Report No. 37B

EVIDENCE AND RELATED SUBJECTS:
SPECIFIC PROPOSALS FOR ALBERTA LEGISLATION

INSTITUTE OF LAW RESEARCH AND REFORM

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INSTITUTE OF LAW RESEARCH AND REFORM

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1. INTRODUCTION

1.1 In our companion report The Uniform Evidence Act: A Basis for Uniform Evidence Legislation, we recommend in general terms the enactment of uniform legislation based upon the 1981 Uniform Evidence Act ("UEA"), subject to the carrying out of a review of the rules of evidence which it would apply to criminal proceedings. The primary purpose of this report is to make proposals for the specific form and content of the uniform evidence legislation and for other legislation which its enactment would make necessary.

1.2 In our companion report (para 3.29) we expressed the opinion that in adopting the Uniform Evidence Act for use in a province, changes which would substantially derogate from uniformity of evidence legislation should be made only sparingly and for strong reason. In this report we will discuss a number of specific policy issues, and will recommend some changes on principle. We will recommend the filling of some lacunae. We will recommend some minor changes which will adapt the proposed Act to an Alberta context without changing its policies. We will attach to this report a draft (App. B) of a proposed Alberta Evidence Act ("draft AEA") which accepts the basic text of the Uniform Evidence Act and incorporates the changes made for the various reasons we have mentioned, a draft Oaths, Affirmations and Witnesses Act (App. C) which will bring forward provisions from the existing Alberta Evidence Act which have not

demonstrably outlived their usefulness, and some amendments to the Alberta Rules of Court (App. D) which would avoid overlap and conflict between the Rules and the proposed Alberta Evidence Act. We will also refer to existing provisions of the existing Alberta Evidence Act which we think should not be brought forward or which we think should go elsewhere in the law.

2. THE PROPOSED ALBERTA EVIDENCE ACT

a. Departures from uniformity of evidence legislation

2.1 We will now identify and discuss a number of policy issues and make some recommendations for changes in the Uniform Evidence Act for Alberta purposes. As we have said (para 1.2) we will recommend changes which will substantially derogate from uniformity of evidence legislation only sparingly and for strong reason.

(1) Corroboration

2.2 UEA s. 125(1) provides that no corroboration of evidence is required. We will deal with four classes of cases in which the present law of Alberta prohibits the making of a finding upon the uncorroborated evidence of one witness, or which requires a court to give a warning to the jury of the danger of relying on uncorroborated evidence, and in which the enactment of UEA s. 125(1) would therefore bring about a change in the law. In one we will recommend a departure from the Uniform Evidence Act as it now stands. In three we will recommend that the proposed Alberta Evidence Act follow the Uniform Evidence Act; and in one case we will recommend a consequential change in other

legislation.

2.3 We will first state the arguments against any rule which precludes a court from making a finding on the strength of the evidence of one witness unless the evidence is corroborated. We will leave the countervailing arguments to the discussion of specific classes of cases in which the law now requires corroboration.

2.4 The first argument against any requirement of corroboration is that such a requirement imposes a technical fetter upon the trier of fact. In some cases he can do justice only by accepting the evidence of one witness, and in those cases a requirement of corroboration will prevent him from doing justice.

2.5 The second argument is that the concept of "corroboration" is necessarily so vague, complex and technical that its introduction entails unacceptable degrees of vagueness, complexity and technicality in the law. The cases deciding whether or not something is corroboration are legion, the appeals are numerous, and the confusion is intense. Many decisions accept as corroboration evidence which corroborates little or which depends upon the evidence of the person whose evidence is to be corroborated. A legal requirement which produces such results is unsatisfactory and should be abolished. These difficulties have recently led the Supreme Court of Canada to abolish the common law requirement that an accomplice's evidence cannot be accepted and to substitute a common sense caution against accepting it without something in the nature of

confirmatory evidence (Vetrovec v. R., May 31, 1982); and some of the Court's remarks are of quite general application.

2.6 It should be noted that UEA s. 125(2) does impose a special requirement in four classes of cases, one of which classes is included in the group which we will discuss. The special requirement is not a requirement of corroboration but is a requirement of caution; it is that "the court shall instruct the trier of fact on the special need for caution ..." with respect to three classes of witnesses and one class of proceedings. The three classes of witnesses are unsworn witnesses, accomplices, and convicted perjurers. The class of proceedings is proceedings on charges of treason, high treason and perjury.

2.7 We will now turn to specific classes and deal with them individually.

(a) Claims involving estates and mentally incompetent persons

2.8 UEA s. 125(1) would reverse ss. 12 and 13 of the existing Alberta Evidence Act which preclude an opposite party from obtaining judgment against the estate of a deceased or mentally incompetent person on his own evidence unless it is corroborated by other material evidence. In the case of a deceased person, the requirement relates only to facts occurring before the death. The conflict between the existing and proposed provisions makes it necessary to decide whether AEA ss. 12 and 13 should be carried forward or whether they should be allowed to lapse. We find the question to be one of great difficulty and one about which there is much difference of opinion.

2.9 The general arguments against a requirement of corroboration (paras 2.4 and 2.5) apply. In addition, if it is assumed that the provinces other than Alberta will follow the Uniform Evidence Act in abolishing the requirement, there is another and very strong argument against carrying forward AEA ss. 12 and 13 which relates particularly to litigation involving estates. That additional argument is that it is very important that the rules of evidence across the country be the same insofar as estates are concerned. Persons frequently die owning property situated in more than one of the provinces and their personal representatives must obtain grants of probate for administration in those jurisdictions. If one jurisdiction requires corroboration of a claim against an estate and another does not, it would be possible to have different decisions in different jurisdictions on the same claim, a result which would be very undesirable. If each jurisdiction would accept the decision of the courts of the first jurisdiction in which the claim is brought, the problem of divergent decisions would be resolved, but it would follow that the claimant who wanted a judgment on his own uncorroborated evidence would choose to bring his claim in a province or territory which did not require corroboration. This would encourage forum shopping and would allow the result of the claim to be dictated by the choice of forum, which would again be undesirable. The same arguments apply, though they are probably less frequently of importance, to claims involving persons who are mentally incompetent.

2.10 There is however a forceful argument on the other side. It is easy to bring a spurious claim against an estate and

to justify it by concocting a story about what happened between the claimant and the deceased person. An estate, without its deceased witness, is at a disadvantage in litigation upon such a claim. The law will encourage false or shaded claims unless it sets up a safeguard against them. Much the same is true with a mentally incompetent person whom the law treats as being incapable of giving evidence and who therefore cannot rebut a claimant's story. The requirement of corroboration has been found to be a valuable safeguard against false and shaded claims and should not be abandoned.

2.11 AEA ss. 12 and 13 require corroboration of the opposite party's evidence in claims made on behalf of an estate or a mentally incompetent person as well as in claims against an estate or a mentally incompetent person. The circumstances in the former case are significantly different from the circumstances in the latter because the representatives are not faced with allegations of which they know nothing; the corroboration requirement is significant only if they have adduced enough evidence to make a prima facie case. There is still at least a theoretical problem, however, as it is easy for a defendant to raise a spurious defence and to justify it by concocting a story about what happened between him and the deceased or mentally incompetent person.

2.12 Our Board is much divided on the question. The majority view, however, is in favour of maintaining the requirement of corroboration in claims by and against estates and mentally incompetent persons. The majority is influenced both by the arguments last mentioned and by forceful representations made

by those who have to live with the operation of the law.

2.13 Recommendation No. 1

(Draft AEA s. 125)

We recommend that the proposed Alberta Evidence Act provide that an opposed or interested party may not on his own uncorroborated evidence obtain judgment

(a) by or against an estate with respect of a matter occurring before the death of the deceased person, or

(b) by or against a mentally incompetent person.

(b) Unsworn children

2.14 The general arguments against a requirement of corroboration (paras. 2.4 and 2.5) apply to the question whether or not the testimony of unsworn children should require corroboration. In addition, it should be noted that under UEA s. 97, which we have carried forward as s. 97 of the proposed Alberta Evidence Act, the child's unsworn testimony will be admitted only if the court has conducted an enquiry and formed the opinion that the child understands that he should tell the truth and is sufficiently intelligent to justify the reception of his evidence. Once a child has passed that test it may be argued that there is no reason to think that his testimony is so much less likely to be reliable than that of an adult that some form of corroboration should be required. It should also be noted that UEA s. 125(2) (Draft s. 125.1(2)) would require an instruction on the "special need for caution", so that even without a requirement of corroboration the proposed Act would

contain a safeguard against unquestioning acceptance of the child's testimony.

2.15 The additional argument in favour of a requirement of corroboration for the unsworn testimony of a child is that that testimony would be unique in that it would not have the safeguard of the oath or affirmation of the witness. If the safeguard of the oath or affirmation is lacking, then a special step should be taken to ensure that the testimony is likely to be trustworthy.

2.16 Our recommendation is that the proposed Alberta Evidence Act follow the Uniform Evidence Act on the subject. We think that the requirement of a warning under Draft AEA s. 125.1(2) would bring home to the trier of fact the dangers involved, whether the trier of fact be judge or jury, and we do not think, as we did in the case of claims against estates, that the perpetuation of the difficulties involved with the requirement of corroboration are justified in the case of the unsworn testimony of children.

2.17 Recommendation No. 2

(Draft AEA s. 125.1)

> We recommend that the proposed Alberta Evidence Act not preclude a court from accepting the uncorroborated evidence of an unsworn child.

2.18 We note in passing that s. 13(2) of the Child Welfare Act allows the unsworn evidence of a child to be received in a proceeding relating to neglected and dependent children and that there is no requirement of a caution. We think that that provision can stand as a special provision relating to a hearing

to determine a child's best interests and that the proposed legislation need not deal with it.

(c) Paternity

2.19 UEA s. 125(1) would also reverse s. 19(1) of the Maintenance and Recovery Act, RSA 1980 c. M-2, which precludes the court from making a finding on the mother's uncorroborated evidence that a man is the father of her illegitimate child. Presumably the requirement of corroboration is based upon the view that it is easy for the mother to name a man as the father and difficult for the man to rebut her statement. Because of the conflict it is necessary to consider whether the corroboration requirement should still apply in affiliation proceedings.

2.20 In our Report No. 20, Status of Children, which has not been acted upon but is under consideration by the government, we recommended that there be a requirement of corroboration in proceedings for maintenance against a father. Indeed, we recommended that the requirement apply wherever paternity is in issue. Our reason was that which we have given in in the preceding paragraph as supporting the corroboration requirement. In the light of the subsequent work that has been done on the Uniform Evidence Act and the general movement away from such technical requirements, we are prepared to reconsider that recommendation. It is particularly relevant to note that a conviction of rape can now be made upon the uncorroborated evidence of the complainant and that it would be incongruous to provide that what amounts to a money judgment cannot be obtained upon evidence upon which a serious criminal conviction can be

made and a man deprived of his liberty; the requirement that a criminal offence be proved beyond a reasonable doubt does not remove the incongruity. We also are impressed with the general desirability of restricting the application of such a technical and complex concept as corroboration, and we are prepared to agree with the Uniform Evidence Act in recommending that it be done away with in paternity proceedings.

2.21 Recommendation No. 3

(Draft AEA s. 125.1)

> We recommend that the proposed Alberta Evidence Act not preclude a court from making a finding of paternity upon the uncorroborated evidence of the child's mother, and that s. 19(1) of the Maintenance and Recovery Act be repealed.

(d) Breach of promise of marriage

2.22 UEA s. 25(1) would reverse AEA s. 11 which provides that the plaintiff in an action for breach of promise of marriage shall not succeed in the action unless the plaintiff's testimony is corroborated by some other material evidence in support of the promise. We do not see any need for the continuance of the requirement.

2.23 Recommendation No. 4

(Draft AEA s. 125.1)

> We recommend that the proposed Alberta Evidence Act not preclude the court from giving judgment for the plaintiff upon the plaintiff's uncorroborated evidence in an action for breach of a promise of marriage.

(2) Self-incrimination by prior testimony and by documents

(a) Prior testimony

2.24 There is a fundamental principle of our criminal law which overrides the public interest in convicting persons guilty of crimes. That fundamental principle is that the law should not compel a person who is accused of a crime to give testimony incriminating himself; it is for the prosecution to prove by other evidence that the accused person committed the crime.

2.25 The first question is this: should the protection against compulsory self-incrimination apply to a witness other than a person charged with a criminal offence? Facts which are relevant to the issue of the person's guilt or innocence of a crime are often relevant to issues in proceedings other than a prosecution for the crime. If the person cannot be compelled to testify the purpose of the other proceedings may be defeated. On the other hand, the protection against self-incrimination would be nugatory if a person suspected of a crime could be compelled to give self-incriminating evidence in other proceedings and if that testimony could be used in criminal proceedings to prove his guilt; proceedings which involve the same facts as a criminal trial are not unusual, and an excuse can be contrived for such proceedings in order to force the suspect to testify. In Canada, the answer to the question has been a compromise: the witness is compelled to answer, but, if he claims the protection of the Evidence Acts, his answers cannot afterwards be used as evidence against him in a criminal trial. The compromise gives full effect to the public interest in ascertaining the facts in the

other proceedings. It gives some effect to the principle against compulsory self-incrimination, because it prevents the prosecutor from using the witness's actual testimony to prove his guilt. It does derogate significantly from the principle against compulsory self-incrimination, because the police and the prosecution, once they have ascertained the facts from the person's testimony, will often be able to find outside evidence to prove them. Any balance which is struck between the competing policies will derogate from one principle or the other, and we think that in general the present balance is proper and that a witness should be compelled to answer self-incriminating questions but that his own testimony should not be used to prove his guilt (though if the evidence is given under compulsion of Alberta law for use elsewhere we do not think he should be compelled to answer: see s. 198 of the proposed Alberta Evidence Act). We think however that a number of additional questions should be asked, and that some changes should be made in the proposals embodied in the Uniform Evidence Act.

2.26 The first of the additional questions is this: should the immunity from use of compulsory self-incriminating answers apply for the benefit of corporations? It probably does so now in some limited circumstances, e.g., when an officer of a corporation is being examined for discovery as the corporation's representative. We do not think however that a corporation should be entitled to the immunity. The principle is that an accused person should not be compelled to incriminate himself. There is no principle that one person, whether or not closely identified with another person, should not be compelled to

incriminate that other; indeed, the principle is to the contrary. It would be fictional to say that a witness giving testimony is actually a corporation giving testimony. It would also be fictional to say that compelling a witness to testify is tantamount to compelling the corporation to testify or that using a witness's evidence to incriminate a corporation is tantamount to using a corporation's evidence to incriminate itself contrary to principle or to the Canadian Charter of Rights and Freedoms. Further, a corporation is not subject to deprivation of liberty as is an individual. Even if a penalty imposed on a one-shareholder corporation will be felt by the one shareholder, we do not think that the shareholder, who chose to set up the artificial entity, should be able to demand that the law treat it as if it were him. We therefore agree with UEA s. 162(1) which restricts the use immunity to natural persons. Draft AEA s. 162(1) would so provide.

2.27 The next question is this: should the use immunity apply in civil proceedings? UEA s. 161(2) gives an affirmative answer, as do the present Canada Evidence Act and some provincial Evidence Acts. The Task Force's reason for the affirmative answer appears to be included in the following sentence (Report page 511): "The proposed rule would also be fairer to the witness because he is summoned to give testimony for the sole purpose of aiding the court in determining the facts in the case at bar and not for the purpose of laying the foundation for a subsequent proceeding against him." However, although we agree that the purpose of calling the witness is correctly stated, we do not agree with the conclusion. The governing principle of

criminal law, as we have said, is that a person should not be required to incriminate himself. The governing principle of civil proceedings is quite the reverse. A party to a civil litigation can be compelled by the opposing party to take the stand and to give evidence against himself, and, probably more important, he can be compelled to attend at an examination for discovery so that the opposing party can find out in advance what he will say and so that the opposing party can obtain from him admissions which can be used against him. Protection of the subject against the state, except by due process of law, is a governing consideration of criminal law; preventing one litigant from concealing evidence of facts which will expose him to civil liability to another litigant is a governing consideration of civil law.

2.28 We note that the Task Force says that "in any event", the civil litigant can usually prove the fact to which the witness testifies by other means, namely, by examining him for discovery or by calling him as a witness in the later litigation. We have two difficulties with this statement. One is that it appears to justify the granting of the immunity on the grounds that it is ineffective. The second is that litigants cannot always circumvent the immunity: a party who has given testimony in an earlier proceeding may die or become incapable of giving testimony in the later proceeding. In such cases we think that the use immunity would stand in the way of doing justice between the parties. We recommend strongly that the use immunity do not apply in civil proceedings. Draft AEA s. 161(1) would give effect to this recommendation.

2.29 The next question is this: in order to obtain immunity against the use of his testimony, should a witness have to claim it? UEA s. 161(2) gives an affirmative answer (though UEA s. 198, which applies when evidence is taken in Alberta for use elsewhere, does not). However, s. 13 of the Canadian Charter of Rights and Freedoms confers a use immunity upon all witnesses and does not require that a witness claim the protection. The Charter being the overriding legislation, we think that the provision in the proposed Alberta Evidence Act should conform to it so as to avoid misunderstanding and confusion. It may indeed be questioned whether a provision covered by the Charter should be in an Evidence Act at all, but we think on the whole that this one should, so that its existence will be widely known.

2.30 The next question is this: should the use immunity apply in proceedings under Alberta law if the self-incriminating testimony has been given elsewhere? UEA s. 161(2) would confer the immunity for the purposes of a province only if the witness claims immunity under the province's Evidence Act or under an Act of the Parliament of Canada; it would not confer the immunity if the protection was claimed under the Evidence Act of another province. We think that the use immunity should apply to testimony given under oath under the law of Canada or of any province, and we think that s. 13 of the Canadian Charter of Rights and Freedoms so provides. Indeed, there is a strong body of opinion on our Board that it is the fact of compulsion which is relevant and not the identity of the jurisdiction which has imposed the compulsion; that line of thought would lead to a provision conferring the use immunity upon testimony given

anywhere in the world. However, we restrict our recommendation to testimony given under Canadian law.

2.31 We have recommended that AEA s. 161 follow s. 13 of the Canadian Charter of Rights and Freedoms by omitting a requirement that a witness claim the use immunity and by ensuring that it applies to all self-incriminating evidence given in Canada. We think that in order to make these points, and because of the Charter's primacy as a constitutional document, draft AEA s. 161(2) should follow s. 13 of the Charter as closely as possible. We say this even though the wording of s. 13 may found a (somewhat strained) argument that a witness may be "incriminated" in civil proceedings and that s. 13 therefore confers the use immunity in civil as well as criminal proceedings.

2.32 The next question is this: if the accused person takes the stand in the criminal trial and gives testimony inconsistent with his earlier protected self-incriminating evidence, should the prosecution be able to use the protected self-incriminatory testimony against him? Under UEA s. 163, the prosecution could use the protected testimony to challenge the accused's credibility, presumably by asking him questions in cross-examination or by proving the protected testimony itself. While it may be argued that this would be forbidden by s. 13 of the Canadian Charter of Rights and Freedoms as tending to incriminate the accused, we think that the answer given by UEA s. 163 is right. The accused's self-incriminating evidence should not be used against him; but if, by his own choice, he takes the stand and tells an inconsistent story, we see no reason why it

should not be pointed out that he had given the first story earlier, at least for the purpose of indicating that the second story may not be reliable. Draft AEA s. 163 therefore follows UEA s. 163.

2.33 We would make one final point, which is not one of principle. UEA s. 161(2) confers the use immunity except in "a subsequent proceeding in the same cause or a prosecution for perjury, or giving contradictory evidence, in that cause or in any other proceeding", and the Charter uses similar language. The underlined words, if adopted by provincial legislation, would purport to affect prosecutions for perjury and for giving conflicting evidence and would, we think, be beyond the powers of the legislature. We therefore suggest that they not be included in the proposed Alberta Evidence Act.

2.34 Recommendation No. 5

(Draft AEA ss. 161-163, 198)

We recommend

(a) that the proposed Alberta Evidence Act confer upon a witness immunity against the use of self-incriminating testimony to incriminate him in any other proceedings under the law of Alberta,

(b) that the immunity apply without being claimed,

(c) that the immunity not apply in favour of a corporation,

(d) that the immunity not apply in civil proceedings,

(e) that the immunity apply to testimony given under the law of Canada or of a province,

(f) that the immunity be stated in words which conform as closely as possible to s. 13 of the Canadian Charter of Rights and Freedoms, and

(g) that self-incriminating testimony relevant to an issue and inconsistent with an accused person's present testimony may be capable of being received in evidence for the sole purpose of challenging his credibility.

(h) that a witness examined in Alberta for the purpose of a proceeding under the law of another jurisdiction have the right to refuse to answer any question on the ground that the answer may tend to incriminate him.

(b) Documents

2.35 The present Evidence Acts do not refer either to any privilege against self-incrimination by the production of documents, or to any use immunity affecting self-incriminating documents once they have been produced. The Task Force (Task Force Report page 511) recommended that documentary evidence be treated the same as oral testimony for the purpose of the use immunity, that is to say, that a witness who is compelled to produce self-incriminating documents be entitled to claim the protection of the Evidence Act and receive immunity against the use of the documents to incriminate him in later proceedings. The immunity however would be restricted to the use of the documents resulting from that production; if the documents could later be got by a demand for production or by police search, they could be used in evidence against the witness.

2.36 The Uniform Evidence Act does not follow the Task Force's recommendation. Instead of conferring a privilege

against production on the grounds of self-incrimination, UEA s. 164 purports to abolish whatever privilege exists. The Uniform Evidence Act does not refer to the use which may be made of the documents once they are produced, but we think that the Uniform Law Conference must have intended that self-incriminating documents produced by a witness could be introduced into evidence in subsequent proceedings. We agree with the policy of UEA s. 164. The historical roots of the protection against self-incrimination related only to testimony, and we think that there is a great difference between exerting the force of law upon a person to convict himself from his own mouth, on the one hand, and, on the other, exerting the force of law upon him to produce documents which have an independent and objective existence. We therefore think that UEA s. 164 should be included in the proposed AEA and should be amplified to provide that self-incriminating documents produced by a witness can be used against him later.

2.37 Some concern was expressed by the Institute's Board as to whether UEA s. 164 clearly abrogates only a claim for privilege based upon self-incrimination, or whether an argument might be made that it extends to other forms of privilege as well, such as the solicitor-client privilege. We think that it would be useful to re-draft UEA s. 164 to make it clear that it does not abrogate any other privilege, in addition to making it clear that documents produced by virtue of it may be used in evidence.

2.38 Recommendation No. 6

(Draft AEA s. 164)

We recommend that the proposed AEA

(a) abolish any privilege whereby a witness may refuse to produce a document on the grounds that its production may tend to incriminate him, and

(b) provide that there is no immunity against the use of a document on the grounds that its use may tend to incriminate him.

(3) Crown privilege

2.39 The claim of a government to a privilege against the production of information is a subject of great controversy. The solution embodied in the Uniform Evidence Act, which appears in UEA ss. 165 to 176, is as follows:

(1) The privilege would have to be claimed by the Attorney General. He would make the claim by certifying to the court that he has personally examined or heard the information and has concluded that disclosure would be contrary to the public interest.

(2) The Attorney General could claim privilege on grounds of "high policy" and specify the grounds. The court, without examining, hearing or enquiring into the information, would then be obliged to grant the privilege; in other words, the only thing the judge could do would be to see whether the certificate is in the proper form. The grounds of "high policy" upon which the Attorney-General could make such a claim

would be international relations, national defence or security, confidences of cabinet and confidential communications made by or to law enforcement officers or authorities relating to the investigation or prosecution of offences.

(3) The Attorney General would alternatively be able to claim privilege on "any other ground of public interest". He would have to specify the public interest and the manner in which harm to it would occur. If on the strength of the certificate the court were satisfied that disclosure would be contrary to the public interest it would be obliged to grant the claim without examining hearing or enquiring into the information in question. Before rejecting a certificate the court would have to give the Attorney-General a second chance to produce an adequate certificate. If the court were not satisfied with the certificate after two tries it would be obliged to order that the information be produced or disclosed to it for its consideration in private and it then would have to grant or refuse the claim of privilege depending on whether or not disclosure would be contrary to the public interest. UEA s. 170 sets out some factors which the court would have to consider.

2.40 Any court with power to compel the production of evidence could consider a claim of privilege, but the Attorney General or a party could require the claim to be referred to a superior court. Appeals would be provided to the Court of Appeal

and the Supreme Court of Canada.

2.41 The majority of our Board think that the UEA solution is a reasonable balance struck in a very difficult area, and our recommendation is therefore that the proposed Alberta Evidence Act should adopt it.

2.42 There is however a view on our Board which should be recorded here although it is a minority view. That view is that, whatever may be the situation at the national level, the information collected at the provincial level is not of a nature which renders it inappropriate that a judge see it, and that it should be for the judge to decide whether there is a sufficient public interest in keeping it confidential to outweigh the public interest in having it available as evidence in judicial proceedings. In this view, it should always be possible, at the provincial level, for a judge to see the information and to decide.

2.43 The minority also have a specific concern about the inclusion in "high policy", and therefore in the ambit of the claim for absolute privilege, of "a confidential communication, made by or to a law enforcement officer or authority, relating to the investigation or prosecution of an offence." There are obvious reasons why <u>some</u> information received confidentially by the police should be kept confidential. However, the wording of the provision, and its inclusion in the absolutely privileged category, leave it open to a broad interpretation which, in the wrong hands, might include a prior inconsistent statement of a witness for the prosecution, or a statement which is supportive

of an accused's position. It should also be noted that the arguments for confidentiality do not appear to be as strong in relation to provincial offences as they do in relation to Criminal Code investigations.

2.44 However, as we have indicated, the majority view is in favour of acceptance of the UEA provisions. We therefore do not make a recommendation for change in them, though we think that the reference to an appeal to the Supreme Court of Canada, which is a subject outside the legislative competence of the province, should be deleted.

(4) Substantiation of allegations

2.45 UEA s. 103(2) would preclude a party from alleging or assuming facts on cross-examination "unless he is in a position to substantiate them." The subsection appears to be aimed at indiscriminate mud-slinging by counsel upon cross-examination. Indiscriminate mud-slinging is of course to be deplored and if possible prevented. We do not think, however, that the enactment of UEA s. 103(2) is the way to prevent it.

2.46 We think that a lawyer may well have grounds for asking a question which alleges or assumes a fact without being in a position to "substantiate" the fact. He may think from other evidence that there is a substantial possibility the alleged or assumed fact is true and that there is a reasonable chance that the witness will confirm it. Counsel may have been told the fact by his client, the accused, as a part of a not unreasonable story; if counsel can "substantiate" the fact only by calling the accused the subsection would effectively prevent

him from putting the allegation to the witness. Or the "collateral facts" rule may put him in a position in which he is precluded from "substantiating" the fact. If the judge is to stop the witness from answering the question (though the section does not suggest that he should do so) he would presumably have to ask counsel whether counsel is "in a position to substantiate" the alleged or assumed fact, and it is not clear whether he should accept counsel's affirmative answer without interrupting the trial to examine the allegedly substantiating evidence. If the only sanction is the comment provided for in UEA s. 103(4), it is again not clear whether the judge, before making the comment, should call upon counsel to "substantiate" the fact or just what he is to do; even if counsel does not "substantiate" the fact the judge can hardly assume without inquiry that he could not have done so. As a small point, we are not sure just what "evidence" the judge is to comment upon; if the witness confirms the allegation, the fact that counsel should not have made the allegation does not cast doubt upon the witness's evidence. If the allegation is hidden so that the witness is tricked into an apparent confirmation, that may well be a separate subject for comment, but it would be the misleading way in which the allegation is made, and not the party's ability to "substantiate" it, which would be relevant to the comment.

2.47 Accordingly, we do not think that the proposed AEA should include a counterpart of UEA s. 103(2) or of the reference to it in UEA s. 103(4). We think that the problem should be dealt with in the future, as it is now, by judges controlling the proceedings, and, where lawyers are involved, by the ethical

standards of the bar.

2.48 Recommendation No. 7

(Draft AEA s. 103)

> We recommend that the proposed Alberta Evidence Act not provide that a party shall not allege or assume a fact on cross-examination unless he is in a position to substantiate it.

(5) Contradiction of witnesses

2.49 UEA s. 103(3) and the relevant parts of UEA s. 103(4) read as follows:

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

We will give reasons for recommending that these provisions not be included in the proposed Alberta Evidence Act.

2.50 Our first reason for our recommendation is that we do not think that an evidence rule in an evidence statute can deal adequately or satisfactorily with a topic which is a blend of evidence, procedure and ethics. In support of that opinion we note that UEA s. 103(4) provides a sanction which is intended to prevent undesirable conduct by a party or of counsel, but that the sanction which it provides is comment on evidence the value of which is not necessarily affected by the undesirable conduct.

2.51 Our second reason for our recommendation, which is related to the first, is that we think that UEA s. 103(3) and (4) would excise from the common law only part of a related subject and would make the whole body of law on that subject less coherent than it now is. It would, for example, apply only if Counsel B, who intends to contradict Witness A, cross-examines Witness A, though the same general considerations apply if he does not rise to his feet. Further, the only sanction which is specifically mentioned would apply only if Party B then adduces contradictory evidence, though the same general considerations apply if Party B merely attacks Witness A's credibility in argument; indeed, in the two leading English cases on the subject (Browne v. Dunn (1893) 6 R. 67 (H.L. Eng.) and Aaron's Reefs Ltd. v. Twiss [1896] AC 273 (H.L. Ir.), Counsel B made allegations only in argument and called no evidence on the fact in issue. Again, UEA s. 103(3) and (4) presumably leave to the common law the court's power to allow the recall of Witness A to explain the testimony being contradicted, which is an important remedy for the abuse at which UEA s. 103(3) is directed. It does not appear to us desirable to bring some fact patterns and one remedy under statute, leaving closely related fact patterns and remedies to the common law.

2.52 We also see some specific problems with UEA s. 103(3) and s. 103(4) which may appear to be drafting problems but which we think are symptomatic of more fundamental difficulties. For example:

(1) That Counsel B intends to contradict a witness is a fact. An argument can be made on the wording of UEA s. 103(3) (para 2.49) that it is the fact of that intention to which the witness's attention is to be

drawn, in which case it would appear that Counsel B would satisfy the section by saying to Witness A: "I draw to your attention the fact that I propose to contradict you about statement X". However, it seems more likely that the words "that fact" refer back to the word "fact" where it occurs earlier in the subsection, particularly since the earlier "fact" is closer than the words relating to Party B's intention, and if so it would appear that it is the fact in issue to which the witness's attention must be drawn. Upon the latter interpretation it would appear that Counsel B can satisfy the subsection by saying to Witness A: "I draw to your attention statement X." Neither statement by Counsel B would be helpful to Witness A or would give him a chance to strengthen his testimony. We prefer the flexibility of the common law rules which in one case may suggest that Counsel B should put to Witness A the contradictory version of the facts which Counsel B proposes to put in evidence, and which in another case may suggest that Counsel B should indicate the grounds on which he proposes to attack Witness A's credibility. In this instance we think that an attempt to cast in legislation judicial language from the cases will be incomplete and overly rigid.

(2) UEA s. 103(3) uses the word "contradict". It appears to be broad enough to cover a case in which B's counsel argues that a statement made by Witness A is not true because of reasons relating to Witness A's general credibility, but we are not sure. If it is, it will not help the witness to have his attention drawn to whatever the section requires that it be drawn to. If the subsection does not extend that far, it seems to us that it leaves the law as something other than a coherent whole.

(3) We do not think that UEA s. 103(4) provides a satisfactory sanction. The provision that the court "may take any other appropriate measure provided by law" obviously does not add anything to what is already provided by law. The earlier words do not say that the judge may comment on what Counsel B says in argument; they only say that the judge may comment on the evidence which Counsel B adduces. If Party B does adduce evidence, all that UEA s. 103(4) provides is that the judge may comment on that evidence, though it would seem more appropriate for him to say that in assessing Witness A's evidence it should be borne in mind that Witness A was not given a chance to meet the opposing evidence or to explain inconsistencies in his own; failure to warn Witness A of Party B's intention to contract him may mean that Witness A's evidence should be given more weight but it can hardly mean that Witness B's should be given less.

(4) UEA s. 103(3) and (4) appear to apply even if Witness A knows from the surrounding circumstances that his testimony will be contradicted.

(5) The adoption of UEA s. 103(3) and (4) would leave the common law to apply if Party B's contradictory evidence is given before that of Witness A whom Party B wants to contradict. No doubt the circumstance that Party A or Counsel A will have had an opportunity to note the contradiction and to give Witness A an opportunity to explain it is a material difference between the cases, but the result would be that one subject is divided between common law and statute.

2.53 Recommendation No. 8

(Draft AEA s. 103)

We recommend that the proposed Alberta Evidence Act leave to the common law the subject of the duty of a party who intends to contradict the evidence given by a witness called by another party.

(6) Enlargement and abridgement of time

2.54 A rigid requirement that a party take a step within a prescribed time period, or no later than a prescribed time, may cause hardship to a party. A failure to give the proper notice may be inadvertent, or it may be due to the fact that the evidence of which notice must be given was not available in time. On the other hand, failure to give proper notice may not have caused prejudice to the other side, or it may be that any prejudice which it has caused can be avoided by consequential orders, such as orders for adjournments and orders for costs.

2.55 The only example of an unalterable time requirement in the Uniform Evidence Act which would be carried forward to the proposed Alberta Evidence Act is the requirement in UEA s. 139(1) that a party intending to introduce a public record in evidence must give seven days' notice of intention to do so and must produce the record within five days of receiving a notice to inspect. UEA s. 41(2) requires ten days' notice of intention to

adduce expert evidence, but the requirement can be dispensed with by leave; and there is another time requirement in UEA s. 88(1) (alibi), but it applies only to indictable offences and does not appear in the proposed Alberta Evidence Act.

2.56 Although the difficulty with UEA s. 139(1) could be cured in the section itself, we think that the proposed Alberta Evidence Act should give the court a general power to enlarge or abridge any time appointed by the proposed Alberta Evidence Act. That would help parties to cope with Draft AEA s. 139(1), and it would be available if other time requirements are inserted in the proposed Alberta Evidence Act before enactment or in the future. Rule 548 of the Alberta Rules of Court provides a precedent. We should observe that we do not think that the inclusion of such a provision would seriously detract from the promotion of uniformity of law even if other jurisdictions should not do likewise.

2.57 Recommendation No. 9

(Draft AEA s. 191.1)

> We recommend that the proposed Alberta Evidence Act give the court power to enlarge or abridge the time appointed by it or by any rules made under it for doing any act or proceeding, upon such terms as may be just.

(7) Evidence bringing administration of justice into disrepute

2.58 UEA s. 22 says that relevant evidence is admissible. S. 24(2) of the Canadian Charter of Rights and Freedoms, however, provides that certain relevant evidence may be excluded, that is,

evidence which is obtained in a manner which infringes or denies any rights or freedoms guaranteed by the Charter the admission of which would bring the administration of justice into disrepute; and the Charter s. 24(2), being part of the constitution, will override a provision in Alberta legislation in the form of UEA s. 22. While UEA s. 22(1) is in effect made subject to "this Act or any other Act or law" we think that it should be made expressly subject to s. 24(2) of the Charter. Doing so will not change the legal situation, but it will warn the reader of the existence of the overriding section in the Charter. Since we regard the matter as one of form, we make no formal recommendation. Draft s. 22 would give effect to this proposal.

b. Matters not covered by the Uniform Evidence Act

(1) Extra-curial proceedings

2.59 We contemplate that the proposed Alberta Evidence Act will be the only Alberta evidence legislation and that the existing Alberta Evidence Act will be repealed: (see para. 6.8). We therefore think it necessary to fill some gaps which we think would be created by the repeal of the existing Alberta Evidence Act and the adoption of the Uniform Evidence Act, without more.

2.60 The Uniform Evidence Act would apply only to two kinds of tribunals (UEA ss. 1, 2). One is the courts. The second is tribunals, bodies or persons which the Lieutenant-Governor-in-Council designates as courts for the purposes of the Act or any of its provisions. The existing Alberta Evidence Act, on the other hand, applies not only to courts but also to a great number of other tribunals, namely, arbitrators, umpires, commissioners,

and other officers or persons having by law or by the consent of parties authority to hear, receive and examine evidence. The repeal of the existing Alberta Evidence Act and the enactment of a new Alberta Evidence Act based on the Uniform Evidence Act, without more, would therefore repeal the only statutory provisions relating to many tribunals.

2.61 If the existing Alberta Evidence Act were to be repealed, and if the new Alberta Evidence Act were to say nothing about a tribunal, we think that there would be confusion and unnecessary expenditure of time and money in determining what rules of evidence do apply to the tribunal. We therefore think that the proposed Alberta Evidence Act should say what rules of evidence will apply to all tribunals, though it should be subject to special legislation relating to a tribunal.

2.62 There is an alternative course of action. The statutes of Alberta could be combed and decisions could be made about what rules of evidence contained in the proposed Alberta Evidence Act would be properly applicable to each tribunal authorized or established by the province. The Lieutenant-Governor-in-Council would then be able to make orders designating as courts all those tribunals to which it would be appropriate to apply some or all of the proposed Alberta Evidence Act, and designating those provisions of the proposed Alberta Evidence Act which should be applicable to each. We think however that a procedure of this kind would be wasteful and for that reason we doubt that the government would or should make available the resources which would be necessary to carry it through to completion. We therefore reject that course of action in favour

of making a general provision in the proposed Alberta Evidence Act.

2.63 We think, however, that the intention of the Legislature in setting up many tribunals is to promote informality, avoid technicality, and to make legal representation unnecessary, and that to apply to all tribunals the rules of evidence which apply to courts would in many cases defeat that intention. Instead, we think that the proposed Alberta Evidence Act should apply to all tribunals but that in the case of tribunals other than courts and those tribunals designated by order in council it should confer upon each tribunal a broad discretion to admit evidence which would be inadmissible in court under the Act. Such a provision would give relief against the exclusionary rules which would create serious problems for tribunals. It would leave it open to a party to argue before a tribunal that an exclusionary rule should apply, while leaving it open to the tribunal to reject the argument if the circumstances or the tribunal's general policies suggest that the evidence should be admitted. Where judicial review of a decision is available, such a provision would allow the court to review the exercise of the discretion to admit evidence in much the same way as it may review any other discretion which the tribunal has. We think that it is to be preferred to a narrower discretionary provision (e.g. a provision that the tribunals are not bound by the strict rules of evidence) because it would leave the court free to address the ultimate question whether a tribunal whose decision is attacked has properly exercised the powers conferred on it.

2.64 We have spoken of "tribunals". We think that the recommendation should apply to every body or person who has, by the law of Alberta or by the consent of the parties, authority to hear, receive and examine evidence. It would not, of course, apply to a body designated by order-in-council as a "court" for the purposes of the proposed Alberta Evidence Act.

2.65 Recommendation No. 10

(Draft AEA s. 3.2)

We recommend:

(a) that the proposed Alberta Evidence Act apply not only to "courts" as defined in it, but also to all other tribunals or persons having by law or by the consent of parties authority to hear, receive and examine evidence, and

(b) that the proposed Alberta Evidence Act confer upon all tribunals, bodies or officers, other than "courts" as defined in it, a discretion to admit evidence which would be inadmissible under the other provisions of the proposed Alberta Evidence Act.

(2) Examinations for discovery and on affidavits

2.66 The Uniform Evidence Act, except for its provisions relating to statutory privileges, would not apply to an examination for discovery or to an examination on an affidavit (UEA s. 3(1)). The existing Alberta Evidence Act applies to all "witnesses", including witnesses who are examined for discovery or on affidavits (AEA s. 1(c)).

2.67 If the proposed Alberta Evidence Act were not to apply to examinations for discovery and affidavits, courts and litigants would be thrown back upon the common law and upon any specific provisions contained in the Alberta Rules of Court. We think that the omission would lead to doubt, confusion, and unnecessary legal research. We therefore think that the proposed Alberta Evidence Act should make some provision for examinations for discovery and examinations on affidavits.

2.68 Speaking generally, we think that examinations for discovery and examinations upon affidavits are court proceedings and should be subject to the rules of evidence which apply in trials. There are however differences between the functions of examinations for discovery and trials which make it desirable to have some special rules applicable to the former; and the rules now applicable to examinations for discovery enable many questions to be asked there which ought not to be asked at trial. We therefore think that where the Alberta Rules of Court have modified the rules of evidence for purposes of examinations for discovery, the Alberta Rules of Court should prevail. We further think that in order to ensure that the adoption of the proposed Alberta Evidence Act does not have undesirable effects on the rules of evidence in examinations for discovery and affidavits, it should confer a special power upon the Lieutenant Governor-in-Council to make rules of evidence for these examinations notwithstanding that the rules so made are not, strictly speaking, rules of practice and procedure authorized by s. 15 of the Court of Appeal Act and s. 18 of the Court of Queen's Bench Act. However, neither the present Alberta Rules of

Court nor any future rules should be able to affect the statutory privileges which would be conferred by Part V of the proposed Alberta Evidence Act.

2.69 Recommendation No. 11

(Draft AEA s. 3.1)

We recommend:

(a) that the proposed Alberta Evidence Act apply to examinations for discovery and examinations on affidavits, but that it be subject to existing or future rules in the Alberta Rules of Court which modify the rules of evidence with respect to such examinations,

(b) that the proposed Alberta Evidence Act confer upon the Lieutenant Governor-in-Council power to make rules modifying the rules of evidence applicable to examinations for discovery and examinations on affidavits, and

(c) that neither the present Alberta Rules of Court nor any rules of court made under (b) be capable of affecting statutory privileges to be granted by the proposed Alberta Evidence Act.

(3) Prosecutions for provincial offences

2.70 Except for the statutory privileges, the Uniform Evidence Act would apply only to trials and the taking of evidence on commissions (the other proceedings mentioned in UEA s. 3(2) being part of federal criminal proceedings only). It would not apply to bail or sentencing hearings. The existing Alberta Evidence Act appears to apply to all aspects of a prosecution for an offence against a provincial statute (AEA s. 1(a)(ii)).

(a) Bail hearings

2.71 The first question is whether the proposed Alberta Evidence Act should apply to bail hearings in prosecutions for provincial offences. The Summary Convictions Act, RSA 1980, c. s-26, s. 4(2) explicitly incorporates all relevant Criminal Code provisions respecting bail into the law relating to the prosecution of Alberta provincial offences. One of those provisions is s. 457.3(1) of the Criminal Code, which provides a framework for the admissibility of evidence. Under that section "the justice may receive and base his decision upon evidence considered credible or trustworthy by him in the circumstances of each case." It appears that CCC s. 457.3(1) has been interpreted so as to allow facts to be stated by counsel. The practice is that a statement which is not challenged is admissible, but that if there is a challenge the facts alleged must either be withdrawn from consideration or proved by sworn testimony (which may include affidavit evidence). It appears to us that the law on the point is satisfactory and we do not recommend that the proposed Alberta Evidence Act deal with evidence on bail hearings.

(b) Sentencing hearings

2.72 There is no statutory provision which provides a framework for the admissibility of evidence in a sentencing hearing. The cases however, do establish a similar framework, and the standards of admissibility are probably somewhat more rigorous than those which apply in bail hearings. Again, information can be given to the court and accepted if it is not

challenged. If it is challenged it must be withdrawn or proved.

2.73 While the common law on the subject is not unsatisfactory, we think that it would be useful to establish a statutory framework for sentencing hearings which is similar to that provided for bail hearings by s. CCC 457.3(1)(e) of the Criminal Code and s. 4(1) of the Summary Convictions Act. We think that the best way to establish such a framework would be to amend the Criminal Code to provide a statutory framework for sentencing hearings similar to that prescribed by CCC s. 457.3(1)(e). The Criminal Code provision would then be automatically incorporated into provincial sentencing hearings by s. 4(2) of the Summary Convictions Act. We think however that until that is done the proposed Alberta Evidence Act should contain a provision applying that statutory framework to the prosecution of offences against provincial statutes.

2.74 Recommendation No. 12

(Draft AEA s. 3.1(3))

> We recommend that (pending an amendment to the Criminal Code which would automatically apply in prosecutions under provincial offences) the proposed Alberta Evidence Act provide that on a sentencing hearing the court may receive and base its decision upon evidence considered credible or trustworthy by it in the circumstances of each case.

(c) Other incidental criminal proceedings

2.75 The rules of evidence do not now apply to other incidental proceedings such as the swearing of informations and proceedings leading to the issue of search warrants. The normal

rules of evidence do not apply to such proceedings, and the specific statutory requirements relating to them appear to be satisfactory. We make no recommendation for change.

(4) Previous convictions

2.76 The discussion in this paragraph and in paragraph 2.77 relates to a witness other than the accused. AEA s. 25(1) allows a witness to be asked whether he has been convicted of a crime, and it allows proof of the conviction in the face of his denial or refusal to answer. Insofar as the question is asked and the evidence tendered for the purpose of attacking the witness's credibility, the provision is an exception from the common law "collateral facts" rule, which provides that if a question is asked which merely goes to credibility the cross-examiner cannot adduce evidence to disprove a witness's answer. The reason for the collateral issue rule is one of trial management, the rule being intended to prevent the trial from going off after subsidiary fact questions which really do not relate to the issues in the case. The reasons for the exception which has been made for proof of prior convictions are, firstly, that prior convictions are peculiarly relevant to credibility and, secondly, that they can usually be proved in a simple way by introducing a certificate of the conviction so that extensive time need not be spent on something which is not strictly relevant to the issues before the court.

2.77 The indiscriminate use of prior convictions to besmirch a witness's reputation has been much criticized. The criticism is justified if the prior conviction is of a kind which

is like to inflame the trier of fact but is not relevant to the question whether or not the witness is telling the truth. On the other hand, if the prior conviction bears upon the witness's propensity to tell the truth or otherwise, as, for example, a conviction for perjury, it seems reasonable that the opposite party should be able to bring it to the attention of the court. We think that on the whole UEA s. 103(1) would strike a reasonable balance: it would allow a party to cross-examine a witness (other than an accused person) about a conviction which is "substantially relevant", and would allow the court to decide what convictions meet that standard. We accordingly think that the proposed Alberta Evidence Act should follow UEA s. 103(1).

2.78 We think that it is doubtful that in the face of a witness's denial of, or refusal to testify about, a previous conviction, the Uniform Evidence Act would permit a cross-examining party to adduce evidence of prior convictions in order to attack the witness's credibility. UEA s. 124(1) and (2) allow cross-examination of an accused about some prior convictions, and UEA s. 103(1) allows cross-examination of other witnesses on a broader category of prior convictions; but neither provision goes on to allow the prosecution to adduce evidence of a prior conviction if a witness denies it or refuses to answer. UEA s. 82(1) provides a means for proving a conviction, but the context suggests that the procedure is available only when the prior conviction is relevant only to a fact in issue, and not when it is relevant to the credibility of the witness. It appears to us that once the law has decided that it is proper for a party to bring out a prior conviction by cross-examination it

should go on to allow the party to prove the conviction if the witness denies or refuses to admit it. We understand that federal legislation is likely to provide for such proof. We think that provisions allowing such proof should be added to both UEA s. 103 and UEA s. 124.

2.79 Recommendation No. 13

(Draft AEA s. 103(2))

> We recommend that the proposed Alberta Evidence Act permit cross-examination upon and proof of a prior conviction of a witness other than an accused if the conviction is substantially relevant to the credibility of the witness.

(5) Notarial protests and notes

2.80 S. 47(1) of the existing Alberta Evidence Act, in effect, provides for the self-authentication of notarial protests, wherever made, of bills of exchange and promissory notes. AEA s. 47(2) makes notarial notes prima facie proof of notice of non-acceptance or non-payment, if the notes are made in Canada. The situation under the Uniform Evidence Act is more complex. A foreign notarial protest appears to fall under UEA s. 141(j), which requires certification under UEA s. 143, which in turn refers to the list of certifying officials in UEA s. 200(2). Certification by some of the certifying officials might take time. The fact that a notary public or commissioner for taking affidavits could make the certification would provide much relief, but there would still be some complication.

2.81 We think that the procedure under the existing Alberta Evidence Act is more appropriate. It is simpler and more

expeditious than the Uniform Evidence Act procedure, and simplicity and expedition are particularly desirable in procedure relating to negotiable instruments. We do not think that additional authentication is needed. For one thing, the self-authentication merely gets the signature into court and the other side can challenge the truth of what is stated. For another, it may be doubted that a document purporting to bear the signatures of two notaries (which would satisfy the Uniform Evidence Act) would be much more reliable than a document purporting to bear the signature of one. We recommend that the provisions of AEA s. 47 be carried forward into the proposed Alberta Evidence Act. A departure from uniformity with the Uniform Evidence Act will not constitute a trap, as a procedure which would satisfy it would also satisfy AEA s. 47.

2.82 Recommendation No. 14

(Draft AEA s. 141(e), (f))

> We recommend that a notarial protest, wherever made, or a note of the fact of notice of dishonour, if made in Canada, be admissible in evidence if if purports to be signed by a notary or (in the case of a note of the fact of notice of dishonour) if it is embodied in his register.

(6) Affidavits taken before commissioned officers

2.83 Under s. 49 of the existing Alberta Evidence Act an affidavit taken before a commissioned officer of the armed forces is both admissible in evidence and self-authenticating, whether the affidavit is taken inside or outside Canada. UEA s. 142(d) is to the same effect, but applies only to an oath taken in Canada. We therefore recommend that a sub-paragraph in the words

of UEA s. 142(d) be added to s. 200(2) of the proposed Alberta Evidence Act so that it will be clear that an affidavit, etc., taken before a commissioned officer outside Canada has the same effect as one taken before an officer inside Canada and so that s. 143 of the proposed Alberta Evidence Act will allow him to certify as to the things mentioned in it. There will be an overlap with ss. 5 and 7 of the Commissioners for Oaths Act but we think that the provisions perform different functions and that the overlap causes no harm and may safely be allowed to exist in the future as it has existed in the past.

(7) Retention and confidentiality of exhibits

2.84 S. 60 of the existing Alberta Evidence Act reads as follows:

> 60. When a document is received in evidence, the court admitting it may direct that it be impounded and kept in custody for any period and subject to any conditions that seem proper or until the further order of the court, as the case may be.

S. 60 accomplishes two things. The first is that it gives the court power to retain documents which are received in evidence. The second is that it gives the court power, by imposing conditions, to require that a document be kept confidential; we think that the latter power is useful in a case in which publication of information contained in the document would be harmful to a party who is required to produce it.

2.85 There is no equivalent provision in the Uniform Evidence Act. R. 699 of the Alberta Rules of Court makes provision for dealing with exhibits and may by implication cover

the first purpose of AEA s. 60. The Rules do not however appear to have provision for an order for confidentiality, and we think that it would be a useful power to include. Since the provision would affect both civil and criminal proceedings, we think that it should be included in the proposed Alberta Evidence Act.

2.86 Recommendation No. 15

(Draft AEA s. 159.1)

> We recommend that the proposed Alberta Evidence Act give the court power to direct that a document received in evidence be impounded and kept in custody for any period and subject to any conditions that seem proper or until the further order of the court, as the case may be.

2.87 S. 55(1) of the existing Alberta Evidence Act provides that, in the absence of an order to the contrary, a document produced by a public officer under subpoena or notice is not to be deposited in court. S. 55(3) provides for the filing of a certified copy. We think that the section guards against unnecessary retention of government documents without infringing the rights of litigants. We recommend that (except for s. 55(4), which deals with fees) it be carried forward into the proposed Alberta Evidence Act.

2.88 Recommendation No. 16

Draft AEA s. 159.2

> We recommend that the proposed Alberta Evidence Act provide that, in the absence of an order to the contrary, a document produced by a public officer under subpoena shall not be deposited in court, and that if needed a certified copy be filed in its place.

(8) Hospitals' and doctors' committees

2.89 S. 9 of the existing Alberta Evidence Act precludes a witness from answering questions or producing documents relating to the proceedings of a hospital tissue committee, research committee or medical staff committee which studies or evaluates medical practice, or to the proceedings of another medical committee designated by an order of the Minister of Hospitals and Medical Care. We have not given any consideration as to whether or not the provision is desirable. Since we will propose that the existing Alberta Evidence Act be repealed, it follows that if the law stated in AEA s. 9 is to be preserved, it will be necessary to provide for it by another statute. We do not think that the proposed Alberta Evidence Act will be an appropriate place for the provision, and we suggest that, if it is thought desirable that it be retained, it be incorporated into the Hospitals Act.

2.90 Recommendation No. 17

(Draft AEA s. 205)

> We recommend that, if AEA s. 9 is to be carried forward (as to which we make no recommendation), it be inserted in the Hospitals Act.

c. Provisions accepted for uniformity

2.91 There are three provisions of the Uniform Evidence Act with which we do not agree, but which we think should be accepted for the sake of uniformity if the federal evidence legislation accepts them. They all relate to criminal proceedings, and the

review we have recommended in paragraph 3.27 of our companion report The Uniform Evidence Act 1981: A Basis for Uniform Evidence Legislation would probably consider them. We will comment on them briefly.

(1) Admissions

2.92 UEA s. 17(1) allows a party to a proceeding to "admit a fact or matter for the purpose of dispensing with proof thereof". UEA s. 17(2) however provides that in a criminal proceeding an admission cannot be made unless the opposite party accepts it.

2.93 We are reluctant to see a distinction made on this point between civil proceedings and criminal proceedings. We recognize that, at least in connection with criminal proceedings, the point is a contentious one. There appears to be a feeling among some prosecutors that some defence counsel will attempt to make admissions which are either self-serving or are worded so that they appear to admit more than they in fact do. Some defence counsel on the other hand appear to think that some prosecutors want to be able to adduce inflammatory evidence and therefore do not want to have the need for it taken away by an admission. It appears to us that prosecutors, without the protection of UEA s. 17(2), would be sufficiently protected by UEA s. 17(3) which makes it clear that a party can prove a fact even if it has been admitted by the other party. It appears to us that with this protection a prosecutor would be able to assess the admission and decide whether it covers sufficiently the fact or area of facts to which it relates. If there is trickery in

the admission he can point that out to the court.

2.94 Having said that, however, we think that uniformity on the point important. We have therefore included UEA s. 17(2) in the proposed Alberta Evidence Act, subject to possible change if the rules of evidence in criminal proceedings are reviewed.

(2) Notice of intention to call witnesses about general reputation

2.95 Under UEA s. 24(2), an accused would not be able to call witnesses about his general reputation in the community unless he gives notice at least 7 days before the commencement of the trial. We think that it would be better policy to provide that the failure to give a notice would go only to the weight of the evidence and not to its admissibility. However, we think that in most cases the provision we have recommended under which the court would have power to enlarge and abridge time (para. 2.57) would allow the court to make whatever order is necessary to safeguard the rights of both prosecution and accused, and we have therefore included UEA s. 24(2) in the proposed Alberta Evidence Act for the sake of uniformity, subject to possible change if the rules of evidence in criminal proceedings are reviewed.

(3) Declarations against penal interest

2.96 UEA s. 58(1) would make admissible in a criminal proceeding a statement made against penal interest by a declarant who is not available to testify. UEA s. 58(2) would provide that the court "may exclude" such a statement "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 a declarant in the making of the statement." The power to exclude is intended to guard against the misuse by an accused of an allegation that someone who is not before the court has admitted committing the crime with which the accused is charged.

2.97 We think that the wording of UEA s. 58(2) is somewhat stronger than it should be. In Demeter v. R. [1978] 1 SCR 538 at p. 544, Mr. Justice Martland quoted as "a valuable guide" the following principle enunciated by the Court of Appeal of Ontario in that case:

> In a doubtful case a Court might properly consider whether or not there are other circumstances connecting the declarant with the crime and whether or not there is any connection between the declarant and the accused.

We prefer the statement which we have just quoted. It seems to us to leave the question more at large than does the wording of UEA s. 58(2). The latter, though drafted in discretionary terms, seems to imply that it is for the accused to find other evidence implicating the declarant. We think that the more open wording of the Demeter judgment is better.

2.98 The Supreme Court of Canada held in Lucier v. R. [1982] 2 W.W.R. 289 (SCC) that a hearsay statement which inculpates an accused person is not admissible merely on the grounds that it is against the penal interest of the declarant. This decision was handed down after the adoption of the Uniform

Evidence Act, and it may require a reconsideration of UEA s. 58(2) insofar as the latter relates to inculpatory statements, a question on which we do not express an opinion.

2.99 Despite the views we have expressed we have, for the sake of uniformity, included UEA s. 58(2) in the proposed Alberta Evidence Act, subject to possible change if the rules of evidence in criminal proceedings are reviewed.

3. THE PROPOSED OATHS, AFFIRMATIONS AND WITNESSES ACT

a. General

3.1 The proposed Alberta Evidence Act should contain all the general Alberta evidence legislation. The existing Alberta Evidence Act should therefore be repealed. However, repeal of the existing Alberta Evidence Act, without more, would repeal several provisions which have no counterparts in the Uniform Evidence Act. We will now proceed to consider those provisions and to make recommendations with respect to each. We think that some should be repealed. Some should be carried forward into the proposed Alberta Evidence Act or, exceptionally, into the Alberta Rules of Court. Most of them should be gathered into a proposed new Oaths, Affirmations and Witnesses Act which we attach as Appendix C to this report. We will make recommendations accordingly, and we will also make a recommendation that the provisions presently contained in the Oaths of Office Act be included in the latter.

b. Oaths and Affirmations

3.2 UEA s. 95, which we have carried forward as s. 95 of the proposed Alberta Evidence Act, is intended to embody two principles. One is that a witness should have a free choice between giving evidence under oath and making a solemn affirmation. The second is that evidence which is affirmed should have equal standing with evidence given under oath. To deny an unhampered freedom of choice is unfair to a witness or deponent who has religious or other scruples about taking an oath. To follow a procedure which is likely to suggest that an affirmation is an inferior substitute to be accepted only when an oath cannot be got is unfair to litigants the establishment of whose rights depends upon the evidence of a witness or deponent who is reliable but has religious or other scruples about taking an oath. S. 95 of the proposed Alberta Evidence Act, however, depends upon the existence of a general law which governs the proceeding in which the evidence is adduced and which provides a procedure for the taking of oaths and affirmations. The availability of verified statements for other than court purposes also depends upon the existence of a general law governing the taking of oaths and affirmations. At the present time much of the general law applicable for both curial and extra-curial proceedings is found in AEA ss. 15 to 18, and repeal of those sections, without more, would leave a gap in it.

3.3 The proposed Oaths, Affirmations and Witnesses Act should fill the gap in the general law which would be left by the repeal of the existing Alberta Evidence Act. One of its objectives should be to provide a witness or deponent with the

free choice between an oath and a solemn affirmation which we mentioned in paragraph 3.2, but it should also provide simple procedures and should not allow the validity of evidence to be questioned on mere technical grounds of form. It should therefore require that a witness be asked whether he wishes to swear or to affirm, but it should not invalidate testimony or an affidavit if the question is overlooked. It should, as does s. 15 of the existing Alberta Evidence Act, provide that a person be bound by an oath which he declares binding, and that a lack of religious belief does not invalidate the oath. We think also that it should provide that if an oath or solemn affirmation is administered in a prescribed form it is binding, and we think that it should, without making any particular form mandatory, prescribe forms which will be suitable in the great bulk of cases.

3.4 The law does not always permit the use of affidavits, and s. 19 of the Alberta Evidence Act accordingly permits the verification of facts by solemn declaration. While the use of the two different forms of verification is a complexity which it might be possible to avoid, we would not want, without additional research and study, to take the risk of making a recommendation which would eliminate a distinction of long standing. We recommend that the proposed Oaths, Affirmations and Witnesses Act continue the existing provision for the verification of facts by solemn declarations.

3.5 We pause to make two parenthetical remarks. The first is that the recommendation which we will make in paragraph 3.6 will include, and obviate the need for special consideration of,

the recommendation which we made in our Report 17 (Small Projects) that s. 19(1) of the existing Alberta Evidence Act be amended to permit and require a witness to make a solemn affirmation when it is not practicable to administer an oath in the manner appropriate to his religious beliefs (e.g., when his sacred book is not available). The second is that if a witness is to have a free choice between oath and solemn affirmation and is bound either by a prescribed form of oath or solemn affirmation or by a form of oath which he declares binding (even though without religious belief) we think that the objection to competence contemplated by s. 18(1) of the Alberta Evidence Act and by R. 274 should be dispensed with; its only continuing function would be to allow a party to require a witness to change from one binding form of testimony (testimony under oath) to another (testimony under solemn affirmation), and that seems to us to be no function at all.

3.6 Recommendation No. 18

(OAWA ss. 1-5)

We recommend that the proposed Oaths, Affirmations and Witnesses Act:

(a) give witnesses and deponents a free choice between oath and solemn affirmation, but not invalidate testimony or an affidavit for failure to offer it formally,

(b) provide that a person is bound by an oath which he declares binding, and that lack of religious belief does not invalidate an oath,

(c) provide that if an oath or solemn affirmation is administered in prescribed form it is binding, and

(d) provide for the verification of facts by solemn declaration.

c. Oaths of office

3.7 We think that it would be convenient to include in the proposed Oaths, Affirmations and Witnesses Act the provisions now contained in the Oaths of Offices Act. This would go some distance towards achieving the desirable objective of incorporating into one statute general legislative provisions relating to oaths and affirmations.

3.8 Recommendation No. 19

(OAWA ss. 6-9)

> We recommend that the Oaths of Office Act be repealed and that its provisions be included in the proposed Oaths, Affirmations and Witnesses Act.

d. Oaths, affirmations, affidavits and declarations

3.9 S. 200 of the proposed Alberta Evidence Act would provide for the recognition in Alberta courts of oaths and affirmations administered outside Alberta by any one of a substantial list of functionaries. S. 201 would provide for the recognition in Alberta courts of oaths and affirmations taken or received out of Alberta by functionaries who can take or receive them in Alberta. Ss. 48 and 49 of the existing Alberta Evidence Act cover much the same ground, but they do so for extra-curial proceedings also. The repeal of AEA ss. 48 and 49, without more, would therefore leave a serious gap in the law as there would be no provision for the recognition of extra-provincial oaths and affidavits for use outside courts other than the limited provisions contained in the Commissioners for Oaths Act. We

think that it is obvious that something should be done to ensure that this gap is not created.

3.10 Where should the remedial provision appear? Ss. 200 and 201 of the proposed Alberta Evidence Act could be extended to cover oaths and affirmations taken for other than court purposes. We think that it would be confusing if the proposed Alberta Evidence Act were for this limited purpose to be more than an Evidence Act. Instead, the Commissioners for Oaths Act and the Notaries Public Act could be extended to fill the gap. We think however that general provisions about recognition of foreign oaths and affirmations would be better included in an Act dealing primarily with oaths and affirmations than in an Act dealing with some of the officials who administer and receive oaths and affirmations. We have therefore reproduced in ss. 11 and 12 of the proposed Oaths, Affirmations and Witnesses Act the contents of ss. 200 and 201 of the proposed Alberta Evidence Act. There would be some overlapping provisions in the Commissioner for Oaths Act, but we think that they perform different functions and should be left untouched; a similar overlap between the Commissioners for Oath Act and the existing Alberta Evidence Act does not seem to have caused problems.

3.11 Recommendation No. 20

(OAWA s. 10-12)

We recommend that the proposed Oaths, Affirmations and Witnesses Act extend to extra-curial proceedings the rules relating to the the recognition of oaths, affirmations, affidavits and declarations administered or taken outside Alberta which the proposed AEA would apply in court proceedings.

e. Damage claims against recalcitrant witnesses

3.12 S. 22 of the existing Alberta Evidence Act provides that a witness who is properly served with a subpoena and disobeys it may be sued by the person on whose behalf he has been subpoenaed for any damage that that person sustains or is put to by reason of the disobedience. The section appears to impose liabilty upon a witness who fails to appear at all and also upon a witness who, having appeared, refuses to give evidence. It appears to impose liability for damage in the form of an adverse court judgment which the witness's evidence would have avoided. It appears also to impose liability for costs incurred for an adjournment of a trial to locate the witness. We have not been able to find a case in which action has been brought under the section in Alberta, and we are in some doubt as to whether it should be carried forward. However, we do not feel able to recommend its deletion, and we therefore recommend that it be included it in the proposed Oaths Affirmations and Witnesses Act.

3.13 Recommendation No. 21

(OAWA s. 13)

> We recommend that the proposed Oaths, Affirmations and Witnesses Act include a provision similar to AEA s. 22 imposing upon a witness who disobeys a subpoena liability for resulting damage.

f. Subpoenas for government employees and documents

3.14 AEA s. 35(3) provides that a subpoena requiring a Crown employee to attend or requiring the production of departmental documents shall not issue unless an order of the

court has been obtained. We think that this is a useful precaution against the undue disruption of government business. The provision leaves decision to the court and we therefore do not think that it involves an infringement of the right to have all relevant evidence produced in court. We therefore propose that AEA s. 35(3) be carried forward. We think that it should go into the Oaths, Affirmations and Witnesses Act.

3.15 Recommendation No. 22

(OAWA s. 14)

> We recommend that the proposed AEA contain a provision that without an order of the court, a subpoena shall not issue requiring the attendance of a government employee or the production of a government document.

4. ALBERTA EVIDENCE ACT PROVISIONS NOT CARRIED FORWARD

a. General

4.1 Appendix D shows the disposition which we recommend be made of the provisions of the existing Alberta Evidence Act. In many cases the appendix contains sufficient information. We will refer here to some provisions the deletion of which should be noted. We will defer until paragraph 5.6 a discussion of AEA s. 56(1).

b. Principal and agent: Burden of proof

4.2 Once a principal has satisfied the judge that an agent is under a duty, AEA s. 14 places on the agent the burden of proving that he carried out the duty. We were unable to locate any source for this provision, and we do not see any need to

depart in this respect from the usual rules relating to the conduct of proceedings. We are therefore of the opinion that the section should not be carried forward, and we make no recommendation with respect to it.

c. Proof by attesting witness

4.3 AEA s. 58 provides that if an attestation to an instrument is not requisite to the validity of the instrument, it is not necessary that the instrument be proved by the attesting witness. It appears that this section was originally based upon the need to reverse a common law rule. It does not appear to us to be necessary any longer, and we do not recommend that it be carried forward.

d. Proof of death of service personnel

4.4 AEA s. 64 provides that the certificate of a person acting under the authority of the National Defence Act (Canada), or of regulations made under that Act, is self-authenticating proof of the death of a member of the Armed Services. Its predecessor was enacted after the first world war to solve problems of proof, and other provinces have similar legislation.

4.5 There is no doubt that there should be an easy and expeditious procedure for proving death in the unhappy circumstances envisaged by AEA s. 64. There is an argument that it is useful to lay out the procedure in terms specifically designed to cover those specific circumstances so that no one will be in doubt what to do when they occur. We think, however, that uniform evidence legislation will be long and complicated if

it tries to deal with specific cases and that the achievement of simplicity and comprehensibility requires that it provide one means of proving facts in as many classes of cases as possible. We think further that a certificate under the authority of federal legislation would be a business record under s. 152 of the proposed Alberta Evidence Act, with the result that it would be admissible in evidence as an exception to the hearsay rule under draft AEA s. 65(1)(k); and we think that it would be self-authenticating under either or both of draft AEA s. 141(b) and s. 141(c). We think also that AEA s. 64 is not needed for extra-curial purposes. We therefore make no recommendation that AEA s. 64 be carried forward.

e. Proof of wills and testamentary dispositions

4.6 AEA ss. 52 and 53 make provision for the receipt of letters probate and the like as prima facie evidence of testamentary dispositions relating to real estate. We think that s. 149 and 150 of the proposed Alberta Evidence Act deal adequately with the subject and we do not recommend that the sections be brought forward.

f. Fees

4.7 Some provisions about the payment of fees to government officials appear in the existing Alberta Evidence Act. It appears to us that these are more appropriately dealt with elsewhere in the law, and we make no recommendation that they be carried forward. The government should see that they are properly provided for.

5. CORRELATION OF THE PROPOSED ALBERTA EVIDENCE ACT AND THE ALBERTA RULES OF COURT

a. General

5.1 The Alberta Rules of Court deal with some evidentiary matters. It goes without saying that the proposed Alberta Evidence Act and the Rules should deal with their respective subject-matters in a harmonious and comprehensible way. We think that in general they do so. There are however some areas of overlap and conflict, and there is one point arising from the proposed repeal of the existing Alberta Evidence Act which we think should be covered by a change in the Rules. We will direct our discussion only to the cases in which we think that there should be a change either in the proposed Alberta Evidence Act or in the Alberta Rules of Court to achieve these ends. Because some of these changes might be held to affect substantive rights we think that they should all be validated by legislation and s. 208 of the proposed Alberta Evidence Act would so provide. We might note parenthetically that it might be desirable for the legislation to avoid a fragmentary validation by validating rules of court and amendments made since November 4, 1976 (prior to which they are validated by s. 47(2) of the Judicature Act), but we have not made any examination of the changes and amendments and express no opinion about them.

5.2 The statutory body whose function it is to recommend changes in the Alberta Rules of Court to the Attorney General is the Rules of Court Committee, and it is not our intention to trespass upon the Committee's function. We will proceed to make our recommendations and commend them to the Committee for

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consideration concurrently with an appropriate stage of the consideration of uniform evidence legislation by the government and by the Legislature.

b. Proposed concurrent changes in the Alberta Rules of Court

(a) Formal admissions

5.3 UEA s. 17(1) reads as follows:

> 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.

S. 17(3) goes on to preserve the other party's right to prove a fact despite the admission, but with a special provision allowing the court to order that other party to pay costs if the evidence adduced does not materially add to or clarify the fact or matter admitted. In general, however, the Uniform Evidence Act leaves admissions in civil matters to be dealt with under UEA s. 22, which makes relevant evidence admissible, and under the common law.

5.4 The Alberta Rules of Court include a number of provisions with regard to admissions. For example:

(a) Under Rule 190, documents in an affidavit of production are, unless objected to, treated as having been admitted as authentic by both sides.

(b) Under Rule 230, a party who is served with a notice to admit facts is taken to admit them unless he disputes them, and there is a costs sanction if he disputes them

when he should not.

(c) Under Rule 163, judgment may be given on admissions of facts made in the pleadings or otherwise under Rule 162.

(d) Rule 199 implies that admissions may be made in the pleadings.

(e) Under Rule 165(3), a notice of payment into court can admit liability.

5.5 UEA s. 17, if enacted in Alberta, would not conflict with the Rules we have mentioned. We think, however, that in civil proceedings the result of having both would be something of a hodgepodge. It seems to us that UEA s. 17 is a rather isolated and piecemeal rule. We therefore recommend that it be restricted to criminal proceedings and that the substance of what it says about civil proceedings be inserted in the Alberta Rules of Court. It appears to us that the appropriate place to put it would be at the beginning of Part 20, which deals with admissions. We do not think that including in rules a minor provision of the Uniform Evidence Act would be a significant departure from uniformity. If it is not thought appropriate to amend the Rules in this way we would change s. 17 of the proposed Alberta Evidence Act to conform to UEA s. 17.

5.6 S. 56(1) of the existing Alberta Evidence Act covers part of the ground covered by R. 230. It allows a party to give notice that he will prove the contents of a document by a copy and provides that if the other party does not object, the copy

will be admitted instead of the original. If the other party does object, he may be penalized in costs for requiring the original to be produced and proved. It seems to us that a demand under R. 230 to admit that a copy is a copy of the original will achieve the same purpose, and we therefore think that AEA s. 56 need not be carried forward.

5.7 Recommendation No. 23

(App. D s. 2)

We recommend that the provisions of UEA s. 17(1) and (3) relating to admissions in civil proceedings, be placed in the Alberta Rules of Court.

(b) Court appointed expert

5.8 UEA ss. 44 to 47 provide for the appointment by the court of an expert to inquire into, and submit a report on, any question of fact or opinion relevant to a matter in issue. Rule 218 of the Alberta Rules of Court does much the same. We note the following differences between the proposed section and the Rule:

(a) UEA s. 44(2) would require that the expert, wherever possible, be appointed and instructed in accordance with the agreement of the parties. Rule 218(2) provides only for agreement to the appointment. UEA s. 44(2) is preferable.

(b) Rule 218(7) allows the court to make further and other directions but does not specifically confer upon it power to authorize the expert to examine the parties or property. Rule 218(9) confers upon an expert who is a

medical practitioner the powers and duties conferred on a medical practitioner under Rule 217 (which provides for medical examinations). UEA s. 44(3) is broader. It confers upon the court power to make further orders to enable any court-appointed expert to carry out his instructions, and it specifically confers power to make orders for the examination of any party or property. We think that, while medical examinations are the most important class, the broader power in UEA s. 44(3) is preferable.

(c) Rule 218(8) provides that in the first instance the expert's remuneration shall be paid by the opposing parties in equal portions at such time as the court directs. Ultimately the court is to decide who will bear the burden. UEA s. 44 does not include a similar provision. We think it desirable that some provision be made, but we also think that it is preferable that this be left to the Rules.

(d) Rule 218(4) requires the expert's report to be verified by affidavit. UEA s. 45 does not. While there is a good deal to be said for the requirement of an affidavit, such a requirement in connection with experts' reports in general was rejected in the course of preparing the Uniform Evidence Act, and we are inclined to accept that decision for the sake of uniformity. We accordingly recommend that the requirement of the affidavit be deleted from s. 218(4)

so that the practice with regard to the reports of court-appointed experts will conform to the practice with regard to the reports of other experts as set out in s. 41 of the proposed Alberta Evidence Act.

(e) UEA s. 47 appears to confer upon every party a right to cross-examine a court-appointed expert. Rule 218(6) does not allow cross-examination without an order. We think that UEA s. 47 should be preferred on this point, both for the sake of unformity and because principle seems to us to favour a right of cross-examination.

(f) UEA s. 47 would allow a party to call only one rebuttal expert without leave. Rule 218(10) would leave the number open. The difference is probably not one of great importance as leave could probably be obtained in a proper case, but we are inclined to think that the more restricted provision would encourage efficiency and might as well be accepted for the sake of uniformity.

5.9 There is clearly much overlap between AEA ss. 44 to 47, on the one hand, and R. 218 on the other. The overlap should not be permitted to occur. Our recommendation is that the proposed Alberta Evidence Act should confer upon the court the general power to appoint expert witnesses but that the Alberta Rules of Court should provide the procedure and the detail. We do not think that including these provisions in the rules would constitute a significant departure from uniformity.

5.10 Recommendation No. 24

(Draft AEA s. 44; App. D s. 3)

We recommend:

(1) That UEA s. 44(1) be included in the proposed Alberta Evidence Act.

(2) That ss. 45, 46 and 47 and the balance of s. 44 not be included in the proposed Alberta Evidence Act.

(3) That a new s. 44(2) be inserted in the proposed Alberta Evidence Act to the effect that the powers conferred by s. 44(1) shall be exercised in accordance with the Alberta Rules of Court.

(4) That R. 218 be amended as follows:

(a) by providing that the court expert shall, if possible, be both appointed and instructed in accordance with the agreement of the parties.

(b) by conferring upon the court a power to direct parties to submit themselves or their property to the court expert's examination, and the other powers set out in UEA s. 44(3).

(c) by deleting the requirement that a court-appointed expert's report be verified by affidavit.

(d) by allowing for cross-examination of the court-appointed expert without leave of the court.

(e) by limiting each party to one rebuttal expert without leave.

(c) Exclusion of witnesses

5.11 UEA s. 107 makes provision for orders excluding witnesses at trial. So does Rule 247 of the Alberta Rules of

Court. There are a number of differences. Under UEA s. 107 a party may require the exclusion of witnesses unless the court thinks that the presence of a witness would materially assist in the presentation of the evidence; R. 247 appears to confer a general discretion on the judge to decide whether or not to exclude witnesses. UEA s. 107(1) excepts from the order parties to the action; R. 247 applies whether or not the witnesses are parties. UEA s. 107(3) specifically allows the judge to comment to the jury if a witness stays in court despite the order; R. 247 does not deal with the point (though the judge could probably comment anyway. See also Stevenson and Cote, An Annotation of the Alberta Rules of Court, p. 293, where it is suggested that the judge may refuse to hear the evidence of the offending witness.) Rule 247 gives a court specific power to order a witness who has given evidence not to communicate with other witnesses, and empowers the court to exclude evidence if there has been improper communication; UEA s. 107 does not cover the subject.

5.12 Again, we think that it would cause confusion and inefficiency to cover the subject matter both in the proposed Alberta Evidence Act and in the Alberta Rules of Court. Our first inclination was to the view that the provisions are more closely associated with procedure and should be dealt with in the Rules. The Rules, however, deal only with civil proceedings, and our ultimate conclusion was that it would be better to deal with the subject in the proposed Alberta Evidence Act, so that it will be covered in one place for both civil proceedings and prosecutions under provincial law.

5.13 If the subject is to be covered in the proposed Alberta Evidence Act, we are inclined to follow UEA s. 107, and s. 107 of the draft Act does so. The differences between the rules and the proposed section are of some substance, but they probably will not frequently affect the result, and we think that the desirability of uniformity is the governing consideration. We do point out the differences, however, and the Rules of Court Committee may wish to consider whether or not to recommend that s. 107 of the draft Alberta Evidence Act be changed to conform with the present provisions of R. 247.

5.14 Recommendation No. 25

(Draft AEA s. 107; App. D, s. 4)

We recommend that the proposed Alberta Evidence Act follow UEA s. 107 in dealing with the exclusion of witnesses, and that R. 247 be repealed.

(d) Testimony out of the court by affirmation

5.15 Under Rule 274 a person examined de bene esse or on commission is to be examined on oath in accordance with his religion, and it is only if he objects to taking an oath, or is objected to as incompetent to take an oath, that he may be required to "make an affirmation and declaration" instead of taking an oath. This provision is somewhat similar to the provisions of ss. 15 to 18 of the present Alberta Evidence Act. It is inconsistent with the spirit of UEA s. 95 and with recommendations which we have made in paragraph 3.6 with regard to giving testimony by affirmation, the essence of which is that a witness should have a free choice between oath and affirmation.

We think that a rule in terms of UEA s. 95 should be substituted for R. 274. (The substitution will have the effect of removing a party's right to object to a witness's competence which is embodied in R. 274; but see our remarks in paragraph 3.5.)

5.16 Recommendation No. 26

(R. 294)

We recommend that R. 274 be deleted and that the following be substituted:

> 274. Every witness shall be required, before giving evidence, to identify himself and to take an oath or make a solemn affirmation.

6. TRANSITION TO PROPOSED LEGISLATION

a. Simultaneous enactment of proposed legislation

6.1 We think that it is obvious that the proposed Alberta Evidence Act, the proposed Oaths, Affirmations and Witnesses Act, and the proposed changes in the Alberta Rules of Court are designed as an integrated whole and should be enacted and come into force simultaneously. The only mechanical difficulty which we perceive relates to the consideration by the Rules of Court Committee of the changes in the Alberta Rules of Court which we have proposed. On the one hand we do not want to suggest that the Committee spend time on our proposals with respect to the Rules without some assurance that action will be taken on the whole integrated proposal. On the other hand, it would be desirable to arrange matters so that the appropriate unhurried Committee consideration can be carried out while other aspects of

our proposals are receiving detailed consideration by the government. We would suggest that the appropriate procedure would be for the Attorney General, once it appears likely that our recommendations will on the whole be accepted, to advise the Committee to that effect and obtain its recommendations in accordance with the Committee's own practices.

6.2 Recommendation No. 27

> We recommend that the proposed Alberta Evidence Act and the proposed Oaths, Affirmations and Witnesses Act be enacted at the same time; that the proposed changes in the Alberta Rules of Court be promulgated at the same time as the two proposed Acts; and that all of them come into force at the same time.

b. Application of proposed legislation to existing litigation

6.3 UEA s. 213 would apply the existing rules of evidence to all proceedings commenced before the uniform evidence legislation based upon it comes into force. The rules of evidence contained in the Uniform Evidence Act would apply only to proceedings commenced after the new uniform evidence legislation comes into force. It appears to us that the result of such a provision would be that for a good many years there would be two sets of rules of evidence in force federally and two sets of rules of evidence in force in each province. Lawyers and judges, and some litigants, would have to bear in mind the distinction between old and new proceedings and to argue on the basis of the set of rules of evidence which would apply to the particular proceeding. We think that such a result should be

avoided unless the adverse consequences of a provision which avoids it are too great.

6.4 We recommend instead that the proposed Alberta Evidence Act apply immediately to all existing and future litigation. We do not think that a litigant has a vested right in a rule of evidence, and we therefore do not think that it is unfair to change the rules of evidence in the middle of a proceeding. We recognize that an occasional litigant may have conducted his affairs upon the existing rules of evidence (e.g., upon the basis that a piece of evidence is or is not admissible) only to find that the proposed Alberta Evidence Act changes the rule. We think that there are however three answers to an argument that it would be unfair to change the rule. The first is that, any changes made in the existing rules of evidence are intended to achieve greater fairness and efficiency, so that on the whole any new rules should be salutary even when applied to existing proceedings. The second is that there will probably be a period between the enactment of the proposed legislation and its coming in force, so that litigants will have a chance to assess the effect which it will have. Finally, we think that avoiding a situation in which two sets of Alberta rules of evidence will have to be known and mastered at the same time is the overriding consideration.

6.5 We have considered two middle courses. One would be to provide that the proposed Alberta Evidence Act will apply to existing proceedings only after the lapse of a prescribed period (such as a year) after the date upon which it comes into force. The other would be to allow the court to apply the old rules if a

change appears likely to cause unfairness. We have however concluded that the greatest interest of litigants, lawyers and judges will be served by a single change having effect at one time. S. 209 of the proposed Alberta Evidence Act is framed accordingly. We do not think that any special provision is needed for the immediate application of the Oaths, Affirmations and Witnesses Act or the proposed changes in the Alberta Rules of Court.

6.6 Recommendation No. 28

(Draft AEA s. 209)

> We recommend that upon coming into force the proposed Alberta Evidence Act apply to all proceedings, whether commenced before or after the date upon which the changes come into force .

c. Repeal of existing Alberta Evidence Act

6.7 We have considered the Alberta Evidence Act section by section and have proposed a disposition of each section as set out in this report and in Appendix E. Where a provision of the Uniform Evidence Act covers the same ground as a provision of the Alberta Evidence Act we have in general, though not always, accepted the Uniform Evidence Act provision and incorporated it in the proposed Alberta Evidence Act. Where a substantive provision of the Alberta Evidence Act has no counterpart in the Uniform Evidence Act we have considered it and have made either a recommendation to carry it forward to one of the proposed pieces of legislation, with or without change, or a recommendation not to carry it forward. We therefore think that, upon the coming

into force of the proposed Alberta Evidence Act, the proposed Oaths, Affirmations and Witnesses Act, and the proposed changes in the Alberta Rules of Court, the Alberta Evidence Act should be repealed.

6.8 Recommendation No. 29

(Draft AEA s. 204)

We recommend that upon the coming into force of the proposed Alberta Evidence Act, the proposed Oaths, Affirmations and Witnesses Act and the proposed changes in the Alberta Rules of Court, the existing Alberta Evidence Act be repealed.

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CHAIRMAN

DIRECTOR

June 17, 1982

APPENDIX A

SUMMARY OF RECOMMENDATIONS

Recommendation No. 1--(p. 7)

(Draft AEA s. 125)

We recommend that the proposed Alberta Evidence Act provide that an opposed or interested party may not on his own uncorroborated evidence obtain judgment

(a) by or against an estate with respect of a matter occurring before the death of the deceased person, or

(b) by or against a mentally incompetent person.

Recommendation No. 2--(p. 8)

(Draft AEA s. 125.1)

We recommend that the proposed Alberta Evidence Act not preclude a court from accepting the uncorroborated evidence of an unsworn child.

Recommendation No. 3--(p. 10)

(Draft AEA s. 125.1)

We recommend that the proposed Alberta Evidence Act not preclude a court from making a finding of paternity upon the uncorroborated evidence of the child's mother, and that s. 19(1) of the Maintenance and Recovery Act be repealed.

Recommendation No. 4--(p. 10)

(Draft AEA s. 125.1)

We recommend that the proposed Alberta Evidence Act not preclude the court from giving judgment for the plaintiff upon the plaintiff's uncorroborated evidence in an action for breach of a promise of marriage.

Recommendation No. 5--(pp. 17, 18)

(Draft AEA ss. 161-163, 198)

We recommend

(a) that the proposed Alberta Evidence Act confer upon a witness immunity against the use of self-incriminating evidence to incriminate him in any other proceedings under the law of Alberta,

(b) that the immunity apply without being claimed,

(c) that the immunity not apply in favour of a corporation,

(d) that the immunity not apply in civil proceedings,

(e) that the immunity apply to testimony given under the law of Canada or of a province,

(f) that the immunity be stated in words which conform as closely as possible to s. 13 of the Canadian Charter of Rights and Freedoms, and

(g) that a statement relevant to an issue and inconsistent with an accused person's present testimony may be capable of being received in evidence for the sole purpose of challenging his credibility.

(h) that a witness examined in Alberta for the purpose of a proceeding under the law of another jurisdiction have the right to refuse to answer any question on the ground that the answer may tend to incriminate him.

Recommendation No. 6--(p. 20)

(Draft AEA s. 164)

We recommend that the proposed AEA

(a) abolish any privilege whereby a witness may refuse to produce a document on the grounds that its production may tend to incriminate him, and

(b) provide that there is no immunity against the use of a document on the grounds that its use may tend to incriminate him.

Recommendation No. 7--(p. 25)

(Draft AEA s. 103)

We recommend that the proposed Alberta Evidence Act not provide that a party shall not allege or assume a fact on cross-examination unless he is in a position to substantiate it.

Recommendation No. 8--(p. 28)

(Draft AEA s. 103)

We recommend that the proposed Alberta Evidence Act leave to the common law the

subject of the duty of a party who intends to contradict the evidence given by a witness called by another party.

Recommendation No. 9--(p. 29)

(Draft AEA s. 191.1)

We recommend that the proposed Alberta Evidence Act give the court power to enlarge or abridge the time appointed by it or by any rules made under it for doing any act or proceeding, upon such terms as may be just.

Recommendation No. 10--(p. 33)

(Draft AEA s. 3.2)

We recommend:

(a) that the proposed Alberta Evidence Act apply not only to "courts" as defined in it, but also to all other tribunals or persons having by law or by the consent of parties authority to hear, receive and examine evidence, and

(b) that the proposed Alberta Evidence Act confer upon all tribunals, bodies or officers, other than "courts" as defined in it, a discretion to admit evidence which would be inadmissible under the other provisions of the proposed Alberta Evidence Act.

Recommendation No. 11--(p. 35)

(Draft AEA s. 3.1)

We recommend:

(a) that the proposed Alberta Evidence Act apply to examinations for discovery and examinations on affidavits, but that it be subject to existing or future rules in the Alberta Rules of Court which modify the rules of evidence with respect to such examinations,

(b) that the proposed Alberta Evidence Act confer the Lieutenant Governor-in-Council power to make rules modifying the rules of evidence applicable to examinations for discovery and examinations on affidavits, and

(3) that neither the present Alberta Rules of Court nor any rules of court made under (b) be capable of affecting statutory privileges to be granted by the proposed Alberta Evidence Act.

Recommendation No. 12--(p. 37)

(Draft AEA s. 3.1(3))

We recommend that (pending an amendment to the Criminal Code which would automatically apply in prosecutions under provincial offences) the proposed Alberta Evidence Act provide that on a sentencing hearing the court may receive and base its decision upon evidence considered credible or trustworthy by it in the circumstances of each case.

Recommendation No. 13--(p. 40)

(Draft AEA s. 103(2))

We recommend that the proposed Alberta Evidence Act permit cross-examination upon and proof of a prior conviction of a witness

other than an accused if the conviction is substantially relevant to the credibility of the witness.

Recommendation No. 14--(p. 41)

(Draft AEA s. 141(e), (f))

We recommend that a notarial protest, wherever made, or a note of the fact of notice of dishonour, if made in Canada, be admissible in evidence if if purports to be signed by a notary or (in the case of a note of the fact of notice of dishonour) if it is embodied in his register.

Recommendation No. 15--(p. 43)

(Draft AEA s. 159.1)

We recommend that the proposed Alberta Evidence Act give the court power to direct that a document received in evidence be impounded and kept in custody for any period and subject to any conditions that seem proper or until the further order of the court, as the case may be.

Recommendation No. 16--(p. 43)

Draft AEA s. 159.2

We recommend that the proposed Alberta Evidence Act provide that, in the absence of an order to the contrary, a document produced by a public officer under subpoena shall not be deposited in court, and that if needed a certified copy be filed in its place.

Recommendation No. 17--(p. 44)

(Draft AEA s. 205)

We recommend that, if AEA s. 9 is to be carried forward (as to which we make no recommendation), it be inserted in the Hospitals Act.

Recommendation No. 18--(p. 51)

(OAWA ss. 1-5)

We recommend that the proposed Oaths, Affirmations and Witnesses Act:

(a) give witnesses and deponents a free choice between oath and solemn affirmation, but not invalidate testimony or an affidavit for failure to offer it formally,

(b) provide that a person is bound by an oath which he declares binding, and that lack of religious belief does not invalidate an oath,

(c) provide that if an oath or solemn affirmation is administered in prescribed form (giving examples) it is binding, and

(d) provide for the verification of facts by solemn declaration.

Recommendation No. 19--(p. 52)

(OAWA ss. 6-9)

We recommend that the Oaths of Office Act be repealed and that its provisions be included in the proposed Oaths, Affirmations and Witnesses Act.

Recommendation No. 20--(p. 53)

(OAWA s. 10-12)

We recommend that the proposed Oaths, Affirmations and Witnesses Act extend to extra-curial proceedings the rules relating to the the recognition of oaths, affirmations, affidavits and declarations administered or taken outside Alberta which the proposed AEA would apply in court proceedings.

Recommendation No. 21--(p. 54)

(OAWA s. 13)

We recommend that the proposed Oaths, Affirmations and Witnesses Act include a provision similar to AEA s. 22 imposing upon a witness who disobeys a subpoena liability for resulting damage.

Recommendation No. 22--(p. 55)

(OAWA s. 14)

We recommend that the proposed AEA contain a provision that without an order of the court, a subpoena shall not issue requiring the attendance of a government employee or the production of a government document.

Recommendation No. 23--(p. 61)

(App. D s. 2)

We recommend that the provisions of UEA s. 17(1) and (3) relating to admissions in civil

proceedings, be placed in the Alberta Rules of Court.

Recommendation No. 24--(p. 64)

(Draft AEA s. 44; App. D s. 3)

We recommend:

(1) That UEA s. 44(1) be included in the proposed Alberta Evidence Act.

(2) That ss. 45, 46 and 47 and the balance of s. 44 not be included in the proposed Alberta Evidence Act.

(3) That a new s. 44(2) be inserted in the proposed Alberta Evidence Act to the effect that the powers conferred by s. 44(1) shall be exercised in accordance with the Alberta Rules of Court.

(4) That R. 218 be amended as follows:

(a) by providing that the court expert shall, if possible, be both appointed and instructed in accordance with the agreement of the parties.

(b) by conferring upon the court a power to direct parties to submit themselves or their property to the court expert's examination, and the other powers set out in UEA s. 44(3).

(c) by deleting the requirement that a court-appointed expert's report be verified by affidavit.

(d) by allowing for cross-examination of the court-appointed expert without leave of the court.

(e) by limiting each party to one rebuttal expert without leave.

Recommendation No. 25--(p. 66)

(Draft AEA s. 107; App. D, s. 4)

We recommend that the proposed Alberta Evidence Act follow UEA s. 107 in dealing with the exclusion of witnesses, and that R. 247 be repealed.

Recommendation No. 26--(p. 67)

(R. 294)

We recommend that R. 274 be deleted and that the following be substituted:

> 274. Every witness shall be required, before giving evidence, to identify himself and to take an oath or make a solemn affirmation.

Recommendation No. 27--(p. 68)

We recommend that the proposed Alberta Evidence Act and the proposed Oaths, Affirmations and Witnesses Act be enacted at the same time; that the proposed changes in the Alberta Rules of Court be promulgated at the same time as the two proposed Acts; and that all of them come into force at the same time.

Recommendation No. 28--(p. 70)

(Draft AEA s. 209)

We recommend that upon coming into force the proposed Alberta Evidence Act apply to all proceedings, whether commenced before or after the date upon which the changes come into force .

Recommendation No. 29--(p. 71)

(Draft AEA s. 204)

We recommend that upon the coming into force of the proposed Alberta Evidence Act, the proposed Oaths, Affirmations and Witnesses Act and the proposed changes in the Alberta Rules of Court, the existing Alberta Evidence Act be repealed.

APPENDIX B

DRAFT OF A PROPOSED ALBERTA EVIDENCE ACT

(Note: The numbering of sections in this draft follows as closely as possible the numbering of the sections in the Uniform Evidence Act and is usually identical. In order to achieve this result any inserted section has been given a decimal number corresponding to the UEA section which precedes the inserted section, and any deletion from the UEA has been noted in the draft beside the corresponding number.)

PART I

INTERPRETATION AND APPLICATION

Interpretation

1. Interpretation. In this Act,

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

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

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

"court", except where otherwise provided, or where the context otherwise requires, means

(a) the Supreme Court of Canada,

(b) the Court of Appeal of Alberta,

(c) the Court of Queen's Bench of Alberta,

(d) the Surrogate Court of Alberta,

(e) the Provincial Court of Alberta,

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

(g) a magistrate or justice of the peace,

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

"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", except where otherwise provided or the context otherwise requires, means an offence under an enactment of the Legislature;

"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.

Source: UEA s. 1. Varied to refer to courts administering Alberta law. Varied to define "offence" to mean an offence under an enactment of the Legislature.

Comment

If the words "or where the context otherwise requires" are not included in the definition of "court" a special definition will be needed for s. 149. If the same words are not inserted in the definition of "offence" a special definition will be needed for s. 25(3)(c) and s. 103(2).

Application

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

Source: UEA s. 2. Adapted for provincial use.

3.(1) Application to civil proceedings. (1) The Lieutenant Governor in Council by regulation may make rules modifying the rules of evidence applicable to examinations for

discovery and examinations on affidavits.

(2) The Alberta Rules of Court and rules made by the Lieutenant Governor in Council under subsection 1 apply to examinations for discovery and examinations on affidavits notwithstanding Parts I to IV and VI to VIII of this Act.

Source: New. See Report paras. 2.66-2.70.

3.1 Application to criminal proceedings. Parts I to IV and VI to VIII apply only to the following criminal proceedings and appeals in connection with those proceedings:

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

(b) the taking of evidence on commission for the purposes of a trial.

(2) In a proceeding relating to sentencing for an offence, the court may receive and base its decision upon evidence considered credible or trustworthy by it in the circumstances of the case.

Source: S. 3.1(1): UEA s. 3(2). Adapted for provincial application. S. 3.1(2): New. See Report paras. 2.72-2.74.

3.2(1) Extra-curial proceedings. Subject to subsection (2) and to any other Act of the Legislature, this Act applies to proceedings before a tribunal, officer or person other than a court having by law or by the consent of the parties authority to hear, receive and examine evidence.

(2) Subject to Part V a tribunal, officer or person referred to in subsection (1) may in his or its discretion admit evidence which would be inadmissible under a provision of this Act.

Source: AEA s. 1(b), and new. See Report, paras. 2.59-2.65.

Comment

S. 3.2 would apply the Act to administrative and other proceedings, but would give a tribunal a discretion to admit evidence which would be inadmissible under the Act. Its

purpose is to allow administrative flexibility but to provide a backdrop of rules of evidence by which a tribunal and a reviewing court could assess the desirability of accepting evidence. See Report, para. 2.59-2.65.

4. Exception for protective jurisdiction. Subject to Part V, 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.

Source: UEA s. 4. Varied by reference to Part V.

5. Application of provincial law.

Deleted.

UEA s. 5 is for inclusion in the federal Act only.

6. Application to Crown. This Act is binding on Her Majesty in right of Alberta.

Source: UEA s. 6. Adapted for provincial application.

PART II

RULES OF PROOF

Legal and Evidential Burden

7. Interpretation. In sections 8 to 13,

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

Source: UEA s. 7.

8. Evidential burden in civil proceeding. 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.

Source: UEA s. 8.

9. Legal burden in civil proceeding. 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.

Source: UEA s. 9.

10.(1) Evidential burden on prosecution in criminal proceeding. 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.

(2) Evidential burden on accused in criminal proceeding. 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.

Source: UEA s. 10.

11.(1) Legal burden in criminal proceeding. 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.

(2) Legal burden respecting insanity. 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.

(3) Where onus reversed. 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.

Source: UEA s. 11.

12.(1) Legal burden respecting excuse, exception, etc. 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.

(2) No burden on prosecution. 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).

Source: UEA s. 12.

13. Burden as to fitness. 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.

Source: UEA s. 13.

14. Circumstantial evidence. 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.

Source: UEA s. 14.

Presumptions

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

Source: UEA s. 15.

16. Effect in criminal proceeding. 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.

Source: UEA s. 16.

Formal Admissions

17.(1) Formal admissions. A party to a criminal 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.

(2) Exception. No admission shall be received under subsection (1) unless it is accepted by the opposing party.

(3) Adducing evidence respecting admitted fact or matter. Nothing in this section prevents a party to a proceeding from adducing evidence to prove a fact or matter admitted by another party.

Source: UEA s. 17. Restricted to criminal proceedings. For discussion of s. 17(2) in criminal proceedings, see Report paras. 2.87-2.89. For deletion of civil proceedings see Report paras. 5.3-5.7; App. D s. 2.

Judicial Notice

18. Judicial notice of enactments. 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.

Source: UEA s. 18.

Comment

The note appended to UEA s. 18 says that each jurisdiction may consider whether to include paragraph (e). Paragraph (e) should promote efficiency and has been included. If the taking of judicial notice would cause prejudice, the court will have power to require proof in the ordinary manner.

19. Judicial notice of other matters. 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.

Source: UEA s. 19.

20. Hearing. 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.

Source: UEA s. 20.

21.(1) Effect of judicial notice. 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.

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

Source: UEA s. 21.

PART III

RULES OF ADMISSIBILITY

General Rule

22.(1) General rule. Relevant evidence is admissible unless it is excluded pursuant to the Canadian Charter of Rights and Freedoms or this Act or any other Act or law, and evidence that is not relevant is not admissible.

(2) Exception 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.

Source: UEA s. 22. Subsection (1) varied to refer to the Canadian Charter of Rights and Freedoms. See Report para. 2.58.

Character Evidence in Criminal Proceedings

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

Source: UEA s. 23.

24.(1) Evidence of accused as to his character traits. 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.

(2) Prior notice required. 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.

Source: UEA s. 24.

25.(1) Evidence of prosecution as to character traits of accused. 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.

(2) Scope of evidence. 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 had adduced evidence of that trait.

(3) Manner of adducing evidence. 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 under an enactment of Canada, a province of Canada, or of any other jurisdiction.

Source: UEA s. 25. Varied in subsection (3)(c) so as to provide for proof of foreign convictions not regulated by UEA s. 25.

26. Saving. 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.

Source: UEA s. 26.

27. Use of evidence. 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.

Source: UEA s. 27.

28. Evidence as to character traits of complainant. 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.

Source: UEA s. 28.

29.(1) Rebuttal evidence. 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.

(2) Self-defence. 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.

Source: UEA s. 29.

30. Application of section 25. 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.

Source: UEA s. 30.

31. No evidence of sexual conduct of complainant.

Deleted.

Applicable only to proceedings under federal criminal law.

32. Exceptions.

Deleted.

Applicable only to criminal proceedings under federal criminal law.

33. Notice and hearing.

Deleted.

Applicable only to criminal proceedings under federal criminal law.

34. Complainant not compellable.

Deleted.

Applicable only to criminal proceedings under federal criminal law.

35. Evidence of possession.

Deleted.

Applicable only to criminal proceedings under federal criminal law.

36. Notice to accused.

Deleted.

Applicable only to criminal proceedings under federal criminal law.

Opinion Evidence and Experts

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

Source: UEA s. 37.

38. Non-expert opinion evidence. 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.

Source: UEA s. 38.

39. Handwriting comparison. 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.

Source: UEA s. 39.

40. Opinion evidence on an ultimate issue. 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.

Source: UEA s. 40.

41.(1) Statement of expert opinion. 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.

(2) Copy of statement to be furnished. 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 cil proceeding unless, at least ten days before the commencement of the trial, a copy of the statment has been furnished to every party adverse in interest to the proponent.

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

Source: UEA s. 41.

42.(1) Attendance of expert Where a written statement of an expert is adduced under section 41, any party may require the

expert to be called as a witness.

(2) Costs. 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.

Source: UEA s. 42.

43. Maximum number of expert witnesses. 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.

Source: UEA s. 43.

44.(1) Court appointed expert. 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 of opinion relevant to a matter in issue.

(2) Exercise of power. The court shall exercise the powers conferred by subsection (1) in accordance with the Alberta Rules of Court.

Source: S. 44(1): UEA s. 44(1). S. 44(2): New. UEA s. 44(2) and (3) deleted. See Report paras. 5.8-5.10. See also App. D, proposed amendments to R. 218.

45. Report admissible in evidence.

Deleted.

See Report, paras. 5.8-5.10. See also App. D., proposed amendments to R. 218.

46. Production of report.

Deleted.

See Report, paras. 5.8-5.10. See also App. D., proposed amendments to R. 218.

47. Examination of expert.

Deleted.

See Report, paras. 5.8-5.10. See also App. D, proposed amendments to R. 218.

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

Source: UEA s. 48.

Hearsay

General Rule

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

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

(3) Power of court to create exceptions. 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.

(4) Question of law. 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.

Source: UEA s. 49.

Exceptions Where Declarant Available

50. Previous identification. 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.

Source: UEA s. 50.

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

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

Source: UEA s. 51.

Exceptions Where Declarant or Testimony Unavailable

52.(1) Interpretation. 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.

(2) Cross-examination of absent declarant. 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.

(3) Interpretation. 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.

Source: UEA s. 52.

53. Civil proceeding. 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.

Source: UEA s. 53.

54.(1) Criminal proceeding--statement in expectation of death. Deleted.

Applicable only to criminal procedures under federal criminal law.

55.(1) Criminal proceeding--statement in court of duty. 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.

(2) Saving. 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.

Source: UEA s. 55.

56. Criminal proceeding--statement as to family history. 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.

Source: UEA s. 56.

57. Criminal proceeding--statement as to testamentary document. 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.

Source: UEA s. 57.

58.(1) Criminal proceeding--statement against interest. 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.

(2) Exclusion. 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 a statement.

Source: UEA s. 58.

59. Condition of admissibility. 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.

Source: UEA s. 59.

Exceptions Where Availability of Declarant or Testimony is Immaterial

60. Statements made, adopted or authorized. 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.

Source: UEA s. 60.

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

(2) Statement by person engaged in common unlawful purpose. 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.

Source: UEA s. 61.

62. Statement made in representative capacity. 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.

Source: UEA s. 62.

Comment

A note appended to UEA s. 62 says that each jurisdiction may consider whether to include a next friend, guardian ad litem, tutor or curator in this list of representatives in s. 62. Tutors and curators do not exist in Alberta. The next friend and the guardian ad litem are not included in section 62 because they are associated with the person represented only in connection with the litigation and because so limited an association with the interests of the person represented should not empower the representative to make statements which will affect those interests.

63. Rule respecting privity abrogated. 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.

Source: UEA s. 63.

64.(1) Statement of agent or employee. 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.

(2) Proceedings by way of indictment. Deleted.

Applicable only to criminal proceedings under federal criminal law.

(3) Directing mind of corporation. 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.

Source: UEA s. 64.

65.(1) Other exceptions. 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.

(2) Self-serving statements. 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.

Source: UEA s. 65.

Statements of Accused

66. Interpretation. In this section and sections 67 to 73,

"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", 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.

Source: UEA s 66.

67. Statements of accused. 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.

Source: UEA s. 67.

68. No question as to truth. 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.

Source: UEA s. 68.

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

Source: UEA s. 69.

70. Contents may be considered. In determining whether a statement was voluntary, the court may considerthe contents of the statement.

Source: UEA s. 70.

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

Source: UEA s. 71.

72.(1) Where statement not receivable. 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.

(2) Burden of proof. 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.

Source: UEA s. 72.

73. Where accused unaware. 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.

Source: UEA s. 73.

74. Preliminary inquiry.

Deleted.

Applicable only to criminal proceedings under federal criminal law.

Source: UEA s. 74.

75. Confirmation by real evidence. 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.

Source: UEA s. 75.

Credibility of Declarant

76.(1) Challenging credibility. 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.

(2) Where declarant unavailable. 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.

Source: UEA s. 76.

Previous Court Proceedings

77.(1) General rule. 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.

(2) Interpretation. In this section, "court" means

(a) a court as defined in section 78, and

(b) a court constituted under the laws of a foreign jurisdiction.

Source: S. 77(1): UEA s. 77. S. 72(2): New.

Comment

UEA s. 77 provides only that findings of Canadian courts are not generally admissible as proof of a fact in issue. Subsection (2) has been added to that it will be clear that Canadian and foreign courts are for this purpose covered by the same rule.

78. Interpretation. In sections 79 to 82,

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

"court" means

(a) a court constituted under the laws of Canada or a province, and,

(b) a court martial under the National Defence Act.

"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" includes

(a) an offence against the laws of Canada or a province, or

(b) a contravention in respect of which

a court martial is held pursuant to the National Defence Act (Canada).

Source: UEA s. 78. Definition of "court" added, and definition of "offence" varied, to adapt for provincial use.

79. Application. 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.

Source: UEA s. 79.

80.(1) Admissibility in civil proceeding. 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.

(2) Defamation proceeding. 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.

Source: UEA s. 80.

81.(1) Theft and possession. 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.

(2) Accessory after the fact.

Deleted.

Applicable only to criminal proceedings under federal criminal

law.

Source: S. 81(1): UEA s. 81(1).

82.(1) Recorded proof and notice. 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.

(2) Proof of signature or official character. 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.

Source: UEA s. 82.

Alibi Evidence

83. Interpretation. 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.

Source: UEA s.ns> 83.

84.(1) Notice of alibi evidence. 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.

(2) Further notice. Where changes occur in the names or addresses of the witnessesmentioned 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.

Source: UEA s. 84.

85. Notice by prosecutor. 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.

Source: UEA s. 85.

86. Adverse comment. 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.

Source: UEA s. 86.

87. Determining the first reasonable opportunity. 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.

Source: UEA s. 87.

88.(1) Proceedings by way of indictment. Deleted.

Applicable only to criminal

proceedings under federal criminal law.

(2) Adverse comment where applicable. Deleted.

Applicable only to criminal proceedings under federal criminal law.

Source: UEA s. 88.

PART IV

KINDS OF EVIDENCE

Testimony

Competence and Compellability

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

Source: UEA s. 89.

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

(2) Members of jury. 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.

Source: UEA s. 90.

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

(2) Persons jointly tried.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.

Source: UEA s. 91.

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

(2) Spouses of persons jointly tried. 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.

Source: UEA s. 92.

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

(a) is against the person or property of the spouse;

(b) is against a person under the age of fourteen years.

Source: UEA s. 93(b) and (c). UEA s. 93(a) and 93(d) deleted as being applicable only to federal criminal proceedings.

94. Comment on failure to testify. 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.

Source: UEA s. 94.

Oath or Solemn Affirmation

95. Oath or solemn affirmation. 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.

Source: UEA s. 95.

96.(1) Witness whose capacity is in question. 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.

(2) Burden as to capacity of witness. 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.

Source: UEA s. 96.

97. Where witness does not qualify. 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.

Source: UEA s. 97.

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

Source: UEA s. 98. Words "or preliminary inquiry" after "trial" deleted, as applicable only to proceedings under federal criminal law.

Calling and Questioning Witnesses

99. Presenting evidence. 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.

Source: UEA s. 99.

100. Questions by court. 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.

Source: UEA s. 100.

101. Court's power to call witnesses. Subject to subsection (1) of 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.

Source: UEA s. 101.

102.(1) leading questions on examination-in-chief or re-examination. 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.

(2) Interpretation. 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.

Source: UEA s. 102.

103(1). Leading questions on cross-examination. 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.

(2) If

(a) a witness

(i) denies that he has been convicted or found guilty of an offence against the law of any jurisdiction, or

(ii) refuses to answer a question about any such conviction or finding of guilt, and

(b) the conviction or finding of guilt is substantially relevant to the witness's credibility,

the conviction or finding of guilt may be proved in the same way as a conviction or finding of guilt referred to in section 82 may be proved under that section.

Source: S. 103(1): UEA s. 103(1). S. 103(2): AEA s. 25(1), restricted and redrafted: See Report para. 2.79. UEA s. 103(2), (3) and (4) deleted: see Report paras. 2.76-2.79.

104. Adverse witness. 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.

Source: UEA s. 104.

105. Interpretation. 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.

Source: UEA s. 105.

106. Re-examination. 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.

Source: UEA s. 106.

107(1). Exclusion of witnesses. 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.

(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.

(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.

Source: UEA s. 107. See Report paras. 5.11-5.14.

108. Where accused confirms earlier evidence. 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.

Source: UEA s. 108.

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

Source: UEA s. 109.

110.(1) Refreshing memory. 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.

(2) Rights of adverse party. 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.

Source: UEA s. 110.

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

Source: UEA s. 111.

112. Past recollection recorded. 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.

Source: UEA s. 112.

113.(1) Examination by court and production. 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.

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

Source: UEA s. 113.

Previous Statements

114. Cross-examination on a previous inconsistent statement. 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.

Source: UEA s. 114.

115.(1) Requirements before cross-examination. 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.

(2) Attention to relevant parts of statement. 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.

Source: UEA s. 115.

116.(1) Statement to person in

authority. 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.

(2) Determining voluntariness. 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.

Source: UEA s. 116.

117. Proof of statement. 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.

Source: UEA s. 117.

118. Previous consistent statement. 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.

Source: UEA s. 118. Varied by deleting the opening words "Subject to section 120," as section 120 is applicable only to proceedings under federal criminal law.

119. Production of statement. 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.

Source: UEA s. 119.

120. Rule respecting recent complaint abrogated.

Deleted.

Applicable only to proceedings under federal criminal law.

121. Use of statement. 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).

Source: UEA s. 121.

Credibility of Witnesses

122. Reputation evidence. 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.

Source: UEA s. 122.

123. Examination as to character and mode of life. 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.

Source: UEA s. 123.

124.(1) No cross-examination on previous record. 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.

(2) Exception. 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.

(3) Proof of conviction. If on being questioned the accused denies the fact or refuses to answer, an adverse party may, in accordance with section 82, prove the finding of guilt or conviction.

(4) Interpretation. In this section, "offence", when used in relation to an offence with which an accused is charged, means an offence under an enactment of Canada, a province of Canada, or any other jurisdiction.

Source: S. 124(1) and (2): UEA s. 124. S. 124(4) added to regulate the proof of foreign convictions not covered by UEA s. 124.

125.(1) Corroboration. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on his own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

(2) In an action by or against a person for whom a trustee or a guardian has been appointed under the Dependant Adults Act, or a person who from unsoundness of mind is incapable of giving evidence, an opposed or interested party shall not obtain a verdict, judgment or decision on his own evidence unless the evidence is corroborated by other

material evidence.

Source: AEA s. 12, 13. Varied as to description of persons referred to in s. 125(2). See Report paras. 2.8-2.13.

125.1(1) No corroboration or warning. Subject to subsection (2) and s. 125, no corroboration of evidence is required and no warning concerning the danger of acting on uncorroborated evidence shall be given in any proceeding.

(2) Caution required. 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; or

(c) the evidence of a witness who has been convicted of perjury.

Source: UEA s. 125. Varied by adding reference to s. 125 of this Act which requires corroboration in certain cases. Varied by deleting UEA s. 125(2)(d) which applies only to proceedings under federal criminal law.

Interpreters and Translators

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

Source: UEA s. 126.

127.(1) Provision of interpreter or translator. 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.

(2) Oath or solemn affirmation. 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.

Source: UEA s. 127.

128.(1) Verifying translation prepared out of court. 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.

(2) Copy to be provided. 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.

Source: UEA s. 128.

129.(1) Attendance of translator. 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.

(2) Where translator not made available. 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.

(3) Costs. 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.

Source: UEA s. 129.

Recorded Evidence

Interpretation

130. Interpretation. In this section and sections 131 to 159,

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

Source: UEA s. 130.

Best Evidence Rule

131. Best evidence rule. Subject to

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

Source: UEA s. 131.

132. Admissibility of duplicates. A duplicate is admissible to the same extent as an original unless the court is satisfied that there is reason to doubt the authenticity of the original or the accuracy of the duplicate.

Source: UEA s. 132.

133. Admissibility of copies. 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.

Source: UEA s. 133.

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

Source: UEA s. 134.

135.(1) Voluminous records. 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.

(2) Examination and copies. 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.

Source: UEA s. 135.

136.(1) Written explanation. 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.

(2) Examination of person making explanation. 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.

Source: UEA s. 136.

137. Testimony, deposition or written admission. 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.

Source: UEA s. 137.

138. Condition of admissibility. 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.

Source: UEA s. 138.

Notice

139.(1) Notice and production. 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.

(2) Notice and production in civil proceeding. 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.

Source: UEA s. 139.

Authentication

140. Authentication. 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.

Source: UEA s. 140.

141. Self-authentication. 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 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 protest of a bill of exchange or a promissory note purporting to be under the hand of a notary public wherever made;

(f) a note, memorandum or certificate purporting to be made by a notary public in Canada, in his own handwriting, or to be signed by him at the foot of or embodied in a protest, or in a regular register of official acts purporting to be kept by him, of the fact of notice of non-acceptance or non-payment of a bill of exchange or promissory note having been sent or delivered;

(g) 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;

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

(i) any inscription, sign, tag, label or other index of origin, ownership or control purporting to have been

affixed in the course of business;

(j) a document purporting to be attested or certified under oath, solemn affirmation, affidavit or declaration administered, taken or received in Alberta by a person authorized to do so;

(k) 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;

(l) 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.

Source of s. 141(a) to (d) and (g) to (l): UEA s. 141. Source of s. 141(e) and (f): AEA s. 47. See Report paras. 2.80-2.82. The word "Alberta" inserted in s. 141(j) to make the paragraph applicable for provincial use.

142. Persons authorized to administer oaths, etc. For the purposes of paragraph 141(j), the following persons are authorized to administer, take or receive oaths, solemn affirmations, affidavits or declarations in Alberta:

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

(b) a Provincial Court judge or justice of the peace;

(c) a commissioner for taking affidavits or notary public in Alberta;

(d) a commissioned officer of the Canadian Forces on full-time service; or

(e) any person so authorized by a statute of the Legislature.

Source: S. 142(a) to (d): UEA s. 142(a) to (d). Adapted for provincial use. S. 142(e): New.

Comment

S. 142(e) has been from abundance of caution added in order to ensure that the list of officials in S. 142(a) to (d) will not be interpreted so as to exclude other officials empowered by statute to administer oaths, etc.

143. Certification. 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(1) or who certified the signature or official character of that person.

Source: UEA s. 143.

144. Dispensing with certification. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of a document described in paragraph 141(1), 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.

Source: UEA s. 144.

Public Records

145. Interpretation. 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.

Source: UEA s. 145.

146. Proof of public record of Canada or United Kingdom. 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.

Source: UEA s. 146.

147. Proof of foreign public records. 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.

Source: UEA s. 147.

148. Matters not subject to proof. 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.

Souce: UEA s. 148.

Court Records

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

(2) Where no seal. 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.

Source: UEA s. 149.

Other Public Records

150.(1) By-laws, regulations, rules,

etc. 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.

(2) Application. 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.

(3) Where no seal. 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.

Source: UEA s. 150.

151. Notarial acts in Quebec. 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.

Source: UEA s. 151.

Business and Government Records

152. Interpretation. In this section and sections 153 to 158,

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

"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 of the public and includes any branch, agency or office of any such Bank or institution.

Source: UEA s. 152.

153.(1) Business records. 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.

(2) Parts of records. 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.

Source: UEA s. 153.

154.(1) Inference from absence of information. 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.

(2) Financial institutions and government records. 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 Legislature, 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.

Source: UEA s. 154. S. 154(2) adapted for provincial use by insertion of the word "Legislature".

155.(1) Examination of record. For the purpose of determininng 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.

(2) Evidence respecting record. 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.

(3) Affidavit evidence. 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.

Source: UEA s. 155.

156. Examination on record. 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.

Source: UEA s. 156.

157.(1) Business records of financial institutions. 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.

(2) Compellability. 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.

Source: UEA s. 157.

158.(1) Inspection and copies. 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.

(2) Notice. Notice of an application under subsection (1) shall be given to any person to whom the business record to be examined or copies 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.

Source: UEA s. 158.

Probative Force of Records

159. Where probative force not indicated. 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.

Source: UEA s.159.

Retention and use of documents

159.1. When a document is received in evidence, the court admitting it may direct

that it be impounded and kept in custody for any period and subject to any conditions that seem proper or until the further order of the court, as the case may be.

Source: AEA s. 60. See Report paras. 2.84-2.86.

159.1.(1) When a public officer produces an original document on a subpoena or on a notice, the document shall not be deposited in the court unless otherwise ordered.

(2) When an order is made that the original be deposited in court, the order shall be delivered to the public officer and the original document shall be retained in court and filed.

(3) If the document is not deposited and if the document or a copy thereof is needed for subsequent reference or use, a copy thereof or of so much thereof as is considered necessary, certified under the hand of the officer producing the document, shall be filed as an exhibit in the place of the original document.

Source: AEA s. 51(1) - (3). See Report paras. 2.87-2.88.

Real Evidence

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

(2) Interpretation. 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.

Source: UEA s. 160.

PART V

STATUTORY PRIVILEGES

Protection Against Use of Previous Testimony

161.(1) No right to withhold answer. A witness shall not be excused from answering a question on the ground that the answer may tend to incriminate him.

(2) Protection against use of answer. A witness who testifies in any proceedings under the law of Canada or of a province has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings under the law of Alberta.

Source: S. 161(1): UEA s. 161(1). Reference to civil proceedings deleted. S. 161(2): Canadian Charter of Rights and Freedoms, s. 13, varied. See Report paras. 2.24-2.34.

162.(1) Corporations not protected. 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.

(2) Single claim sufficient.

Deleted.

Consequential upon deletion of UEA s. 161(2) requirement that witness claim protection.

Source: UEA s. 162(1).

163. Exception for previous inconsistent statement. 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.

Source: UEA s. 163.

164.(1) Privilege respecting records abrogated. Subject to any other Act, any

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

(2) No use immunity. A record which tends to incriminate a witness who produces it is not inadmissible against him in any other proceeding by reason only that it tends to incriminate him.

(3) Limitation. Nothing in this section affects any ground of privilege other than self-incrimination.

Source: 164(1): UEA s. 164. 164(2) and s. 164(3): New. See Report paras. 2.36-2.37.

Government Privilege

165. Interpretation. In this section and sections 166 to 175.

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

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

"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", 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.

Source: UEA s. 165. Definition of "Cabinet" varied for provincial use."

166.(1) Notice to Attorney General. 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.

(2) Notice by court. 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.

Source: UEA s. 166.

167.(1) Claiming privilege. 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.

(2) Matters to be specified in certification. 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.

Source: UEA s. 167.

168.(1) Decision of court. 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.

(2) Opportunity to certify further particulars. 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.

Source: UEA s. 168.

169.(1) Where further particulars not certified. 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.

(2) Where further particulars certified. 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.

(3) Consideration in private. Where, after consideration in private under subsection (1) and (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.

Source: UEA s. 169.

170. Factors to be considered by court. In determining whether the production or disclosure of any information would be contary 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.

Source: UEA s. 170.

171. Orders of court. 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.

Source: UEA s. 171.

172. Further or other order. 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.

Source: UEA s. 172.

173. No secondary or other evidence. 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.

Source: UEA s. 173.

174. Claims before lower courts. 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 to the Court of Queen's Bench for determination in accordance with sections 168 to 173.

Source: UEA s. 174. Varied for provincial application.

175. Appeals. An appeal lies to the Court of Appeal from an order of the Court of Queen's Bench under s. 171 or 172.

(2) Time limit for appeals. 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.

(3) Appeals to Supreme Court of Canada.

Deleted.

Purported regulation of appeals to the Supreme Court of Canada beyond the powers of the province.

Source: UEA s.175(1) and (2).

Privilege for Psychiatric Assessment

176. Psychiatric assessment. 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.

Source: UEA s. 176.

Privileges Relating to Marriage

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

Source: UEA s. 177.

178. Privilege. 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.

Source: UEA s. 178.

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

Source: UEA s. 179.

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

have bveen made in confidence.

Source: UEA s. 180.

181.(1) Who may make claim. 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.

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

Source: UEA s. 181.

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

(2) Further exception. 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.

Source: UEA s. 182.

183. Exceptions in criminal proceedings. 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.

Source: UEA s. 183.

184. Loss of privilege. 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 of disclosure of any significant part of the privileged statement, unless the production or disclosure is made in circumstances that give rise to a privilege.

Source: UEA s. 184.

185. Former privileges abolished. 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.

Source: UEA s. 185.

PART VI

DECISION MAKING POWERS

186. Implied terms in contracts. The trier of fact shall determine whether a contract contains an implied term.

Source: UEA s. 186

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

Source: UEA s. 187.

188.(1) Foreign law. Subject to sections 18 and 19, foreign law shall be determined by the court as a question of fact.

(2) Expert evidence. In making a determination under subsection (1), the court, except in a civil proceding where the parties agree otherwise, shall consider only the evidence adduced by qualified expert witnesses, whether legal practitioners or not.

(3) Where foreign law not proved. 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.

Source: UEA s. 188. Varied by reference to ss. 18 and 19.

Comment

If the term "foreign law" includes the law of provinces other than Alberta, as it customarily does for purposes of the conflict of laws, UEA s. 188, which requires that foreign law be proved, would be in conflict with ss. 18 and 19, which provide for the taking of judicial notice of laws of other provinces. S. 188 is therefore made subject to ss. 18 and 19. The latter will govern, but if there is a law of another province which they do not cover, proof could be made under s. 188 and s. 189.

189.(1) Notice of intention to produce foreign law. 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.

(2) Where notice not required.

Deleted.

Not applicable for provincial use.

Source of s. 189(1): UEA s. 189(1).

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

Source: UEA s. 190.

191. Formal defects. 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.

Source: UEA s. 191.

191.1(1) Enlargement and abridgment of time. Unless there is an express provision that this section does not apply, the court may enlarge or abridge the time appointed by this Act for doing any act or taking any proceeding on such terms as may be just.

(2) An enlargement may be ordered although the application therefor is not made until after the expiration of the time appointed or allowed.

Source: New. See Report paras. 2.54-2.57. (For form see R.648, Alberta Rules of Court.)

192. General power to comment. 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.

Source: UEA s. 192.

193. Appeal on admission or exclusion of evidence at trial. 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.

Source: UEA s. 193.

PART VII

EXAMINING WITNESSES FOR OTHER JURISDICTIONS

194. Interpretation. In sections 195 to 199,

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

"senior court" means a superior court of the province.

Source: UEA s. 194. Varied for provincial application.

195. Examination of a witness out of the jurisdiction of the court. 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.

Source: UEA s. 195.

196.(1) Order for examination. 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.

(2) Appropriate directions and enforcement. 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.

Source: UEA s. 196.

197. Conduct money and expenses. 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.

Source: UEA s. 197.

198.(1) Right to refuse answer or production. 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 incriminate him; 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.

(2) Applicable provincial law. 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.

Source: UEA s. 198. Varied. Right to refuse to answer on grounds of civil liability deleted. See Report paras. 2.24 to 2.34.

199. Rules of court. 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.

Source: UEA s. 199.

PART VIII

TAKING EVIDENCE IN OTHER JURISDICTIONS

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

(2) Interpretation. 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, charge d'affaires, counsellor, secretary, attache, 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.

(e) a commissioned officer of the Canadian forces on full time service.

Source: UEA s. 200. The word "Alberta" inserted twice in s. 200(1) to make applicable for provincial use. Source of S. 200(2)(e): AEA s. 49. Added to fill lacuna; see Report para. 2.83.

201. Oaths, etc., taken out of the jurisdiction by persons authorized in the jurisdiction. Any oath, solemn affirmation, affidavit or declaration administered, taken

or received out of Alberta by a person authorized to do so in Alberta and in the manner so authorized has the same effect as if it had been administered, taken or received by that person in Alberta.

Source: UEA s. 201. Varied for provincial application.

202. Document admissible in evidence. 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.

Source: UEA s. 202.

203. Lack of oath or solemn affirmation. 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.

Source: UEA s. 203.

PART IX

REPEAL, TRANSITIONAL AND COMMENCEMENT

Alberta Evidence Act

204. R.S.A., c. C-21. The Alberta Evidence Act is repealed.

The Hospitals Act

205. R.S.A., c. H-11. The Hospitals Act is amended by adding the following after s. 29:

29.1. A witness in an action, whether a party to it or not,

(a) is not liable to be asked and shall not be permitted to answer any question as to any proceedings before a committee to which this subsection applies, and

(b) is not liable to be asked to produce, and shall not be permitted to produce, any report, statement, memorandum, recommendation, document or information of, or made by or made to, a committee to which this subsection applies and that was used in the course of or arose out of any study, investigation, research or programme carried on by a hospital or any such committee for the purpose of medical education or improvement in medical or hospital care or practice.

(2) Subsection (1) applies to the following committees:

(a) a tissue committee of a hospital;

(b) a research committee of a hospital;

(c) a medical staff committee established for the purpose of studying or evaluating medical practice in a hospital;

(d) a medical committee designated by an order of the Minister of Hospitals and Medical Care as an approved medical committee for the purpose of this section.

(3) The Minister of Hospitals and Medical Care shall not make an order under subsection (2)(d) with respect to a medical committee unless he is satisfied that the committee consists only of physicians and functions primarily for any or all of the following purposes.

(a) conducting medical research;

(b) furthering medical education;

(c) improving medical care or practice.

(4) Subsection (1) does not apply to original medical and hospital records pertaining to a patient.

(5) Notwithstanding that a witness in an action

(a) is or has been a member of,

(b) has participated in the activities of,

(c) has made a report, statement, memorandum or recommendation to, or

(d) has provided information to,

a committee to which subsection (1) applies, he is not, subject to subsection (1), excused from answering any question or producing any document that he is otherwise bound to answer or produce.

(6) Neither

(a) the disclosure of any information or of any document or anything contained in a document, or the submission of any report, statement, memorandum or recommendation, to any committee to which subsection (1) applies, for the purpose of its being used in the course of any study, investigation, research or program carried on by a hospital or any such committee for the purpose of medical education or improvement in medical or hospital care or practice.

nor

(b) the disclosure of any information, or of any document or anything contained in a document, that arises out of such a study, investigation, research or program,

creates any liability on the part of the person making the disclosure or submission.

Source: AEA s. 9.

Comment

We neither recommend the continuance nor the deletion of this section. We suggest that if the section is to be continued, it should be incorporated into the Hospitals Act, but expects that legislative counsel will consider whether that is where it should appear. See Report paras. 2.89-2.90.

Judicature Act

206. R.S.A., c. J-1. Section 12 of the Judicature Act is repealed.

Source: New.

Comment

Judicature Act s. 12 provides for the taking of judicial notice of the laws of other provinces. Its subject-matter is covered by draft AEA ss. 18 and 19, which follow UEA ss. 18 and 19. While we think s. 12 to be reasonably satisfactory we recommend acceptance of the UEA provisions for the sake of uniformity.

Maintenance and Recovery Act

207. R.S.A., c. M-2. S. 19(1) of the Maintenance and Recovery Act is repealed.

Source: New. See Report paras. 2.19-2.21.

Alberta Rules of Court

208. R.S.A., c. J-1. S. 47(1) of the Judicature Act is amended by deleting the period at the end thereof and adding the following: "and as amended by Alberta Regulation._____."

Source: New. Report paras. 5.1-5.19 and App. B. Number of Regulation to be inserted.

Transitional Provisions

209. Transitional proceedings. This Act applies to proceedings commenced before as well as after the commencement of this Act.

Source: New. See Report paras. 6.3-6.6.

Commencement

210. Coming into force. This Act shall

come into force on a day to be fixed by proclamation.

Source: UEA s. 214.

APPENDIX C

DRAFT OF A PROPOSED OATHS, AFFIRMATIONS AND WITNESSES ACT

PART 1

OATHS AND AFFIRMATIONS

1. Right to affirm. Whenever it is lawful to administer an oath to any person, such person shall be entitled instead to make a solemn affirmation if he so desires.

Source: S. 1(1): New. See Report paras. 3.2 - 3.6.

2. Administration of oath or solemn affirmation. (1) Any person to whom it is lawful to administer an oath shall be asked prior to its being administered whether he wishes to take an oath or to make a solemn affirmation.

(2) When an oath or solemn affirmation is duly administered and taken or made, that oath or solemn affirmation shall be valid for all purposes notwithstanding that subsection (1) has not been complied with.

(3) When an oath is duly administered and taken, that oath shall be valid for all purposes notwithstanding that at the time of taking the oath the person to whom it was administered has no religious belief.

Source: S. 2(1) and (2): New. S. 2(3): AEA s. 15(2).

3. Binding effect. (1) An oath or solemn affirmation binds the person taking or making it if it has been administered in a form and with such ceremonies as he may

declare as binding.

(2) An oath, solemn affirmation or solemn declaration binds the person taking or making it if it has been administered in a form set out in section 4 or section 5 or prescribed by an Act or regulation notwithstanding that such person does not expressly declare that form to be binding.

Source: AEA s. 15(1). Form varied. S. 3(2): New.

4. Form of oath and solemn affirmation. (1) An oath may be administered to a witness in the following form:

> The person taking the oath shall hold the Bible, the New Testament, or the old Testament in the case of an adherent of the Jewish religion, and the officer administering the oath shall say: "You swear that the evidence you give touching the question in this action or matter shall be the truth, the whole truth, and nothing but the truth. So help you God", to which the person sworn shall say "I do" or give his assent thereto in a manner satisfactory to the court or to the officer administering the oath.

(2) An oath may be administered to a person making an affidavit in the following form:

> The officer administering the oath shall say: "You swear that the contents of this your affidavit are true. So help you God", to which the person making the affidavit shall say "I do" or give his assent thereto in a manner satisfactory to the officer administering the oath.

(3) A witness may make a solemn affirmation in the following form:

> The officer obtaining the affirmation shall say: "You solemnly affirm that

the evidence you give touching the question in this action or proceeding shall be the truth, the whole truth and nothing but the truth", to which the witness shall say "I do" or give his assent thereto in a manner satisfactory to the court or to the officer obtaining the solemn declaration.

(4) A person making an affidavit may make a solemn affirmation in the following form:

The officer obtaining the solemn affirmation shall say: "You solemnly affirm that the contents of this your affidavit are true", to which the person making the affidavit shall say "I do" or give his assent thereto in a manner satisfactory to the officer obtaining the solemn declaration.

Source: S. 4(1): AEA s. 16. Varied. S. 4(2), (3) and (4): New.

5. Solemn declaration. Any person authorized by law to administer oaths or to take affidavits in any matter may receive the solemn declaration of any person making it before him, in the following form, in attestation of the execution of any writing, deed orinstrument or of the truth of any fact or of any account rendered in writing:

I, A.B. solemnly declare that (state the fact or facts declared to), and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

Declared before me . . . . . at . . . . this . . . . day of . . . . 19 . . .

Source: AEA s. 19.

PART II

OATHS OF OFFICE

6.(1) Oath of allegiance. When by a statute of Alberta a person is required to take an oath of allegiance it shall be taken in the following form:

> I, ..., swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors, according to law.
>
> So help me God.

(2) Where the name of Her Majesty Queen Elizabeth the Second is expressed in the form, the name of the Sovereign at the time that the oath is taken shall be substituted therefor if different.

Source: Oaths of Office Act, s. 1.

7. Official oath. When by a statute of Alberta a person is required to take an official oath on

(a) being appointed to an office other than that of judge or justice of the peace, or

(b) being admitted to a profession or calling,

the oath shall be taken in the following form:

> I, ..., swear that I will diligently, faithfully and to the best of my ability execute according to law the office of . . . .
>
> So help me God.

Source: Oaths of Office Act, s. 2.

8. Judicial oath. When by a statute of Alberta a person is required to take a judicial oath on his appointment as a judge or as a justice of the peace, the oath shall be taken in the following form:

> I, ..., swear that I will honestly and faithfully and to the best of my ability exercise the powers and duties of a . . . .
>
> So help me God.

Source: Oaths of Office Act, s. 3.

9. Affirmation. When on the administering of an oath prescribed by sections 6, 7 or 8 of this Act the person about to take the oath is permitted by law to make a solemn affirmation or declaration instead of taking an oath, the person may make a solemn affirmation in the prescribed form of the oath, substituting the words "solemnly swear and truly declare and affirm" for the word "swear", and omitting the words "So help me God."

Source: Oaths of Office Act, s. 4.

PART III

EXTRA-PROVINCIAL OATHS, AFFIRMATIONS, AFFIDAVITS AND DECLARATIONS

10. Application. This Part does not apply to oaths, affirmations, affidavits and declarations to which the Alberta Evidence Act applies.

Source: New.

11.(1) Oaths, etc., taken out of the jurisdiction. Any oath, affirmation, affidavit or declaration administered, taken or received out of Alberta by an official

mentioned in subsection (2) has the same effect as if it had been administered, taken or received in Alberta by a person authorized to do so.

(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, affirmation, affidavit or declaration is administered, taken or received:

(a) a judge, magistrate or officer of a court or 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, charge d affairs, counsellor, secretary, attache, counsul-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.

(e) a commissioned officer of the Canadian forces on full time service.

Source: Draft AEA s. 200.

12. Oaths, etc., taken out of the jurisdiction by persons authorized in the jurisdiction. Any oath, affirmation, affidavit or declaration administered, taken or received out of Alberta by a person authorized to do so in Alberta and in the manner so authorized has the same effect as if it had been administered, taken or

received by that person in Alberta.

Source: Draft AEA s. 201.

PART IV

WITNESSES

13. Action against witness disobeying subpoena. When a witness who has been

(a) served in due time with

(i) a subpoena issued out of any court in Alberta, or

(ii) a notice authorized instead thereof, and

(b) paid his proper witness fees and conduct money,

defaults in obeying the subpoena or notice without any lawful and reasonable impediment, the witness, in addition to any penalty he may incur for a contempt of court, is liable to an action, on the part of the person by whom or on whose behalf he has been subpoenaed or summoned, for any damage that that person sustains or is put to by reason of the default.

Source: AEA s. 22.

PART V

SUBPOENAS

14. Government employees and documents. A subpoena shall not issue out of a court requiring

(a) the attendance of an employee employed by the Government or by the Legislative Assembly of

Alberta, whether his employment is permanent or temporary, or

(b) the production of a document of a Department in the official custody or possession of an employee referred to in paragraph (a)

without an order of the court.

Source: AEA s. 35(3). See report paras. 3.14 - 3.15.

PART VI

REPEAL AND COMMENCEMENT

15. RSA, c. O-1. The Oaths of Office Act is repealed.

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

APPENDIX D

DRAFT AMENDMENTS TO ALBERTA RULES OF COURT

1. The Alberta Rules of Court are hereby amended.

2. The following Rule is added before Rule 230 and after the heading "Admissions":

> 229.1(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.
>
> (2) Nothing in this rule prevents a party from adducing evidence to prove a fact or matter admitted by another party, but 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.

Source: UEA s. 17(1), (3). See Report paras. 5.3 - 5.7.

3. Rule 218 is amended as follows:

(a) by striking out subsection (1) and substituting the following:

> (1) This rule applies to the appointment by the court of an independent expert.

Source: New. See Report paras. 5.8 - 5.10.

(b) by striking out subsection (2) and substituting the following:

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

Source: R. 218(2) and UEA s. 44(2). See Report para. 5.10.

(c) By striking from subsection (4) the words and commas ", verified by affidavit,"

Source: UEA s. 45. See Report para. 5.10.

(d) By striking out subsection (6) and substituting the following:

(6) Any party may cross-examine an expert appointed under subsection (1) 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.

Source: R. 218(6) and UEA s. 47. See Report para. 5.10.

(e) By striking out subsection (7) and substituting the following:

(7) 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 supplementary reports.

Source: R. 218(7) and UEA s. 44(3). See Report para. 5.10.

4. Rule 247 is struck out.

Source: New. Subject matter covered with variations by draft AEA s. 107. See Report paras. 5.11 to 5.14.

5. Rule 274 is struck out and the following is substituted:

274. Every witness shall be required,

before giving evidence, to identify himself and take an oath or make a solemn declaration.

Source: UEA s. 95. See Report paras. 5.11 - 5.14.

APPENDIX E

DISPOSITION OF THE PROVISIONS OF THE ALBERTA EVIDENCE ACT

(This Appendix is provided as a guide to the reader who wishes to follow a provision from the existing Alberta Evidence Act to the proposed Alberta Evidence Act (PAEA) or to the proposed Oaths, Affirmations and Witnesses Act (OAWA) which are Appendix A and Appendix B to this Report, or to the Rules in the Alberta Rules of Court referred to in Appendix C. Statements about the relative effect of old and new provisions are necessarily statements of opinion as to which there may be divergences of view and indeed later judicial disagreement, however, and it is for this reason that we refer to this Appendix only as a guide which the reader should use only to help him to form his own opinion.)

Existing AEA section	Disposition
S. 1. Definitions	Not carried forward.
S. 1. Application	See PAEA Ss. 3, 3.1 and 3.2. Variations with respect to application to interlocutory civil proceedings and sentencing proceedings and to tribunals other than traditional courts.
S.3. Witnesses: incapacity from crime or interest.	PAEA S. 89. Substantially the same.
S. 4(1). Competence of parties.	PAEA S. 89. Substantially the same.
S. 4(2). Competence of spouses.	PAEA S. 89: Same in civil actions. PAEA S. 92: Varied for provincial offences.

S. 4(3). Competence of accused.	PAEA S. 91. Varied. Accused incompetent for Crown. And competent but not compellable for defence in joint trial.
S. 5.	PAEA S. 185(a). Same.
S.6. Use immunity for self-incriminating evidence.	PAEA S. 161. Varied. Corporations excluded. Protection need not be claimed.
S. 7. Privilege concerning adultery.	PAEA S. 185(d). Privilege abolished.
S. 8. Marital privilege.	PAEA Ss. 178 to 184. Important changes.
S. 9. Confidentiality of hospital committees.	PAEA S. 205. Incorporated in Hospitals Act as s. 291.
S. 10. Limitation on expert witnesses.	PAEA S. 43. Varied. Number increased. Applied per proceeding and not per issue.
S. 11. Corroboration: Breach of promise of marriage.	PAEA S. 125.1(1). Abolished.
S. 12. Corroboration: Claims by and against estates.	PAEA S. 125(1). Same.
S. 13. Corroboration: Claims by and against mental incompetents.	PAEA S. 125(2). Same.
S. 14. Principal and agent:	Not carried forward.

S. 15(1).	OAWA s. 3(1).
S. 15(2).	OAWA s. 2(3).
S. 16.	OAWA s. 4(1).
S. 17.	Not carried forward. But see OAWA s. 4(1) and (2).
S. 18.	OAWA s. 2. Varied to make solemn affirmation equally available. Provision for objection to competence not carried forward.
S. 19.	OAWA s. 5.
S. 20(1). Evidence of children: Admission.	PAEA s. 97. Varied.
S. 20(2). Evidence of children: Corroboration.	PAEA S. 125.1(1): Requirement of corroboration abolished. S. 125.1(2)(a):Caution to be given.
S. 21.	PAEA S. 126. Same.
S. 22. Civil action against non-appearing witness.	OAWA s. 13. Same.
S. 23(1). Cross-examination on previous statement.	PAEA S. 115(1)(a). Varied.
S. 23(2). Contradiction by previous statement.	PAEA S. 115(2). Same effect.
S. 23(3).	PAEA S. 119. Same effect.

S. 24(1). Proof of prior statement.	PAEA S. 117. Same effect
S. 24(2). Drawing statement to witness' attention.	PAEA S. 115(2). Same effect.
S. 25(1).	Accused: PAEA ss.124, 25(3)(c). Non-accused: PAEA s. 103. Substantial variations.
S. 25(2). Proof of conviction.	PAEA S. 103(2), 82(1), 124(3).
S. 25(3). Fee.	Not carried forward.
S. 26(1). Impeachment and contradiction of party's witness.	Impeachment: PAEA S. 122. Contradiction: PAEA S. 104. Similar effect.
S. 26(2). Contradiction by previous statement.	PAEA S. 104. Varied.
S. 26(3). Reference to inconsistent statement.	PAEA S. 115(2). Varied.
S. 27. Admissibility of previous court proceedings.	PAEA Ss. 77-82. Some extensions and modifications.
S. 28(1). Proof of letters patent.	PAEA S. 146(b)(iv) as to letters patent. S. 147(d). Same effect.
S. 28(2). Exemplifications.	PAEA Ss. 146(b)(iv), 147(d). Same effect.
S. 29. Evidence of statutes, etc.	PAEA Ss. 146, 147. Same effect.

S. 30. Proof of proclamations, regulations, etc.	PAEA Ss. 146, 148. Same effect.
S. 31. Orders in council.	PAEA S. 146(b)(ii), s. 148. Same effect.
S. 32. Official gazettes.	PAEA S. 146(a). Same effect.
S. 33. Judicial notice of statutes, etc.	PAEA S. 18. Same effect.
S. 34(a). Certified copies of official documents.	PAEA S. 146(b)(iii). S. 148. Same effect
S. 34(b). Copies of certain documents.	PAEA S. 150. Same effect.
S. 35(1), (2), (4), (5) and (6). Crown privilege.	PAEA Ss. 165-175. Varied substantially.
S. 35(3). Subpoenas of government employees and documents.	OAWA S. 13. Same.
S. 36(1). Government records.	Admissibility: PAEA Ss. 152, 153. Admissibility of copy: s. 133(f). Authentication: s. 141(c). Hearsay exception (but not "prima facie proof"): s. 65(1)(k). Otherwise substantially the same.

S. 36(2). Issue of licenses.	Admissibility: PAEA Ss. 152, 153. Admissibility of copy: s. 133(f). Authentication: s. 141(c). Hearsay exception (but not "prima facie proof"): s. 65(1)(k). Non-issue: s. 154(2). Substantially the same.
S. 36(3). Affidavit: Proof of official character.	Affidavit often not required: PAEA S. 141. If affidavit required under s. 155(2), s. 155(3) is to same effect as AEA s. 36(3). Substantially the same.
S. 37. Vital statistics records.	Certified copy probably admissible as of right as a public record (PAEA S. 145, 146(b)(iii), s. 148). If not, as a business record (s. 152), and would require proof of unavailability of original or duplicate (s. 133(f)).
S. 38. Weighmaster's certificate.	Business record (PAEA S. 152). Presumed authentic (s. 141(a)). Admissible as copy (s. 133(f)). Admissible as hearsay exception (s. 65(1)(k)). Same effect.
S. 39(1). Copy of public book or document.	Public record (PAEA S. 154), admissible by certified copy (s. 146(b)(ii)) or s. 146(b)(iii). Certification: self-authenticating (s. 148).
S. 39(2). Fee.	Not carried forward.
S. 40. Probative force.	PAEA S. 159. Same effect.

S. 41. Photographs of documents and records.	Carried forward with some variations. See PAEA Ss. 130, 132 and 136. See also notice requirement under s. 139.
S. 42. Bank records.	PAEA S. 152 makes these "business records". See related provisions. Substantially the same effect.
S. 43(1). Signatures of judges, etc.: Judicial notice.	No comparable provision. General effect achieved by self-authentication provisions: PAEA S. 82(2), 148, 149(1), 150(1), 202.
S. 43(2). Canadian Transport Commission signatures: judicial notice.	No comparable provision. If public record (PAEA S. 145) certification is self-authenticating (s. 148).
S. 44(1). Self-authentication of official signatures.	PAEA S. 148. Same effect.
S. 44(2). Copies: print, written, or partly both.	Not carried forward. Unnecessary.
S. 45. Proof of judgments, etc.	PAEA S. 149. See also S. 150. See R 246 re Queen's Bench documents. Same effect.
S. 46. Notarial documents.	PAEA S. 151. Similar effect.

S. 47. Notarial protests and notes of notices.	As to authentication, PAEA S. 141(e), (f). Same effect. As to exception from hearsay rule, PAEA s. 65(1)(k). Same effect, except not prima facie evidence.
S. 48. Oaths, etc., outside Alberta.	PAEA Ss. 200, 201, 202. OAWA Ss. 10, 11. Similar effect. Some variations.
S. 49. Officer in the Canadian forces.	PAEA S. 200(2)(e), 202, 142(d). OAWA S. 11(2)(e), 12. Same effect.
S.50. Defective affidavits, etc.	PAEA S. 191. See also R. 306. Same effect.
S. 51. Examinations and depositions.	PAEA S. 150. Similar effect. See also Rules 212(3), 215(1), 281(3) and 282.
Ss. 52, 53. Proof of wills, etc.	PAEA Ss. 149, 150. Similar effect.
S. 54. Documents from the Land Titles office.	PAEA S. 141(a), s. 141(c). Similar effect.
S. 55(1), (2) and (3). Non-deposit of original government document. Evidence by copy.	PAEA S. 159.2. Same effect.
S. 55(4). Fees.	Not carried forward.
S. 56. Requirement to admit copy.	Not carried forward. Substance covered by R. 190, 230.

S. 57. Foreign commissions.	PAEA Ss. 194-199. Minor variations.
S. 58. Abolition of requirement of proof by attesting witness.	Not carried forward. Unnecessary.
S. 59. Comparison of disputed writing.	PAEA S. 41. Varied.
S. 60. Impoundment of documents.	PAEA S. 159.1. Similar effect.
S. 61. Statements in old documents.	PAEA S. 65(1)(d). Some omissions. Less evidential force.
S. 62. Proof of old documents.	PAEA S. 141(e).
S.63. Common law proof preserved.	Not carried forward. Unnecessary.
S. 64. Death of serviceman.	Not carried forward. Unnecessary.