2) In making a determination under subsection (1), the court, except in a civil proceeding where the parties agree otherwise, shall consider only the evidence adduced by

qualified expert witnesses, whether legal practitioners or not.

Where foreign law not proved

(3) Where a foreign law is not proved, it shall, in a civil proceeding, be presumed to be identical to the domestic law, but there is no such presumption in a criminal proceeding.

Notice of intention to produce foreign law

189. (1) Except where the court orders otherwise, a party intending to adduce evidence of foreign law shall, at least seven days before the commencement of the trial in a criminal proceeding or ten days before the commencement of the trial in a civil proceeding, give the opposing party a notice of his intention containing a statement of the substance of the evidence.

Where notice not required

(2) A notice is not required under subsection (1) where

(*a*) evidence of foreign law has been adduced at the preliminary inquiry; or

(*b*) the proceeding is taken under the *Extradition Act* or the *Fugitive Offenders Act* (Canada).

(Note - This subsection is for inclusion in the federal Act only.)

Meaning of words

190. The court shall determine the meaning of words used in their ordinary sense in an instrument or enactment.

Formal defects

191. In the interests of justice, the court may, subject to any conditions it considers appropriate, admit evidence despite a failure to comply with a required formality or order an adjournment where a required formality has not been complied with.

General power to comment

192. Where any provision of this Act permits, requires or forbids a court to comment or instruct the trier of fact on the weight to be given to any evidence, the general power of the court to comment on the evidence or on the credibility of witnesses is affected only to the extent necessary to give effect to that provision.

Appeal on admission or exclusion of evidence at trial

193. In determining whether an erroneous admission or exclusion of evidence resulted in a substantial error or miscarriage of justice or otherwise justifies an appeal, an appeal court shall consider all the circumstances of the trial, including whether a timely and specific objection to the admission of evidence was made or whether the substance and relevance of the excluded evidence were made known to the trier of fact or were apparent from the context of the questions asked.

PART VII

EXAMINING WITNESSES FOR OTHER JURISDICTIONS

Interpretation

194. In sections 195 to 199,

"court"

"court" means any court, tribunal, body or person having power to compel the production of evidence;

"senior court"

"senior court" means a superior court of a province, the Federal Court of Canada in relation to a matter within its exclusive jurisdiction or a judge of any such court.

(Note - Reference to the Federal Court of Canada is for inclusion in the federal Act only.)

Examination of witness out of the jurisdiction of the court

195. Where a court of competent jurisdiction in or out of Canada, for the purpose of a proceeding pending before it, authorizes the obtaining of the testimony of a witness out of its jurisdiction but within the jurisdiction of a senior court, an application may be made to the senior court for an order under section 196 for the examination of the witness.

Order for examination

196. (1) Where the senior court to which an application is made under section 195 is satisfied that an order should be made, it may order the examination of a witness referred to in that section before the person appointed in the order and in the manner specified in it and may, by the same or a subsequent order, command the attendance of the witness and the production of any

record or thing specified in the order that relates to the matter in question.

Appropriate directions and enforcement

(2) An order under subsection (1) may give all directions relating to the examination of the witness as the senior court making the order considers appropriate and the order may be enforced in the same manner as an order of the senior court made in any proceeding before it.

Conduct money and expenses

197. Any person ordered to attend for an examination under section 196 is entitled to conduct money and payment for expenses and loss of time as if he were a witness in a trial before the senior court that made the order.

Right to refuse answer or production

198. (1) Subject to subsection (2), a person examined pursuant to an order under section 196 has the right

(*a*) to refuse to answer any question on the ground that the answer may tend to criminate him or establish his liability to a civil proceeding at the instance of the Crown or any person; and

(*b*) to refuse to produce any record on the ground that he could not be compelled to produce it at a trial of the matter in question before the senior court that made the order.

Applicable provincial law

(2) Where an examination is ordered under section 196 for the purpose of a proceeding taking place in another province, the examination shall be conducted in accordance with the law of that other province.

Rules of court

199. An application for an order under section 196 shall be made in accordance with the rules relating to those applications that are made by the senior court applied to, and in the absence of rules to the contrary, a commission or order or letters rogatory for the examination of a witness, issuing from a court of competent jurisdiction in or out of Canada, shall be taken as sufficient evidence in support of the application.

PART VIII

TAKING EVIDENCE IN OTHER JURISDICTIONS

Oaths, etc., taken out of the jurisdiction

200. (1) Any oath, solemn affirmation, affidavit or declaration administered, taken or received out of (Canada) (Province) by an official mentioned in subsection (2) has the same effect as if it had been administered, taken or received in (Canada) (Province) by a person authorized to do so.

Interpretation

(2) For the purposes of subsection (1), "official" means any of the following persons exercising functions or having jurisdiction or authority in the place where the oath, solemn affirmation, affidavit or declaration is administered, taken or received:

(*a*) a judge, magistrate or officer of a court of justice;

(*b*) a commissioner for taking affidavits, notary public or other competent authority of a similar nature;

(*c*) the head of a city, town, village, township or other municipality; or

(*d*) any officer of Her Majesty's or Canada's diplomatic, consular or representative services, including any high commissioner, ambassador, envoy, minister, chargé d'affaires, counsellor, secretary, attaché, consul-general, consul, honorary consul, vice-consul, pro-consul, consular agent, permanent delegate, trade commissioner, assistant trade commissioner and a person acting for any of them.

Oaths, etc., taken out of the jurisdiction by persons authorized in the jurisdiction

201. Any oath, solemn affirmation, affidavit or declaration administered, taken or received out of (Canada) (Province) by a person authorized to do so in (Canada) (Province) and in the manner so authorized has the same effect as if it had been administered, taken or received by that person in (Canada) (Province).

Document admissible in evidence

202. Any document that purports to be signed by a person mentioned in subsection 200(2) or section 201 and sealed with his seal or the seal or stamp of his office, in testimony of any oath, solemn affirmation,

affidavit or declaration administered, taken or received by him, is admissible in evidence without proof of his signature or official character or the authenticity of the seal or stamp and without proof that he was exercising his functions or had jurisdiction or authority in the place where the oath, solemn affirmation, affidavit or declaration was administered, taken or received.

Lack of oath or solemn affirmation

203. Evidence taken in a jurisdiction outside Canada shall not be excluded by reason only of the lack of an oath or a solemn affirmation if the evidence was taken in conformity with the law of that jurisdiction.

PART IX

REPEAL, TRANSITIONAL AND COMMENCEMENT

(Note - The following provisional list of amendments affects federal legislation. Each jurisdiction will have its own consequential provisions.)

Canada Evidence Act

R.S., c. E-10

204. The *Canada Evidence Act* is repealed.

Criminal Code

R.S., c. 34

205. Sections 123, 142, 317, 318, 586 and 593 and subsections 139(1), 195(3) and 256(2) of the *Criminal Code* are repealed.

206. Section 469 of the said Act is repealed and the following substituted therefor:

Evidence of accused

"**469.** (1) When the evidence of the witnesses called on the part of the prosecution has been taken down and, where required by this Part, has been read, the justice or other appropriate court official shall ask the accused whether he wishes to give evidence and shall advise the accused that any evidence he gives shall be under oath or solemn affirmation and subject to cross-examination and that such evidence shall be recorded and may be used against him at his trial.

Witnesses for accused

(2) After subsection (1) is complied with and the evidence of the accused, if any, is recorded, the justice shall ask the accused if he wishes to call any witnesses.

Depositions of witnesses

(3) The justice shall hear each witness called by the accused who testifies to any matter relevant to the inquiry, and for that purpose section 468 applies with such modifications as the circumstances require."

207. Subsection 638(1) of the said Act is amended by striking out the word "or" at the end of paragraph (*a*) thereof, by adding the word "or" at the end of paragraph (*b*) thereof and by adding thereto the following paragraph:

"(*c*) to a provincial court judge where the proceedings are in the provincial court."

208. All that portion of section 639 of the said Act preceding paragraph (*b*) thereof is repealed and the following substituted therefor:

Reading evidence of witness

"**639.** Where the evidence of a witness mentioned in paragraph 637(*a*) is taken by a commissioner appointed under section 638, it may be read in evidence in the proceedings if

(*a*) it is proved by oral evidence or by affidavit that the witness is unable to attend by reason of death or physical disability arising out of illness or some other good and sufficient cause,"

209. Section 643 of the said Act is amended by striking out the word "or" at the end of paragraph (*c*) thereof and by adding thereto, immediately after paragraph (*d*) thereof, the following paragraphs:

"(*e*) cannot with reasonable diligence be identified or found, or

(*f*) testifies to a lack of memory of his evidence despite an attempt, where required by the court, to refresh his memory,"

Federal Court Act

R.S., c. 10 (2nd Supp.)

210. Section 41 and subsection 53(2) of the *Federal Court Act* are repealed.

Interpretation Act

R.S., c. I-23

211. Subsection 24(1) of the *Interpretation Act* is repealed.

Juvenile Delinquents Act

R.S., c. J-3

212. Section 19 of the *Juvenile Delinquents Act* is repealed.

Pending Proceedings

Pending proceedings

213. Proceedings commenced before the coming into force of this Act shall be carried on until their final conclusion as if this Act had not come into force unless the parties agree that this Act or any of its provisions applies.

Commencement

Coming into force

214. This Act shall come into force on a day to be fixed by proclamation.