

"Source: *Report on Evidence, 1975.*

**Department of Justice Canada. Reproduced
with the permission of the Minister of Public
Works and Government Services Canada, 2006."**



Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

REPORT

evidence

1

Canada

**FIRST REPORT
EVIDENCE**

©Minister of Supply and Services Canada 1977

Available by mail free of charge from:

Law Reform Commission of Canada

130 Albert St., 7th Floor

Ottawa, Ontario K1A 0L6

Catalogue No. J31-15/1975

ISBN 0-662-51261-8

Reprinted 1977, 1981, 1982 and 1983



Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

December 1975

The Honourable S. R. Basford,
Minister of Justice,
Ottawa, Ontario.

Dear Mr. Minister:

In accordance with the provisions of Section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission on the laws of Evidence.

Yours respectfully,

E. Patrick Hartt
Chairman

Antonio Lamer
Vice-Chairman

J. W. Mohr
Commissioner

G. V. La Forest
Commissioner

**REPORT
ON
EVIDENCE**

Table of Contents

Acknowledgments	ix
Introduction	1
Evidence Code	13
Comments on Evidence Code	49
Comments on Specific Sections	51
Comments on Structure	109
Publications	115

Acknowledgments

During the four and a half years the Commission was engaged in working on the law of evidence, it benefited greatly from the assistance of many individuals, the Bar, and other professional groups and organizations. To all of these we express our appreciation. A special debt of gratitude is owing to the British Columbia Law Reform Commission which (while it bears no responsibility for the end result) cooperated with us throughout and provided us with valuable comments on several drafts. We would also like to thank Chief Justice Fatzer and the Supreme Court of Kansas who (through the instrumentality of Judge Spencer Gard, who chaired the Committee that produced the Uniform Code in the United States) provided us with valuable insights regarding the manner an Evidence Code works in practice. Finally we should like to express our appreciation to the following former Commissioners and consultants who actively participated in the work of the project:

Special Consultant

Neil Brooks

Other members of Project Staff

Jean-Louis Baudouin

Judge Ronald J. Delisle

Judge René J. Marin
Graham Murray
Judge H. G. Oliver

Outside consultants

Anthony Doob
Bruce McDonald
Stanley A. Schiff
Paul C. Swingle
E. A. Tollefson

Former Commissioners

Mme. Justice Claire Barrette-Joncas
Dean Martin L. Friedland
John D. McAlpine
Mr. Justice William F. Ryan

Secretary

Jean Côté

Introduction

The Problem

No facet of a lawyer's work so fascinates the layman as his skills at trial. One need only mention the popularity a few years ago of such television programs as *Perry Mason* to demonstrate this. Perry's ability to ferret the truth out of witnesses, to obtain evidence and to get it admitted, to outmanoeuvre his opponents—these were the essential ingredients that kept viewers watching over a period of several years.

But if the public finds trials and trial tactics splendid fare as drama, those who are involved with them in real life are somewhat less enthused by it all. Probably no part of law is less attractive to them (unless perhaps it is the language of the law, about which we will have more to say later). They are confronted with technical, and what seems to them sometimes arbitrary, rules when they seek to tell the truth as they know it. Evidence commonly accepted by reasonable men in determining facts is rejected as hearsay, or because it is thought prejudicial to a party, or for other cause. And the litigant is sometimes appalled by the consequent delay—and the expense. As George Herbert put it: "Lawsuits consume time, and money, and rest and friends."

Such complaints are well-nigh universal. An Italian proverb perhaps says it best: "In the lawyer's garden, a trial is a fruit tree that takes root and never dies."

If complaints about the length, complexity—and costs—of trial are universal, the rules for the admission of evidence under our system of administering justice make our trial procedure an even better target for this kind of criticism than the system prevailing in other western countries. For there can be no doubt that the difference between the common law system of evidence and that prevailing in other western countries is very great. In fact, it can in a general way be said that these countries do not have rules of evidence in the sense of rules governing the admission of evidence. Why, it may fairly be asked, do we need such a body of rules when it so materially adds to the costs of trial? After all, not only European courts but many of our administrative boards and arbitral bodies of all kinds get along very well without these, and the latter often deal with questions that are at least as important as many coming before the courts.

Why We Have Rules of Evidence

This question cannot be answered without some broad general comparison between the nature of a trial under our system and under the European system. The European system is essentially “inquisitorial”. The judge plays a central role in assembling the evidence. He decides what witnesses shall be summoned, he asks the questions, and the process of taking evidence generally takes place before the trial proper. There is, moreover, considerable emphasis on written evidence including notarially attested records of every sort of transaction. Our system by contrast is an “adversarial system”, one in which each party presents the evidence to support his version of the facts, and the judge in general acts as an impartial arbiter to hear and determine the issues. Not that the judge is a mere umpire. He must, when need be, intervene in the interests of justice, for justice is what the process is about. But he must as much as possible avoid joining in the fray lest his impartiality be affected. As Lord Bacon put it, “an over-speaking judge is no well-tuned cymbal”. So the parties are left with considerable leeway to present their case. But subject to rules—the rules of evidence.

No doubt champions can be found to contest either side of the question whether the inquisitorial or adversarial system is best suited to elicit the truth. Suffice it to say that, on the whole, the adversarial system has served that purpose well. It also serves other purposes as well. No judicial system better answers the need for impartiality and the appearance of impartiality in judicial proceedings. Moreover, as presently organized, our courts serve as a bulwark against the arbitrary power of the state, and are perceived as serving that end. Consequently, as we observed in our Working Paper on *Discovery*, there is no justification for the radical readjustment a change to an inquisitorial process would call for. The adoption of European-style rules and practice in regard to evidence would mean a new kind of judiciary and a wholly new structure for the administration of justice.

But if we retain the adversarial system we must accept certain consequences for the law of evidence. A system that requires the parties to present the evidence presupposes at least a discretion in the judge to scrutinize the evidence to make sure it is relevant; to guard, particularly when there is a jury, against less reliable evidence being given too much weight; to ensure that there is no undue consumption of time by, for example, presenting exceptionally large numbers of witnesses to prove a point; and to make sure that certain types of evidence are excluded for extrinsic policy grounds (for example, to protect state secrets), and so on. And a system that permits the parties to question witnesses must ensure, on the one hand, that counsel does not "lead" his witnesses into giving the story he seeks, regardless of the truth, or on the other hand, permit the adverse party to badger or intimidate his opponent's witnesses. Much of this could, it is true, be done by simply giving a judge an unfettered discretion, without burdening him with specific rules to govern that discretion. This is frequently done by administrative boards and *ad hoc* arbitrators employing an adversarial system. But consistency in the administration of justice is important, and that cannot be achieved by courts spread throughout the length and breadth of the land unless there are rules to guide discretion. Moreover, it is important that those preparing for trial know what facts are to be considered. So we have rules of evidence.

Must Evidence be so Complicated?

If a case can be made for rules of evidence, it by no means follows that they need be as complicated as they have become. And complicated they are—and hard to find! Wigmore—the great American authority on evidence—takes eleven hefty tomes to set forth the law of evidence. And Phipson, the English authority whose work is widely used in Canada, has a collection of 7,000 precedents and thus, which as Dean Wright caustically remarked in reviewing its republication, is “as helpful as past volumes in providing ample authority to prove that almost anything is inadmissible” as evidence. Present evidence law has rightly been categorized as “a proliferation of ostensible legal rules, refinements of rules, distinctions in the refinements, refinements and distinctions in the exceptions, and so forth *ad infinitum*”.

How then is a judge in the heat of a trial expected to cope when fine points regarding the admissibility of evidence may be raised at any time? And how can he be expected, often on the spur of the moment, to assess numerous conflicting or narrowly distinguishable precedents cited by opposing counsel? The simple fact is: he can't. No one can fully master Wigmore's or Phipson's or the welter of judicial precedents that make up evidence law. The law of evidence functions because it is often ignored. Surely this is not good enough. For it means that the law is unevenly applied, a problem that is all the more serious where opposing parties are not equally matched.

Why, it may be asked, are the rules of evidence so complex? Well, partially it is owing to the nature of jury trials, and partially to what in retrospect must be seen as a misuse of the doctrine of precedents. In a trial by jury, the jury decides what the disputed facts are, the judge being the judge of law. But when trial by jury was developing, the jurors were largely simple, unlearned men, often lacking experience. So it was necessary for the judge not only to determine whether evidence was relevant, but also to reject evidence such as hearsay, to which inexperienced persons might attach undue weight, and generally to control the trial. As judges made rulings, often wise in context—though, of course, not invariably so—these rulings were taken as precedents to be followed in similar cases. Where these did not quite fit or were

thought unwise, distinctions were made by later judges. And sometimes statutory amendments, often narrowly written and construed, were made. All of this has led to the complicated state of affairs already described.

Much of the factual underpinnings for this manner of proceeding has now vanished. An all but negligible number of civil cases and at least 95% of criminal cases in Canada are now tried by a judge alone, so there is no need for all the precautions about what is to be allowed in evidence now. Judges are experienced in weighing evidence and, in any event, they have to learn of disputed evidence to determine whether it is admissible or not. Even where there is a jury, the situation is profoundly different from the past. Jurors today are far more sophisticated and better educated than in the past.

Our Solution

While we are satisfied that rules of evidence are necessary to maintain a reasonable degree of consistency in court procedure, the time has surely come for a reformulation on broader lines. What is needed are easily available, clear and flexible rules. As in the case of any rules of procedure, a measure of discretion must be given the presiding officer—here the judge—to apply them in a reasonable manner. One cannot provide for every eventuality that can arise without getting lost in the thicket.

We are not, of course, recommending a clear break with the past. Indeed what we are proposing is a distillation of the experience of the past so that it can be rationally used. Many of the existing rules are sound and well-tested, and have the advantage of being familiar to the profession. We would retain these. Some, though generally sound, have simply become too detailed and complex for easy accessibility and application. We would reformulate these on broader lines. Others are partially anchored in past situations that have changed. We would modify these to meet new conditions. And finally there are rules that are based on situations that have been entirely superseded, and others that were the result of blunders in the first place. We would repeal these.

Fortunately we are not without guidance in this endeavour. Much of the work has already been done for us in the United States. There, some of the greatest names in evidence law have laboured for many years to rationalize this branch of the law. The end result has been the production of codes and uniform rules, the influence of which is increasingly felt not only in the United States but in other countries as well.

In devising our own code of evidence we have relied on American experience, but we have not slavishly followed it. Our Evidence Project worked for several years in studying our own laws and seeing how they might best be rationalized. The Project's work was submitted for comment to the profession which did so both in public and private meetings and in written communications with the Commission. These were then reviewed by a task force within the Commission before being submitted to the Commission. We agonized over each individual rule, and we attempted to adapt them to the Canadian setting.

The Nature of the Rules

We can now turn to a brief general discussion of the rules we propose. The purpose of the code is set forth in the first section. It is that the truth be ascertained and judicial proceedings justly determined without unjustifiable expense and delay, while protecting other important social interests. To that end the basic rules of the common law are subjected to rational simplification, in clear, orderly and flexible rules. These, by section 2, are to be liberally interpreted, and the rule that statutes in derogation of the common law are to be strictly construed is not to apply to the code. The comprehensiveness of this approach is assured by the provision in section 3 that any matters of evidence not provided for in the rules shall be interpreted in the light of reason and experience so as to secure the purpose of the code. This section makes the rules a code; it replaces the common law.

The general approach of the rules can be demonstrated by reference to the cardinal principles regarding the admissibility of evidence set forth in sections 4 and 5. The first provides that all relevant evidence is admissible, unless expressly excluded by some other rule or statute. The second gives the judge a discretion to

exclude evidence where its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or cause undue prejudice, confuse the issues, or mislead the jury.

Section 4 substantially reflects the basic postulate of existing evidence law: that all relevant evidence is admissible unless excluded on some ground of policy. But this postulate is now so buried in a myriad of precedents that it can hardly be perceived. Indeed, the present law of evidence resembles nothing so much as a confused and multifaceted attempt to exclude relevant evidence. Section 4 not only sets forth the basic principle. In one stroke it abolishes all rules excluding evidence unless they are reinserted in the code. And this is done only on the basis of some rational policy. Section 4 performs yet another function. It properly recognizes that relevant evidence is a matter of logic and good sense. Particular cases can be looked at for the light they can shed, but they do not constitute an impediment to experienced judgment.

Section 5 is the major rule excluding evidence, and is illustrative of the rational foundation of the various other rules excluding evidence. Judges have always exercised discretion to keep out evidence when it was unduly time consuming, or excessively prejudicial to a party, or misleading or confusing. This is necessary if proceedings are to be fair and be concluded within a reasonable period of time. What the section does is to state a principle of general application to replace a common law rule that had been widely applied to specific situations. Like section 4 it does away with senseless, time consuming and expensive digging for precedents.

Section 5 also belies the criticism that codification makes for rigidity. What it provides is flexibility within the rule by giving the judge adequate discretion. Not an open-ended discretion but a judicial discretion, one to be exercised on the basis of principle. Thus he may reject evidence the probative value of which is slight—it must be *substantially* outweighed by the danger of undue consumption of time, or of confusion, and so on. This clarity in the limit and scope of judicial discretion is hardly characteristic of common law evidence.

The policy grounds supporting section 5—avoidance of the danger of unnecessary delay, of confusion, or of misleading the jury—are largely concerned with the hearing itself. More specific rules excluding evidence are supported by similar considerations—for example, those regarding character and hearsay.

But judicial proceedings do not exist in a vacuum. The desirability of obtaining the truth in judicial proceedings is sometimes outweighed by other considerations. Many of the rules are grounded in such extrinsic policy considerations. This is true of most of the privileges, for example, the privilege against self-incrimination and of state secrets. These and others provide for the exclusion of relevant evidence on the ground that the policies they subserve outweigh the public interest in the administration of justice. Our tendency throughout, however, has been to seek clear justification for the exclusion of evidence that would assist in arriving at the truth. Occasionally the weighing of competing values cannot be done in the abstract. Here again we have given the judge a discretion but indicated the considerations to be weighed in exercising that discretion.

The foregoing discussion of the most basic principles of evidence illustrates the general structure of the code. The various parts set forth general principles, followed by specific exceptions, so that the law may be readily understood. These general rules rid us of all unnecessary common law rules. Not surprisingly, however, we have retained many of the common law rules, for many of these have well withstood the test of time. To these we have attempted to give better order and clarity of form. But we have not hesitated to excise useless growths and unnecessary complexities that have been added over the years. Each rule has been considered on the basis of reason, experience and practicality.

But we could not rid ourselves of all the unnecessary particularities of the past in one stroke. Take hearsay. It will be easier under the code to escape what has been called the “hearsay maze”, but we are confident that greater simplification can be made as lawyers become satisfied that triers of fact will give hearsay only such weight as it deserves. There are, as well, a number of provisions that are not, strictly speaking, necessary. In a few cases we thought it wise expressly to dispatch a few especially virile

dragons that clutter the legal landscape. Among these are the rule in *Hodge's* case and the rules governing corroboration which we have buried at the end of the code. We took a similar approach to others that appear to have died a natural death at common law, such as the ultimate issue rule whose shade (in common with other dubious rules) tends to be fitfully raised when all other hope of winning a case appears to have vanished. Sections of this kind could in a future revision be done away with—and forgotten.

A Word on Drafting

We also attempted to improve the way the rules were expressed to conform with the view of the Commission that laws should be stated as simply as possible. In this we have been influenced by Seneca's admonition that "A law should be brief in order that the unlearned may grasp it more easily." One might add that brevity and clarity are qualities from which the learned may also benefit. In any event, we are deeply conscious that laws—even the law of evidence—are not the sole possession of the lawyers, but belong to the people.

In attempting to give clarity of form we have occasionally departed from traditional ways of drafting. Thus, rather than confront the reader at the outset with a long list of definitions that can only be fully understood when the whole document has been mastered, we have tended to define matters in context (preceding a matter when necessary to an understanding of what follows; following it when the definition simply provides additional insights). We realize that the other method has the advantage of having the definitions where the informed reader knows they will be found. But the application of the definitions does not make this imperative in the code, and in any event the better way of getting the best of both worlds may well be to have the laws adequately indexed.

To further assist understanding we have added comments to the various rules. These we hope will be helpful not only to persons learned in the law but to other concerned citizens. We think the publication of at least the more important statutes with explanatory notes of this kind would be a useful way to promote knowledge of the law among laymen.

Bilingualism and Bijuralism

In constructing the code we have been greatly influenced by models devised in civil law jurisdictions. This seemed both natural and wise since these jurisdictions have had far more experience in this type of endeavour than those governed by the common law. At the same time we have retained the traditions of common law legislation that appeared better adapted to our needs. This is in keeping with our statutory mandate that our recommendations for reform should involve "the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions."

We have as well not confined ourselves to a slavish word for word reproduction in the English and French versions. Rather we have attempted to render the substance of each rule in terms and in a form appropriate to each language, although we have conformed to a common organization and structure for obvious reasons of convenience. To facilitate this endeavour we have avoided the technique of breaking up sections into paragraphs, except in the case of long or complicated enumerations. Whatever advantage this technique may have is more than outweighed in a bilingual country by the fact that this tends to cast one of the versions in a mould created for the other language. The marginal increase in clarity that such paragraphing yields is easily offset by that resulting from a comparison with another version expressed in accordance with the specific characteristics of the other language.

We do not think we have achieved anything like a definitive solution to the problems of statutory drafting in a country where bijural, as well as bilingual and bicultural problems must be met. Different adaptations may be required for different kinds of legislation. But we have undertaken an experiment that we hope will have seminal force.

Conclusion

We find it unnecessary further to discuss the individual rules. This is done in the comments to the code. We would also refer

those seeking more comprehensive treatment to the various study papers of the Evidence Project.

Given the detailed nature of the work, it should hardly give cause for surprise that there are minor disagreements about a few sections. These are set forth in the comments but there is a reassuring degree of unanimity on almost all of them. In any event some measure of disagreement is to be expected when one attempts to support law on grounds of rational policy, for there is often much to be said on both sides of any issue. Such debate, however, is surely preferable to disputations on whether the principle of an obscure case decided in 1885 may have been modified by an equally obscure judgment of 1910.

Whatever lack of unanimity there may be about specifics, of one thing we are sure. All of us are in full agreement that the need to reform the law of evidence is long overdue. We are convinced that the only rational way of effecting this reform is by a set of rules such as those we now propose. These, no doubt, will require adjustment in the light of experience as time goes on, but this can readily be done if one starts with a coherent structure. We do not regard as particularly progressive any reform that tends to add still more patches to the outlandish patchwork quilt we call the law of evidence.

EVIDENCE CODE

CONTENTS

	Sections
TITLE I — GENERAL PRINCIPLES.....	1— 5
PART I — PURPOSE AND CONSTRUCTION.....	1— 3
PART II — GENERAL RULES.....	4— 5
 TITLE II — DECISION-MAKING POWERS RESPECTING EVIDENCE.....	 6—11
 TITLE III — BURDENS OF PROOF AND PRESUMPTIONS.....	 12—14
PART I — BURDENS OF PROOF.....	12—13
PART II — PRESUMPTIONS.....	14
 TITLE IV — SPECIFIC RULES RESPECTING ADMISSIBILITY.....	 15—48
PART I — EXCLUSIONARY RULES.....	15—45
Exclusion Because of Manner Evidence Obtained.....	 15—16
Exclusion of Certain Circumstantial Evidence	17—45
<i>Character and Disposition</i>	17—20
<i>Preventive Actions</i>	21—23
<i>Compromises</i>	24—26
Hearsay.....	27—31
Privileges.....	32—45
<i>General</i>	32—37
<i>Particular Privileges</i>	38—45
PART II — AUTHENTICATION AND IDENTIFICATION.....	46—48

TITLE	V — METHODS OF ESTABLISHING FACTS.....	49—85
PART	I — GENERAL.....	49
PART	II — WITNESSES.....	50—73
	General.....	50—53
	Competence and Compellability.....	54—57
	Manner of Questioning Witnesses.....	58—61
	Credibility.....	62—66
	Opinion and Expert Evidence.....	67—73
PART	III — REAL EVIDENCE.....	74—81
	General.....	74
	Proof of Contents of Writings, Recordings and Photographs.....	75—81
PART	IV — JUDICIAL NOTICE.....	82—85
TITLE	VI — APPLICATION.....	86—87
TITLE	VII — ABROGATION AND REPEAL.....	88—89

TITLE I
GENERAL PRINCIPLES

PART I PURPOSE AND CONSTRUCTION

- 51 1. The purpose of this Code is to establish rules of evidence to help secure the just determination of proceedings, and to that end to assist in the ascertainment of the facts in issue, in the elimination of unjustifiable expense and delay, and in the protection of other important social interests. Purpose
- 51 2. This Code shall be liberally construed to secure its purpose and is not subject to the rule that statutes in derogation of the common law shall be strictly construed. Construction
- 51 3. Matters of evidence not provided for by this Code shall be determined in the light of reason and experience so as to secure the purpose of this Code. Unprovided matters

PART II GENERAL RULES

- 52 4. (1) All relevant evidence is admissible except as provided in this Code or any other Act. Relevant evidence generally admissible
- 52 (2) "Relevant evidence" means evidence that has any tendency in reason to prove a fact in issue in a proceeding. "Relevant evidence" defined
- 52 5. Evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusing the issues, misleading the jury, or undue consumption of time. Exclusion on grounds of prejudice, confusion, waste of time

TITLE II
DECISION-MAKING POWERS
RESPECTING EVIDENCE

- 53 6. The trier of the facts in issue is the jury if one is empanelled; otherwise the judge is the trier of fact. Trier of fact

18	<i>Evidence Code—Title II</i> <i>Decision-making powers</i>	<i>Comments</i> <i>Page</i>
Questions of admissibility generally	7. (1) Subject to this section, the judge shall determine the existence of the following preliminary facts, namely, facts upon which depend the admissibility of evidence, the competence and compellability of a person to be a witness, and the existence of a privilege.	53
Relevancy conditioned on fact	(2) Where the relevancy of evidence depends upon the existence of a preliminary fact, the judge shall admit it upon, or subject to the introduction of evidence sufficient to support a finding of the existence of that fact.	54
Where fact is in issue	(3) Where a preliminary fact is also a fact in issue in the proceedings, it is for the trier of fact to determine.	54
Exclusion of jury when determining certain preliminary facts	(4) The determination of preliminary facts shall be conducted out of the hearing of the jury in the following situations:	55
Evidence bringing justice administration in disrepute	(a) in determining whether evidence should be excluded on the ground that it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute;	55
Statements to persons in authority	(b) in determining whether a statement should be excluded on the ground that it was made to a person in authority under circumstances likely to render it unreliable;	55
When accused requests it	(c) when the accused is a witness and requests the exclusion of the jury; and	55
When justice requires it	(d) whenever the interests of justice so require.	55
Testimony by accused	(5) An accused does not by testifying for the purpose of determining a preliminary fact subject himself to cross-examination on other issues, and if the hearing is one described in paragraph (4)(a) or (4)(b) to determine the admissibility of a statement made by the accused, the prosecution shall	55

not ask the accused whether the statement was true or false.

- 55 8. When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or purpose, the judge shall restrict the use of the evidence to its proper scope and instruct the jury accordingly. Limited admissibility
- 56 9. When evidence of an act, statement or writing or part thereof is introduced by a party, he may be required at that time to introduce evidence of any other part or of any other act, statement or writing that ought in fairness to be considered contemporaneously with it. Remaining and related writings, etc.
- 56 10. After the close of the evidence and arguments of counsel, the judge shall when there is a jury fairly and impartially sum up the evidence and relate it to the essential questions in issue; he may also comment to the jury upon the weight of the evidence and the credibility of the witnesses if he also instructs the jury that these matters are for them to determine and that they are not bound by the judge's factual summation or comment. Summing up and comment by judge
- 56 11. (1) No judgment shall be set aside on appeal by reason of the erroneous admission or exclusion of evidence unless the error resulted in a substantial wrong or miscarriage of justice, and in the case of an erroneous exclusion of evidence, its substance and relevance were made known to the judge or were apparent from the context of the questions asked. Effect of erroneous ruling
- 56 (2) In determining whether an erroneous admission of evidence resulted in a substantial wrong or miscarriage of justice, the appeal court shall consider whether a timely and specific objection to the admissibility of the evidence was made. Matters to be considered in determination

TITLE III
BURDENS OF PROOF AND
PRESUMPTIONS

PART I BURDENS OF PROOF

"Burden of persuasion"	12. (1) "Burden of persuasion" means the obligation of a party to persuade the trier of fact of the existence of a fact in issue.	57
Civil proceedings	(2) In civil proceedings, except as otherwise provided by law, a party has the burden of persuasion as to each fact the existence of which is essential to the claim or defence he is asserting, and this burden is discharged if the trier of fact is satisfied of the existence of such fact on evidence sufficient to establish that the existence of the fact is more probable than its non-existence.	57
Criminal proceedings	(3) Except as provided in this section, in criminal proceedings the burden of persuasion is on the prosecution, and this burden is discharged if the trier of fact is satisfied beyond a reasonable doubt of the existence of each element of the offence and of the non-existence of any defence, excuse or justification.	58
Defence, excuse or justification	(4) The prosecution does not have the burden of persuasion with respect to the non-existence of a defence, excuse or justification unless there is evidence in the case sufficient to raise a reasonable doubt on the issue.	58
When burden on accused	(5) When an Act expressly provides that the accused has the burden of persuasion with respect to a defence, excuse or justification to a criminal offence, that burden is discharged if the trier of fact is satisfied that the existence of the defence, excuse or justification is more probable than its non-existence.	59
"Burden of producing evidence"	13. (1) "Burden of producing evidence" means the obligation of a party to introduce	59

sufficient evidence of a fact to warrant the trier of fact to consider it.

59 (2) In civil proceedings the burden of producing evidence is discharged if the judge finds that on the evidence introduced a reasonable man could be satisfied that the existence of the fact in issue is more probable than its non-existence. Civil proceedings

59 (3) In criminal proceedings the prosecution's burden of producing evidence is discharged if the judge finds that on the evidence introduced a reasonable man could be satisfied beyond a reasonable doubt that the accused is guilty. Criminal proceedings

59 (4) Where an Act expressly provides that the accused has the burden of persuasion with respect to a defence, excuse or justification to a criminal offence, the accused also has the burden of producing evidence in this respect, and the latter burden is discharged if the judge finds that on the evidence introduced a reasonable man could be satisfied that the existence of the defence, excuse or justification is more probable than its non-existence. Defence, excuse or justification

PART II PRESUMPTIONS

60 14. (1) "Presumption" means an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the proceedings. "Presumption"

61 (2) In civil proceedings a presumption imposes upon the party against whom it operates the obligation of satisfying the trier of fact that the non-existence of the presumed fact is more probable than its existence, unless the presumption is conclusive under the rule of law from which it arises. Effect in civil cases

61 (3) In criminal proceedings a presumption operates against the accused as to a fact that is essential to guilt only if the facts that Effect in criminal cases

give rise to the presumption are found to exist or are otherwise established beyond a reasonable doubt, and such presumption may be rebutted by evidence sufficient to raise a reasonable doubt as to the existence of the presumed fact.

Conflicting
presumptions

(4) Where two presumptions conflict the presumption founded on the weightier considerations of policy and logic shall apply, and if there is no such preponderance both presumptions shall be disregarded.

61

TITLE IV

SPECIFIC RULES RESPECTING ADMISSIBILITY

PART I EXCLUSIONARY RULES

Exclusion Because of Manner Evidence Obtained

Exclusion of
evidence
bringing
administration
of justice
into
disrepute

15. (1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.

61

Matters to be
considered in
determination

(2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including the extent to which human dignity and social values were breached in obtaining the evidence, the seriousness of the case, the importance of the evidence, whether any harm to an accused or others was inflicted wilfully or not, and whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.

62

Statements to
persons in
authority

16. (1) A statement made by the accused to a person in authority is inadmissible if

62

tendered by the prosecution in a criminal proceeding, unless the judge is satisfied beyond a reasonable doubt that the statement was not made under circumstances (including the presence of threats or promises) that were likely to render the statement unreliable, or unless the accused personally or through his counsel agrees to its admission.

- 63 (2) Nothing in this section affects the admissibility of evidence other than a statement of the accused, including evidence of any fact discovered as a result of such statement or that such facts were discovered as a result of the statement.
- Facts found as a result of statement admissible

Exclusion of Certain Circumstantial
Evidence

Character and Disposition

- 63 17. (1) In criminal proceedings, evidence tendered by the prosecution of a trait of character of the accused that is relevant solely to the disposition of the accused to act or fail to act in a particular manner is inadmissible, unless the accused has offered evidence relevant to a trait of his character or to a trait of the character of the victim of the offence.
- Evidence of accused's character to show disposition: when not admissible
- 63 (2) In criminal proceedings, evidence of a trait of the character of the victim of a sexual offence that is relevant solely to the disposition of the victim to act or fail to act in a particular manner is inadmissible, unless the judge at a hearing in camera is satisfied that the admission of such evidence is necessary for a fair determination of the issue of guilt or innocence.
- Evidence of victim's character in sexual cases to show disposition: when not admissible
- 65 18. Nothing in section 17 prohibits the admission of evidence that a person committed a crime, civil wrong or other act when relevant to prove some fact other than his
- Similar facts rule

disposition to commit such act, such as evidence to prove absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

Habit;
routine
practice

19. Nothing in section 17 prohibits the admission of evidence of habit or routine practice to prove conduct in conformity with the habit or routine practice on a particular occasion.

66

Manner of
giving
character
evidence

20. Evidence of a trait of a person's character may be given in the form of opinion, evidence of reputation or evidence of specific instances of conduct.

66

Preventive Actions

Subsequent
remedial
measures

21. Evidence of measures taken after an event, which if taken previously would have made the event less likely to occur, is inadmissible to prove negligence or culpable conduct in connection with the event, except when offered to rebut an allegation regarding the feasibility of precautionary measures.

66

Liability
insurance

22. Evidence that a person was or was not insured against liability is inadmissible as tending to prove negligence or other wrongdoing unless the probative value of such evidence substantially outweighs the danger of undue prejudice.

67

Payment of
medical and
similar
expenses

23. Evidence that a person has furnished or offered or promised to pay medical, hospital or similar expenses occasioned by an injury is inadmissible to prove liability for the injury.

67

Compromises

Attempted
compromises
and
negotiations

24. Evidence of attempts to compromise a disputed claim or of conduct or statements made in compromise negotiations is inadmissible to prove liability for, or invalidity of the claim or its amount, but nothing in this

67

section prevents the use of such evidence for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

68 25. Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to a crime, or of statements made in connection with any such plea or offer, are inadmissible against the person who made the plea or offer for the purpose of determining guilt. Guilty pleas and offers

68 26. A statement made in the course of an attempt to reach a pre-trial settlement of a criminal complaint is inadmissible against the accused in a criminal proceeding in which the accused is charged with having committed an act constituting the subject matter of the attempted settlement. Pre-trial settlement of criminal complaint

Hearsay

68 27. (1) Hearsay evidence is inadmissible except as provided in this Code or any other Act. Hearsay rule

68 (2) In this Code Definitions
(a) "hearsay" means a statement, other than one made by a person while testifying at a proceeding, that is offered in evidence to prove the truth of the statement; and "Hearsay"

68 (b) "statement" means an oral or written assertion or non-verbal conduct of a person intended by him as an assertion. "Statement"

70 28. A statement previously made by a witness is not excluded by section 27 if the statement would be admissible if made by him while testifying as a witness. Exception: previous statement by witness

70 29. (1) A statement made by a person who is unavailable as a witness is not excluded by section 27 if the statement would be Exception: statement of person unavailable as witness

	admissible if made by the person while testifying as a witness.	
"Unavailable as a witness" defined	(2) "Unavailable as a witness" includes situations where a person who made a statement	71
Dead or unfit	(a) is dead or unfit by reason of his bodily or mental condition to attend as a witness;	71
Attendance cannot be obtained	(b) is absent from the proceeding and the proponent of his statement has been unable to procure his attendance by process or other reasonable means;	71
Refuses to testify	(c) persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so;	71
Unable to remember	(d) testifies to a lack of memory of the subject matter of the statement; or	71
Cost and trouble of attendance not warranted	(e) is absent from the proceeding and the importance of the issue or the added reliability of his testimony in court does not justify the expense or inconvenience of procuring his attendance or deposition.	71
When proponent procures unavailability	(3) A statement is not admissible under this section if the unavailability of the person who made it was brought about by the proponent of the statement for the purpose of preventing the person from attending or testifying.	71
Notice required before tendering evidence	(4) A statement is not admissible under this section unless the party seeking to give it in evidence has within a reasonable time given notice to every other party of his intention to do so with particulars of the statement and the reason why the person is unavailable as a witness.	71
Exception: statements against party	30. The following statements are not excluded by section 27 when offered against a party:	71

- | | | |
|---|--|---|
| 72 | (a) a statement made, authorized, adopted or agreed to by the party; | Party's statement |
| 72 | (b) a statement by the party's agent or servant concerning a matter within the scope of his agency or employment and made during the continuation of that relationship; | Agent |
| 72 | (c) a statement regarding title by a predecessor in title or other person in privity of title with the party; and | Person in privity of title |
| 72 | (d) a statement by a person engaged with the party in common enterprise made in pursuance of their common purpose. | Person in common enterprise |
| 31. The following are not excluded by section 27: | | |
| 72 | (a) a record of a fact or opinion, if the record was made in the course of a regularly conducted activity at or near the time the fact occurred or existed or the opinion was formed, or at a subsequent time if compiled from a record so made at or near such time; | Other exceptions
Statements made in course of regularly conducted activities |
| 73 | (b) records, reports or statements of public offices or agencies, setting forth the activities of the office or agency, matters observed pursuant to a duty imposed by law, or in civil cases and against the prosecution in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law; | Public records and reports |
| 74 | (c) records or data compilations of vital statistics if the report thereof was made to a public office pursuant to requirements of law; | Records of vital statistics |
| 74 | (d) evidence that a matter is not included in a record made in the course of a regularly conducted activity, to prove the non-occurrence or non-existence of the | Absence of record or entry |

Marriage, baptismal and similar certificates	<p>matter if it was of a kind of which such a record was regularly made or preserved;</p> <p>(e) statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter;</p>	75
Ancient documents	(f) statements in a document in existence twenty years or more;	75
Market reports	(g) market quotations, tabulations, lists, directories or other compilations generally used and relied upon by the public or by persons in particular occupations;	75
Judgment of previous conviction	(h) evidence of a final judgment adjudging a person guilty of a crime, to prove any fact essential to sustain the judgment, except when tendered by the prosecution in a criminal proceeding against anyone other than the person adjudged guilty;	75
General reputation	(i) reputation of a person's character arising before the controversy among those with whom he associates or in the community;	76
Reputation re personal or family history	(j) reputation among members of a person's family by blood, adoption or marriage, or among his associates, or in the community, concerning a fact of his personal or family history, such as birth, death or relationship;	76
Reputation re boundaries	(k) reputation in a community, arising before the controversy, as to boundaries or of customs affecting lands in the community; and	76
Reputation re general history	(l) reputation as to events of general history important to the community, province or country where they occurred.	76

Privileges

General

- | | | |
|----|---|--|
| 77 | 32. Except as provided in this Code or any other Act, no person has a privilege to refuse to disclose any matter, to refuse to produce any object or writing, or to prevent another from being a witness or disclosing any matter or producing any object or writing. | No privilege except as recognized |
| 77 | 33. A person who under this Code has a privilege against disclosure of a matter may refuse to disclose or prevent any other person from disclosing the matter. | What privilege includes |
| 77 | 34. A person who has a privilege waives it if he or any other person while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the privileged matter, unless such disclosure was itself privileged. | Waiver by voluntary disclosure |
| 77 | 35. Privileged matter erroneously compelled to be disclosed or disclosed without opportunity to claim the privilege is inadmissible against the holder of the privilege. | Privileged matter disclosed under compulsion, etc. |
| 78 | 36. A claim of privilege, whether in present proceedings or upon a prior occasion, is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom. | Comment on or inference from claim of privilege |
| 78 | 37. Only the holder of a privilege may, on appeal, allege error on a ruling disallowing a claim of privilege. | Effect of error in ruling on privilege |

Particular Privileges

- | | | |
|----|---|--------------------|
| 78 | 38. An accused in a criminal proceeding who has testified in a prior proceeding (other than a preliminary hearing in respect of the matter with which he is accused) has a privilege to prevent such testimony from being | Self-incrimination |
|----|---|--------------------|

used against him, unless such criminal proceeding is a prosecution for perjury in giving the testimony.

Person disclosing under provincial law privileged

39. (1) A person who is required by the law of a province to make a return or report has a privilege against disclosure of its contents in proceedings governed by this Code to the extent that the law of the province provides for such a privilege in proceedings governed by provincial law.

79

Officer to whom report made: privilege

(2) A public officer to whom a return or report is required to be made by the law of a province has a privilege against disclosure of the return or report or its contents in proceedings governed by this Code to the extent that the law requiring it to be made provides for such a privilege in proceedings governed by provincial law.

79

Exception

(3) This section does not apply to proceedings involving false statements or fraud in the return or report.

79

Marital or family privilege

40. A person has a privilege against disclosure of any confidential communication between himself and a person who is related to him by family or similar ties if, having regard to the nature of the relationship, the probable probative value of the evidence and the importance of the question in issue, the need for the person's testimony is outweighed by the public interest in privacy, the possible disruption of the relationship or the harshness of compelling disclosure of the communication.

79

General professional privilege

41. A person who has consulted a person exercising a profession for the purpose of obtaining professional services, or who has been rendered such services by a professional person, has a privilege against disclosure of any confidential communication reasonably made in the course of the relationship if, in the

80

circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice.

- 81 42. (1) A person who in contemplation of litigation has consulted a lawyer for the purpose of obtaining legal services has a privilege against disclosure of any confidential communication made with a view to giving or receiving such services. Lawyer-client privilege
- 81 (2) A person has a privilege against disclosure of information obtained or work produced in contemplation of litigation by him or his lawyer or a person employed to assist the lawyer, unless, in the case of information, it is not reasonably available from another source and its probative value substantially outweighs the disadvantages that would be caused by its disclosure. Privilege re preparatory work
- 81 (3) A privilege under this section may be claimed by the holder of the privilege in person *or by his lawyer, or if incompetent by his guardian or committee, or if deceased by his personal representative, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence.* Who may claim
- 82 (4) There is no privilege under this section: Exceptions
- 82 (a) if the purpose of seeking the legal services or producing the work or obtaining the information was to enable or aid anyone to commit or plan to commit what the person claiming to hold the privilege knew or reasonably should have known to be a crime or tort; Crime or tort
- 82 (b) as to a communication relevant to an issue between parties who claim through the same deceased client of a lawyer, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transaction; Claimants through deceased

32	<i>Evidence Code—Title IV</i> <i>Part I—Exclusionary Rules</i>	<i>Comments</i> <i>Page</i>
Breach of duty by lawyer or client	(c) as to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;	82
Document attested by lawyer	(d) as to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or	82
Joint clients	(e) as to a communication relevant to a matter of common interest between two or more clients, that was made by any of them to a lawyer retained or consulted in common, when offered in a proceeding between any of the clients.	82
"Lawyer"	(5) In this section "lawyer" includes a person reasonably believed by the client to be authorized to practice law, and in the Province of Quebec includes a notary.	82
	(6) A privilege under this section may be claimed in addition to the privilege under section 41.	82
Definitions	43. (1) In this section	
"Official information"	(a) "official information" means confidential government information the disclosure of which would be injurious to the public interest; and	82
"State secret"	(b) "state secret" means confidential government information that relates to national defence or security, the international relations of Canada, federal-provincial relations, or matters of confidence of the Queen's Privy Council for Canada.	82
Crown privilege	(2) The Crown in right of Canada has a privilege, which may be claimed by a Minister of the Crown, against disclosure of any official information or state secret unless the public interest in preserving the confidentiality of the information is outweighed by the public interest in the proper administration of justice.	82

- 82 (3) Where the Crown claims a privilege for a state secret the judge may, in lieu of determining the claim himself, and shall at the request of a party or the Crown, stay the proceedings and refer the claim to the Chief Justice of Canada, who shall designate a judge of the Supreme Court of Canada to determine the matter. Reference of claim to Chief Justice of Canada
- 82 (4) In ruling on a claim of privilege under this section a judge may require the Crown to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person so authorized is willing to have present. Procedure
- 82 (5) Where a judge orders disclosure of information under this section he may do so subject to such restrictions or conditions as he deems appropriate. Restrictions on disclosure
- 82 (6) A claim of privilege under this section may be made in any proceedings, whether governed by the law of Canada or a province. Application
- 83 **44. (1)** The Crown has a privilege against disclosure of the identity of a person who has furnished information purporting to disclose a violation of any law of Canada or any province to a person charged with the duty of enforcing that law, unless in the circumstances the interests in maintaining the secrecy of the information are outweighed by the interest in arriving at a fair determination of the issues. Identity of informer
- 83 (2) The privilege under this section may be claimed by any person, but may be waived by a person charged with the duty of enforcing the law in question. Who may claim privilege
- 83 **45. (1)** A person has a privilege, which may be claimed by him or his agent or employee, against disclosure of a trade secret held by him, if the allowance of the privilege Trade secrets

will not tend to conceal fraud or otherwise work injustice.

(2) When disclosure of a trade secret is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

83

PART II

AUTHENTICATION AND IDENTIFICATION

General

46. When the relevancy of evidence depends upon its authenticity or identity, the requirement of authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

83

Self-authentication

47. (1) The following are presumed to be authentic:

84

Public document under seal

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

85

Certified public document

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

85

Certified copies of public records

(c) a copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed in a public office, including data compilations, certified as correct by the

85

- custodian or other person authorized to make a certification that complies with paragraph (a), (b), or (h) or any Act of Canada or any province or a rule of court;
- 85 (d) any publication purporting to be issued by public authority; Official publications
- 85 (e) printed materials purporting to be newspapers or periodicals; Newspapers and periodicals
- 85 (f) inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin; Trade inscriptions, etc.
- 85 (g) documents accompanied by a certificate of acknowledgement under the hand and seal of a person authorized by law to take acknowledgments; Acknowledged documents
- 85 (h) a document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a certification by a person described in subsection (2) as to the genuineness of the signature and official position of the executing or attesting person or of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation; and Foreign public documents
- 85 (i) any matter declared by any Act to be presumptively or *prima facie* genuine or authentic. Other statutes
- 85 (2) A certification under paragraph (1)(h) may be made by a diplomatic or consular official of Canada or by a diplomatic or consular official of the foreign country who is assigned or accredited to Canada. Who may certify foreign documents
- 85 (3) If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of a document described Judge's discretion to dispense with certificate to foreign document

in paragraph (1)(h), the judge may, for good cause shown, order that it be treated as presumptively authentic without certification, or permit it to be evidenced by an attested summary with or without certification.

Subscribing
witness'
testimony
unnecessary;
exception

48. The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

86

TITLE V

METHODS OF ESTABLISHING FACTS

PART I GENERAL

How facts
established

49. Facts may be proved by the testimony of witnesses or real evidence, or they may be admitted by the parties, or be inferred, presumed or judicially noticed.

86

PART II WITNESSES

General

Affirmation

50. Before testifying, every witness shall affirm:

86

"I promise to tell the truth. I am aware that if I tell a lie or wilfully mislead the court I am liable to be prosecuted."

Instructions
by judge

51. The judge may give instructions to any witness whenever he considers it advisable to ensure that the witness understands the obligation to tell the truth.

87

Witnesses
must have
personal
knowledge

52. A witness other than an expert witness may not testify to a matter unless sufficient evidence is introduced to support a finding that he has personal knowledge of the matter, and such evidence may be given by the witness himself or otherwise.

88

- 88 **53.** A person who serves as an interpreter or translator is subject to all the provisions of this Code relating to witnesses, except that, instead of promising in his affirmation to tell the truth, he shall promise to make a true interpretation or translation. Interpreters and translators

Competence and Compellability

- * 88 **54.** Every person is competent and compellable to testify to any matter, except as provided in this Part or any other Act. General rule of compellability
- 88 **55.** (1) The presiding judge and a member of a jury sworn and empanelled in a trial may not testify at that trial. Incompetency of judge and juror
- 88 (2) A person who was a member of a jury may not give evidence in a proceeding to inquire into the validity of the verdict of that jury. Verdict not impeachable
- 89 **56.** The accused in a criminal proceeding cannot be compelled to be a witness, but the judge, prosecutor and defence counsel may comment on his failure to testify and the trier of fact may draw all reasonable inferences therefrom. Accused not compellable, but comment permitted
- 89 **57.** In a criminal proceeding, a person who is related to the accused by family or similar ties is not compellable to be a witness for the prosecution if, having regard to the nature of the relationship, the probable probative value of the evidence and the seriousness of the offence charged, the need for a person's testimony is outweighed by the possible disruption of the relationship or the harshness of compelling the person to testify. Marital, family, etc. exception

Manner of Questioning Witnesses

- 90 **58.** (1) Subject to this section, the parties to a proceeding have the responsibility of presenting the evidence and examining the witnesses. Parties' responsibility

38	<i>Evidence Code—Title V Part II—Witnesses</i>	<i>Comments Page</i>
Control by judge	(2) The judge shall exercise reasonable control over the presentation of evidence and the examination of witnesses so as to make them effective for the ascertainment of the truth, to avoid needless consumption of time, and to protect witnesses from harassment or undue embarrassment.	90
Examination by judge	(3) The judge may exceptionally call, recall or examine a witness to clarify or elicit evidence if this appears essential to the just determination of the proceedings.	90
Leading questions of party's witness	59. (1) A party calling a witness shall not ask him leading questions unless they relate to introductory or undisputed matters or are necessary to elicit the testimony of the witness, or unless it becomes apparent that the witness desires to give only such answers as he believes will be damaging to the party's case.	90
Leading questions by adverse party	(2) A party who is examining a witness called by another party may ask him leading questions unless it becomes apparent that the witness desires to give only such answers as he believes will help the case of the party asking the questions.	91
"Leading question" defined	(3) "Leading question" means a question that suggests the answer the examining party desires.	90
Refreshing memory	60. (1) A party may put to a witness any question, or use any writing, object or other means of refreshing his memory if the witness is unable to recall fully a matter on which he is being examined and the question or other means will tend to refresh his memory rather than lead him into mistake or falsehood.	91
Adverse party's rights re matters used	(2) An adverse party is entitled to have produced at the hearing anything used by a witness, either before or while giving evidence, to refresh his memory, and to inspect it and cross-examine the witness about it, and to	92

introduce in evidence those portions that relate to the evidence given by the witness.

- 92 **61.** (1) The judge may, and at the request of a party shall, exclude from the courtroom any witness to prevent him from hearing the testimony of other witnesses. Exclusion of witness
- 92 (2) This section does not authorize the exclusion of a party to the action (and if a party is not a natural person, an officer or employee of such party designated by counsel for that party) or of a person whose presence is essential to the presentation of the case of one of the parties. Exceptions: party and person whose presence essential
- 92 (3) The judge may order any person not to discuss evidence that has been given in a proceeding with a witness who has not testified, but this does not apply to discussions between an accused and his counsel and in a civil action between a party and his counsel. Prohibition to discuss evidence

Credibility

- 92 **62.** Any party, including the party calling him, may examine a witness and introduce other relevant evidence for the purpose of attacking or supporting his credibility, except as otherwise provided in this Code. Impeaching credibility
- 95 **63.** Evidence of a trait of a witness' character for truthfulness or untruthfulness is inadmissible to attack or support the credibility of the witness unless it is of substantial probative value. Character for truthfulness
- 95 **64.** (1) Evidence of the conviction of a witness for a crime is inadmissible for the purpose of attacking his credibility if the witness has been pardoned for the crime or five years have elapsed from the day of his conviction or release from confinement for his most recent conviction of a crime, whichever is the later. Previous conviction: witnesses

40	<i>Evidence Code—Title V Part II—Witnesses</i>	<i>Comments Page</i>
Accused's character	(2) In a criminal proceeding no evidence of the accused's character, including evidence that he has been convicted of a crime, is admissible for the sole purpose of attacking his credibility as a witness, unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.	95
Examination re prior statement	65. In examining a witness concerning a statement made by him on a previous occasion, the statement need not be disclosed to him except as required by the judge.	96
Opportunity to explain prior extrinsic evidence or prior statement	66. The judge may exclude extrinsic evidence relevant to the credibility of a witness, such as matters indicating bias, interest, prejudice or character or that the witness has made a prior statement that is inconsistent with any part of his testimony, unless the witness has been given an opportunity to deny or explain such matters.	97
	Opinion and Expert Evidence	
Opinions and inferences	67. A witness other than one testifying as an expert may not give an opinion or draw an inference unless it is based on facts perceived by him and is helpful to the witness in giving a clear statement or to the trier of fact in determining an issue.	97
Basis of opinion	68. The judge may require that a witness be examined with respect to the facts upon which he is relying before giving evidence in the form of an opinion or inference.	98
Opinion on ultimate issue	69. Testimony in the form of an opinion or inference otherwise admissible may be received in evidence notwithstanding that it embraces an ultimate issue to be decided by the trier of fact.	98
Testimony by experts	70. When scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine an issue, a witness qualified as an expert	98

by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

- | | | |
|----|--|---------------------------------------|
| | 71. An expert witness may base an opinion or inference on any of the following: | Bases of expert opinion |
| 98 | (a) facts perceived by him; | Personal knowledge |
| 98 | (b) facts made known to him before the hearing, even if such facts are not admitted or admissible in evidence, so long as they are of a kind reasonably relied upon by experts in the field in forming opinions or inferences on the subject; and | Reports by others |
| 99 | (c) facts admitted or to be admitted in evidence in the proceedings and assumed by the expert to be true for the purpose of giving the opinion or making the inference. | Hypothetical questions |
| 99 | 72. A person shall not testify as an expert unless the party who intends to adduce the evidence has given reasonable notice to all other parties and furnished at the time of that notice the name, address and qualifications of the witness, the substance of the proposed testimony and a summary of the grounds for each opinion and inference proposed to be given. | Notification of intent to call expert |
| 99 | 73. (1) The judge may, if he considers it desirable, appoint an independent expert who shall, if possible, be a person agreed upon by the parties. | Court appointed expert |
| 99 | (2) The judge shall give the independent expert instructions regarding his duties, and these instructions shall, if possible, be agreed upon by the parties. | Instructions by judge |
| 99 | (3) The independent expert shall inform the judge and the parties in writing of his opinion, and may thereafter be called to testify by the judge or any party and be subject to examination by each party. | Manner of testifying |

Compensation	(4) An independent expert is entitled to reasonable compensation in an amount to be determined by the judge, such compensation to be paid in criminal cases, from funds provided by law, and in civil cases, by the parties in such proportion and at such time as the judge directs.	99
--------------	---	----

PART III REAL EVIDENCE

General

General	74. (1) In considering any real evidence, the trier of fact may draw all reasonable inferences therefrom.	100
"Real evidence"	(2) "Real evidence" means anything submitted for examination by the trier of fact, such as writings, recordings, photographs, physical objects, sites, the physical condition of persons and visual and auditory presentations.	100

Proof of Contents of Writings, Recordings and Photographs

Best evidence rule	75. The original is required to prove the contents of a writing, recording or photograph, except as otherwise provided in this Part or by any other Act.	100
Admissibility of duplicates	76. A duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original, or in the circumstances it would be unfair to admit the duplicate in lieu of the original.	101
Admissibility of other evidence of contents	77. The original is not required to prove the contents of a writing, recording, or photograph if	101
Originals lost or destroyed	(a) all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;	102
Original unobtainable	(b) no original can be obtained by any available judicial process or procedure;	102

- 102 (c) at a time when an original was under the control of the party against whom the evidence is offered, he was put on notice by the pleadings or otherwise that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or Original in possession of adverse party
- 102 (d) the writing, recording, or photograph is not closely related to a controlling issue. Collateral matters
- 102 78. The contents of an official record or of a document recorded or filed as required by law, including data compilations, may be proved by copy, certified as correct in accordance with section 47 or testified to be correct by a witness who has compared it with the original, but if such a copy cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. Public records
- 102 79. The contents of voluminous writings, recordings or photographs that cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, but the originals or duplicates shall be made available for examination and copying by other parties at a reasonable time and place, and the judge may order that they be produced in court. Summaries
- 102 80. Contents of writings, recordings or photographs may be proved by the testimony or deposition of the party against whom they are offered or by his written admission, without accounting for the nonproduction of the original. Testimony or written admission of party
- 103 81. In this Part Definitions
(a) "duplicate" means a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by "Duplicate"

	mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique that accurately reproduces the original;	
"Original"	(b) "original" when used in relation to a writing or recording means the writing or recording itself or any counterpart intended by a person executing or issuing it to have the same effect; when used in relation to a photograph includes the negative or any print therefrom; and when used in relation to data stored in a form readily accessible to a computer or similar device, includes any printout or other output readable by sight, shown to reflect the data accurately;	102
"Photograph"	(c) "photograph" includes still photographs, x-ray films, and motion pictures; and	102
"Writings", "recordings"	(d) "writings" and "recordings" mean letters, words, or numbers, or their equivalent, set down by handwriting, type-writing, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.	102

PART IV JUDICIAL NOTICE

"Judicial notice" defined	82. "Judicial notice" means use of a fact or matter not proved according to the ordinary rules governing the presentation and admission of evidence.	103
Facts generally known	83. (1) Judicial notice shall be taken of facts that are so generally known that they cannot be the subject of reasonable dispute.	103
Facts generally known in jurisdiction and facts readily determined	(2) Judicial notice may be taken of facts that are so generally known within the territorial jurisdiction of the trial court that they cannot be the subject of reasonable dispute and of facts capable of accurate and	103

ready determination by resort to sources whose accuracy respecting such facts cannot reasonably be questioned.

104 (3) Judicial notice may be taken of any fact in determining the law or the constitutional validity of a statute. Facts noticed in determining law

84. (1) Judicial notice shall be taken of:

104 (a) the constitutional, statute (whether public or private) and decisional law of Canada or any province; Constitutional, statutory and decisional law

104 (b) customary international law and treaties that apply to Canada; and Customary international law

104 (c) any matter published in the *Canada Gazette* or the official gazette of any province. Matters published in official gazettes

(2) Judicial notice may be taken of the following matters:

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

105 (b) the law of other countries and of their political subdivisions. Foreign law

105 (3) If the judge is unable to determine the law of another country or a political subdivision thereof, he may either apply the relevant law of Canada and the province where the court is sitting or dismiss the action. Where judge cannot determine foreign law

105 85. (1) Judicial notice shall be taken of a matter referred to in section 83(2) or section 84(2) if a party requests the judge to do so and gives each adverse party sufficient notice to enable him to prepare to meet the request and furnishes the judge with sufficient information to enable him to comply with it. Judicial notice on request

105 (2) In determining the propriety of taking judicial notice of a matter or in determining a matter to be judicially noticed, the judge may consult and use any source of Sources to be consulted in taking judicial notice

	pertinent information, whether or not furnished by a party.	
Party to be afforded opportunity to be heard re judicial notice, and source of knowledge to be revealed	(3) If the judge has been requested or proposes to take, or has taken judicial notice of a matter referred to in section 83(2) or section 84(2), he shall, if requested, afford each party reasonable opportunity to make representations regarding the matter and as to the propriety of taking judicial notice, and if the judge resorts to any source of information, including the advice of persons learned in the matter, that is not received in open court, that information and its source shall be made a part of the record in the proceedings and the judge shall, if requested, afford each party reasonable opportunity to make representations respecting the validity of that information.	105
Judge to instruct jury to take judicial notice	(4) If a matter that would otherwise have been for determination by the jury is judicially noticed, the trial judge shall instruct the jury to accept as a fact the matter so noticed.	105
When judicial notice may be taken	(5) Judicial notice may be taken at any stage of the proceedings.	106

TITLE VI

APPLICATION

General application	86. (1) This Code applies to all criminal proceedings, to all proceedings before the Federal Court of Canada, and to all proceedings before the Supreme Court of Canada other than appeals from proceedings not governed by this Code.	106
Application to preliminary facts, judicial notice, certain criminal proceedings	(2) Only sections 4 and 5 (the general rules of relevancy and exclusion) and sections 32 to 45 (the rules dealing with privileges) apply to the determination of preliminary facts under section 7(1), to the determination of the propriety of taking judicial notice or of a matter to be judicially noticed, and to criminal proceedings to determine sentence,	106

granting of a discharge, issuance of summonses and warrants, release on bail or otherwise, or granting or revoking probation.

- 106 87. Sections 4 and 5 (the general rules of relevancy and exclusion) and sections 32 to 45 (the rules dealing with privileges) apply to every investigation, inquiry, hearing arbitration or fact-finding procedure governed by the law of Canada, and in applying these rules the presiding officer shall have the powers given to the judge by this code. Application to other hearings, inquiries, etc.

TITLE VII

ABROGATION AND REPEAL

88. For greater certainty, it is hereby provided that Rule in *Hodge's case* abrogated

- 107 (a) the rule of law known as the rule in *Hodge's case* is abrogated; and
- 107 (b) every rule of law that requires the corroboration of evidence as a basis for a conviction or that requires that the jury be warned of the danger of convicting on the basis of uncorroborated evidence is abrogated. Corroboration not required

89. The following provisions are repealed: Repeal

- 108 (a) the *Canada Evidence Act*, chapter E-10 of the Revised Statutes of Canada, 1970; R.S.C., c. E-10
- 108 (b) sections 47(2), 123, 139(1), 195(3), 256(2) and 586 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970; R.S.C., c. C-34, ss. 47(2), 123, 139(1), 195(3), 256(2), 586
- 108 (c) section 41 of the *Federal Court Act*, chapter 10 (2nd Supp.) of the Revised Statutes of Canada, 1970; and C. 10, s. 41 (2nd Supp.)
- 108 (d) section 19 of the *Juvenile Delinquents Act*, chapter J-3 of the Revised Statutes of Canada, 1970. R.S., c. J-3, s. 19

**COMMENTS
ON
EVIDENCE CODE**

Comments on Specific Sections

TITLE I – GENERAL PRINCIPLES

PART I – PURPOSE AND CONSTRUCTION

Sections 1 and 2: These sections reflect the spirit in which the Code was drafted and set the tone for its interpretation. The rules are to be construed liberally and flexibly to promote the ends of justice and to facilitate decisions on the merits in individual cases. These sections are deliberately phrased in very broad language, their purpose being to steer the courts away from the technical and narrow common law approach to evidence. The Code will not reach its full potential unless it is interpreted in a liberal and purposive manner.

Section 3: An attempt has been made to cover all matters that are strictly evidence law, but anything that remains is by this section to be determined reasonably in the light of experience to secure the purpose of the Code. Precedent is, of course, a major source of experience and may be looked to, but it will not have binding force. The completeness of treatment made possible by this section make the rules a code. This section does not, of course, cover matters of procedure, though these may have an important impact

on evidence, for example rules of discovery and rules governing the manner in which a site may be viewed.

PART II – GENERAL RULES

Section 4: This section forms the foundation of the whole scheme of the Code. The basic axiom of any rational fact finding process must be that all information relevant in determining the issues is admissible. The section makes this the general rule, thereby abolishing all existing rules of evidence preventing relevant evidence from being presented to the court. This approach is reinforced by other provisions in the code, notably section 54, which states that as a general rule all persons are competent and compellable to testify to any matter, and section 32, which states that as a general rule no person has a privilege to prevent information from being disclosed to the court.

Other sections of the Code set forth rules for the exclusion of relevant evidence. But this is done only when strong policy reasons outweigh the interest in the admission of the evidence. If evidence is relevant and there is no rule excluding it in the Code or another Act, it is admissible in evidence.

Relevancy is a relationship between an offered item of evidence and a proposition sought to be proved. In legal proceedings the offered evidence is relevant if it tends to prove a fact in issue. The definition makes it clear that relevancy is not a legal concept. Whether the existence of one fact tends to prove the existence of another is a matter of reason based on human experience.

Section 5: A lawsuit is not an abstract scientific investigation to discover absolute truth. It is a very practical affair aimed at resolving disputes between parties within a reasonable time and at a reasonable cost. Consequently the desirability of obtaining the truth must be balanced against the need to resolve disputes expeditiously. For this reason, this section provides that relevant evidence must be excluded if its probative value is substantially outweighed by the danger of undue consumption of time.

As well, a legal proceeding is not and cannot be a perfectly rational and dispassionate proceeding. Human beings are intimately involved, the stakes are high, passions and emotions clash, and often the trier of fact is a jury untrained in weighing evidence. For these reasons the judge must have the discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of undue prejudice, confusing the issues or misleading the jury.

Each potential danger specified in the section is well recognized at common law. Most rules of evidence are founded upon them. While judges sometimes explicitly recognize their discretion to exclude evidence because the presence of one of these dangers outweighs the probative value of the evidence, more often they justify its exclusion by calling it irrelevant. This section will permit them to be more candid in giving reasons for their rulings. It will not affect present practices to any great extent, except perhaps in those areas where we have recommended the abolition of a previously rigid common law exclusionary rule such as the collateral fact rule.

The phrase undue prejudice as used in the section means evidence that might tend to arouse emotions or otherwise cause the case to be decided on an improper basis. It does not mean, in this context, evidence that was improperly obtained; such evidence is dealt with in section 15.

TITLE II – DECISION-MAKING POWERS RESPECTING EVIDENCE

Section 6: Generally the jury, if there is one, determines the facts; the judge determines the law to be applied to the facts. In cases where the judge sits alone, he performs both functions.

Section 7: Most rules of evidence operate to exclude certain types of evidence. Thus when an objection to the admissibility of evidence is made at trial a finding whether the evidence is excluded by a particular rule must be made. This finding often entails the

determination of some fact, commonly called a preliminary fact, such as: did a lawyer-client relationship exist? — was a confession given voluntarily? — is a witness qualified to speak as an expert? — is a person whose statements are offered in evidence unavailable? — does the soiled shirt belong to the victim? This section deals with the procedure for determining these preliminary facts. Although the present law with respect to this matter is in some respects obscure, the section, with the exception of subsection (5), does not depart significantly from present practices.

Subsection (1) states the general rule. Normally, if the application of a rule of evidence depends upon a preliminary fact, the existence of that fact should be determined by the judge. This is necessary if trials are to be conducted expeditiously and if the purposes of the exclusionary rules are not to be defeated by having the jury hear the very evidence it might later have to put out of its mind. Usually the judge will be able to make a ruling on the admissibility of evidence by considering the offered evidence alone. Occasionally he may have to hold a special hearing for the purpose (a *voir dire*) and hear independent evidence. During a *voir dire* the judge is not bound by the rules of evidence, except the general rules of relevancy and exclusion (sections 4 and 5) and those respecting privilege (sections 32 to 45): see section 86(2).

The admissibility of evidence may be objected to on the ground that it is irrelevant unless some preliminary fact is also found to exist. Thus a soiled shirt might only be relevant if it is found to belong to the victim; a letter, if it is found to have been written by the plaintiff; a footprint, if it is the accused's. In such a case subsection (2) provides that the offered evidence is admissible if the judge finds there is sufficient evidence to support a finding that the preliminary fact exists: its determination is then for the jury. If the judge had to determine these preliminary facts before such evidence was admitted, he would end up usurping the jury's role as trier of fact. Since the offered evidence will be excluded only because it is not relevant, and not for policy reasons, there is little danger in permitting the jury to hear the offered evidence, even if the preliminary fact is not found to exist.

On rare occasions a preliminary fact is also an ultimate fact in issue. For example, the plaintiff in a contract case may allege that the original contract is lost and offer secondary evidence of

its contents: see section 77(a). The defendant may be alleging that the original never existed — that there was never any contract. Ruling on the admissibility of the secondary evidence of the alleged contract's contents necessarily involves deciding the very issue in the case, namely whether a contract existed. This is obviously a matter for determination by the trier of fact. Consequently, to prevent the usurpation of the jury's function subsection (3) provides that where a preliminary fact is also a fact in issue it is for the trier of fact to determine.

Subsection (4) provides that hearings to determine preliminary facts must be conducted out of the presence of the jury in the following circumstances: where the offered evidence might tend to bring the administration of justice into disrepute if admitted; where the evidence is a statement made to a person in authority (usually a confession); where the accused is to be a witness and requests the exclusion of the jury; and whenever the judge finds that such a course is necessary in the interests of justice. Holding such a hearing out of the presence of the jury often means that certain evidence presented at the hearing has to be presented again before the jury. But this seems necessary in the instances enumerated to prevent the jury from hearing prejudicial evidence that may be excluded as a result of the *voir dire*.

Subsection (5) provides that if the accused takes the stand on a *voir dire* for the purpose of having an out-of-court statement made by him excluded, he cannot be asked by the prosecution whether the statement is true. This change in the law is justified on the grounds that such a question usually has only slight probative value to the question in issue on a *voir dire* and seriously impairs the accused's right to silence.

Section 8: Evidence is sometimes admissible against one party to a proceeding but not against another (e.g., a confession made by one accused that cannot be used as evidence against another accused), or it may be admissible for one purpose but not another (e.g., a previous conviction admitted to impeach the credibility of the accused that cannot be used to show that the accused was a "bad man" and therefore had a propensity to commit the crime). To cover these situations this section requires that the use of the evidence be restricted to its proper scope and that the jury be

instructed of the limited purpose for which they can use it. Because of the difficulty of following such instructions, the instances where this rule will be used are rare.

Section 9: This rule in the main codifies present law. Its purpose is to prevent a party from presenting a matter out of context and thus leaving a false impression with the trier of fact that is difficult to dispel.

Section 10: The judge's fair and impartial summary of the evidence at the end of the case performs a valuable function. It puts the evidence into perspective for the jury who have often sat through a long trial, listened to unfamiliar testimony and heard the partisan arguments of counsel. The judge's comments on the weight of the evidence are also often of value to the jury. The judge has great experience in weighing evidence. If this experience is shared with the jury, whose unique fact-finding ability lies in the fact that they represent a cross-section of the community, the best results are likely to be achieved. However, it is essential in giving his comments that the judge does not lead the jury to believe they must accept his assessment of the evidence.

Section 11: This rule is directed at courts of appeal and provides for the situation where evidence was wrongfully admitted or excluded at trial. Its purpose is to eliminate frivolous appeals, to discourage the granting of a new trial for inconsequential errors, and to ensure to the extent possible that trials are conducted in such a manner that the trial judge is always informed by the adversaries of the application of the rules. In substance it codifies the present law. Subsection (1) states the general rule that the trier of fact's decision will not be upset unless the error in the admission or exclusion of evidence resulted in a substantial wrong or miscarriage of justice. It also provides that no reversal for an erroneous exclusion of evidence can take place unless the court of appeal finds that the substance and relevance of the evidence was made known to the trial judge. Subsection (2) provides that in determining whether an error in the admission of evidence resulted in a reversible error, the court of appeal must consider whether a timely and specific objection was made to its admissibility.

TITLE III – BURDENS OF PROOF AND PRESUMPTIONS

PART I – BURDENS OF PROOF

Section 12: The term “burden of proof” often causes great confusion. In part this is because the term embraces two distinct concepts. It is sometimes used to refer to the responsibility of one of the parties to persuade the trier of fact of the existence of the facts in issue. If the party bearing this responsibility does not discharge it, the case will be decided against him. The expression “burden of persuasion” (which is defined in subsection (1)) more aptly describes this concept.

At other times “burden of proof” is used to refer to the responsibility of a party to introduce sufficient evidence to support a finding that a fact in issue exists. If the party bearing this responsibility does not discharge it, the judge will rule against him and the matter will not even be considered by the trier of fact. In effect the judge will have found that the party has not introduced any evidence upon which a reasonable person could find in his favour on the matter. This concept is defined in section 13(1).

Section 12(2) has two purposes. It gives some guidance as to who has the burden of persuasion in civil cases. And, it sets forth the degree of belief to which the trier of fact must be persuaded.

The burden of persuasion with respect to each fact in issue will normally be on the party to whose case the fact is essential. Since it is the plaintiff who claims redress, he will normally bear the burden of persuasion on all facts that constitute his cause of action. The substantive law, of course, determines what facts are essential to his cause of action. The affirmative defences the defendant may put forth, and thus upon which he normally has the burden of persuasion, are also determined by the substantive law.

While the above states the normal rule for the allocation of the burden of persuasion, occasionally the party against whom the claim or defence is asserted has the burden. Various reasons underlie this allocation of the burden. Sometimes it is because the

claim put forward by a party should, as a matter of social policy, be discouraged; at other times, because the party against whom the claim is being asserted has exclusive knowledge or control of the evidence; or again, because the facts supporting the claim are so probable that it would be a waste of time to have them proved by the party asserting them. However, it is difficult to fix general principles for allocating the burden of persuasion and thus the section simply provides that the burden is on the party asserting a fact in issue "except as otherwise provided by law".

Under existing law, the burden of persuasion in civil cases is often expressed in the following manner: that the party who has the burden must establish his case beyond the "balance of probabilities", or by the "preponderance of evidence". The difficulty with these formulations is that they appear to require a mechanical weighing of the evidence. The important consideration is that the jury must be satisfied to the requisite degree of belief that the burden has been discharged, a matter not susceptible of exact description. It is felt that subsection (2) more accurately describes the usual civil burden than the other formulas in common use.

In a number of situations (e.g., disbarment proceedings, claims of fraud, crime or moral dereliction) existing law requires a greater degree of belief to discharge the burden of persuasion in civil cases than the usual burden, such phrases as "clear and convincing", "convincing evidence", and in some cases the criminal standard "proof beyond a reasonable doubt" being used to describe this increased burden. The fact is, however, that the degree of belief to satisfy the trier of fact will inevitably vary with the circumstances, including the seriousness of the matter in question. There seems no necessity, therefore, for a multiplicity of standards of belief.

Subsection (3) codifies the existing law regarding the burden of persuasion in criminal cases. In order to ensure that innocent people are not convicted of a crime, the general rule is that no person can be convicted unless the trier of fact is satisfied of his guilt beyond a reasonable doubt. However, there are qualifications to this rule. These are set forth in subsections (4) and (5).

Subsection (4) codifies the present law by providing that the prosecution does not have to disprove every possible defence that might exonerate the accused. The prosecution need only do so if

there is sufficient evidence in the case to raise a reasonable doubt about the issue. It would be too burdensome to compel the prosecution to negate self-defence, duress, provocation and every other possible defence, excuse or justification, even where there was no evidence in the case suggesting that such a defence was open to the accused.

Subsection (5) creates an exception to the general rule set forth in subsection (3). Under the present law the prosecution is often relieved of proving an element of a particular offence beyond a reasonable doubt. To be acquitted the accused must discharge a burden of persuasion with respect to that issue by a preponderance of the evidence. For example an accused will not be acquitted of a crime on the ground that he was insane when he committed it unless he proves insanity by a preponderance of evidence. Similarly a person found in possession of an instrument suitable for house-breaking, under circumstances that give rise to a reasonable inference that the instrument has been used or is or was intended to be used for house-breaking, will be convicted unless he proves by a preponderance of the evidence that he was in possession of the instruments for a lawful purpose. The many other statutory instances where the prosecution is relieved of proving the accused's guilt beyond a reasonable doubt with respect to each element of the offence are listed in the Evidence Project's Working Paper on *Burdens of Proof and Presumptions*. Some of the sections placing a burden of persuasion on the accused are phrased in terms of a presumption, others in terms of a defence. Requiring the prosecution to prove beyond a reasonable doubt that the accused is guilty is one of our most important safeguards against convicting innocent people. In section 14(3) we recommend that a presumption that operates against the accused may be rebutted by evidence sufficient to raise a reasonable doubt on the issue. In the rare case where it may be thought proper to shift the burden of persuasion to the accused on any matter, it should be done clearly and expressly in the legislation. That is the combined effect of subsections (3) and (5).

Section 13: Normally a party who has the burden of persuasion with respect to an issue will also have the burden of producing evidence. That is, he must introduce sufficient evidence of a fact

to warrant the jury to consider it. Until such evidence is produced, the judge must rule that on the evidence, no reasonable person could find that the party has discharged his burden of persuasion. Therefore, under this section the standard required to discharge the burden of producing evidence on an issue relates to the standard required to discharge the burden of persuasion on that same issue. The purpose of imposing a burden of producing evidence on a party is to prevent the jury from considering evidence on an issue that no reasonable person would deem sufficient to satisfy the requisite burden of persuasion on that issue; to save the time of the court by not requiring evidence to rebut a hopeless case; and, to prevent the prosecution in a criminal proceeding from compelling the accused to lead a defence until it has established a strong *prima facie* case against him.

PART II — PRESUMPTIONS

Section 14: The term “presumption” is used in a wide variety of senses. Two of these uses must be distinguished in understanding the definition in this section. It may refer to the situation where, when certain basic facts are proved, the designated presumed fact may, but need not, be assumed by the trier of fact. For instance, if it is proved that a person struck another on the head with a hammer, it may be assumed that he intended to injure him. This is a logical inference based on experience and the law does not affect the drawing of this inference either by compelling it or prohibiting it. This type of inference is not a presumption under this section. The word “presumption” is also used to describe the situation where, when certain basic facts are proved, another fact must be assumed. Under most provincial statutes regulating the use of highways, for example, when it is proved that a person driving an automobile struck a pedestrian and caused injury, it must by law be presumed that he was driving negligently. This is a true presumption as defined by subsection (1).

Most presumptions are rebuttable. Even though a presumption requires a fact to be assumed if certain basic facts are proved, a party against whom the presumption operates may introduce evidence contradicting the presumed fact. Subsections (2) and (3)

establish the degree of belief to which a party must persuade the trier of fact to rebut a presumption against him.

Under present law it is often unclear in civil cases what effect a presumption has on the allocation of the burden of proof. Some presumptions appear to shift the burden of producing evidence, others to shift the burden of persuasion. Presumptions are created for the same reasons that govern the allocation of the burden of persuasion, that is, reasons of fairness, expedition, and social policy discussed in the comments to section 12. To better promote these reasons and for greater clarity and simplicity, all presumptions should have the effect of shifting the burden of persuasion. Thus subsection (2) provides that a presumption in a civil case is only rebutted if the party against whom it operates satisfies the trier of fact that the non-existence of the presumed fact is more probable than its existence.

A presumption against the accused is sometimes an appropriate procedural device for narrowing the issues that the prosecution must initially prove in a criminal trial. For the reasons given in the comments to section 12, however, it is enough to rebut such a presumption if there is sufficient evidence to raise only a reasonable doubt about the issue.

Occasionally two presumptions conflict. Subsection (4) provides a method for resolving such conflicts. The one founded on the weightier considerations prevails.

TITLE IV – SPECIFIC RULES RESPECTING ADMISSIBILITY

PART I – EXCLUSIONARY RULES

Exclusion Because of Manner Evidence Obtained

Section 15: Rules of evidence are unlikely to prove very effective in controlling police behaviour. However, the courts must be able to protect the integrity of the adjudicative process. Therefore evi-

dence should be excluded if it was obtained in such a manner that its admission would bring the administration of justice into disrepute and in effect render the judicial process, which ultimately is designed to further the aims of the penal system, self-defeating.

Because of possible disagreement among judges about when the admission of unfairly obtained evidence would bring the administration of justice into disrepute, guidelines are set out in the section to assist judges in exercising their discretion. From these it is evident that the intent of the section is not to incorporate an absolute exclusionary rule into Canadian evidence law, but to give judges the right in exceptional cases to exclude evidence unfairly obtained, and thus restore what many believe to be the English common law discretionary rule.

Section 16: If the police obtain a statement from the accused in such a manner that its admission would bring the administration of justice into disrepute, the statement will be excluded by the judge under section 15. However, the statement may have been obtained under circumstances that do not justify its exclusion under that section, but that may still have rendered the statement unreliable. If so, the statement is excluded under this section.

A dissection of the section reveals the extent to which it follows the present law. First, like the present law, it applies to all types of out-of-court statements of the accused. Even his exculpatory statements may be unreliable because of the circumstances under which they were made. Secondly, again like the present law, the section is restricted in its application to statements made to persons in authority. While the definition of "a person in authority" has caused the courts some difficulties, it is the psychological pressures caused by the confrontation of the accused with an authoritative figure that causes most statements to be unreliable. These pressures, because they are not common knowledge, are difficult for the jury to assess. Moreover placing on the Crown the burden required by the section in respect of all out-of-court statements of the accused would be too burdensome. Thirdly, the section requires the prosecution to prove beyond a reasonable doubt that the accused's statement was not made under circumstances likely to render it unreliable. The policy reason for this is that in most cases the admission of the confession will lead to the conviction of the accused and this ought, of course,

to be proved beyond a reasonable doubt. Also, since on many *voir dire*s the reliability of the statement can be determined only by deciding upon the credibility of the police officers and the accused, a high standard of proof will place an onus on the police to ensure that they take statements from an accused person under conditions in which there can be no doubt of the statement's reliability. Fourthly, because of its ambiguous usage the word "involuntary", which is often used under present law to describe a statement that should be excluded, is not used in the section. While it is still perhaps a useful label to embrace all statements held to be inadmissible, the test to be applied under the section directs the court's inquiry to the rationale for excluding such statements. Fifthly, the section makes it clear that the accused can waive the necessity for holding a *voir dire* if he does not wish to dispute the admissibility of a statement. Permission for such waiver can assist in expediting the trial.

Finally, subsection (2) makes it clear that only a statement made under circumstances likely to render it unreliable is excluded. Real evidence found as a result of the statement, and the fact the real evidence was found, are not excluded by the section since the likelihood of such evidence being unreliable is very small. This codifies existing law.

General points of procedure with respect to the *voir dire*, such as the exclusion of the jury and the examination of the accused, are dealt with in section 7.

Exclusion of Certain Circumstantial Evidence

Character and Disposition

Section 17: The use of what is called character evidence is one of the most complicated areas of evidence law. The Code attempts to simplify the matter by distinguishing the inadmissibility of character evidence from the manner of proving it when admissible, and by distinguishing its admissibility to attack or support the credibility of witnesses from its admissibility to prove the conduct of the parties. Sections 62 to 66 deal with the admissibility of character evidence when it is being used to attack or support the credibility of witnesses. This section deals with character evidence sought to be admitted to prove the conduct of a party on a specified occasion.

Finally, section 20 provides for the methods by which character may be proved. Character may in some cases, such as a defamation action, be a fact in issue. Since there is no question of its relevancy in such cases and since there is no basis upon which it could be excluded, no special rule in the Code deals with its admissibility in those cases. It is, therefore, admissible under section 4, the general rule admitting all relevant evidence.

Although we may at times place too much importance upon a trait of a person's character, there is no question that it is relevant in proving his conduct on a specific occasion. Thus if an aggressive and a peaceable person were involved in a physical altercation, we might, on the basis of their character traits, assume that the aggressive person was more likely to have begun the fight. Consequently in the absence of a specific rule excluding it, character evidence in many cases would be admissible under section 4.

For policy reasons, section 17 provides that character evidence is inadmissible in some situations. The prosecution is prohibited by subsection (1) from tendering evidence of the accused's character unless he offers evidence of his own character or that of the victim. Although evidence of the accused's character offered by the prosecution might be relevant, it is also gravely prejudicial. The prejudice arises from the tendency of people to be less concerned about the consequences that befall a person of bad character. Thus if a jury hears that the accused is a person of bad character, they may find him guilty even though they are not satisfied beyond all reasonable doubt. If, however, the accused first leads evidence of his good character as tending to prove that he is not the kind of person who would commit the crime he is charged with, the prosecution must be permitted to rebut this evidence or the trier of fact might be left with a misleading impression of the accused. Similarly in a prosecution for assault, for example, if the accused tenders evidence of the victim's character trait for aggressiveness as tending to prove that the victim was the aggressor, the prosecution should be permitted to rebut this inference by offering evidence that the accused is also aggressive.

The character of the victim in a sexual offence is seldom relevant. However, if the accused alleges that the victim consented to the sexual conduct in question and non-consent is an essential element of the offence, evidence that the victim has consented to

such conduct under similar circumstances might be relevant. To protect the victim from needless embarrassment subsection (2) provides that the determination of relevancy should be conducted at a hearing *in camera*.

In most other cases character evidence as circumstantial evidence is of slight probative value. Even when it is slightly probative it usually ought to be excluded because of the possibility of prejudice, the consumption of time and the confusion of the issues. But in some cases, for instance civil cases where there is an allegation of moral turpitude, the probative value of character evidence might outweigh these dangers. These matters, however, require no special provision. They can adequately be dealt with under the general rule (section 5) that such evidence may be excluded.

Comment by Commissioner La Forest

I would have gone further in subsection (2) and excluded evidence of the victim's character in sexual cases for the purpose of showing disposition. I am not unmindful that such evidence can be cogent and that the liberty of the accused is involved. But the charge against him must, after all, be proved beyond a reasonable doubt. On the other hand, it cannot be overlooked that the enforcement of the law on the matter has become very difficult. The victim's fear of the trauma of a rape trial makes this the least reported of all crimes. The possibility of prosecution thus becomes a very ineffective deterrent to a crime that is increasing at an alarming rate. I am impressed with the following reasoning of the Evidence Project: "[I]n some cases the woman's reputation, not her consent, becomes the central issue. Besides questioning the probative worth of such evidence, the Project was deeply concerned with the effects of existing abuses of this type of evidence. Since the complainant may suffer unfair embarrassment and great harm, rape victims are often reluctant to press charges, and also women of bad character are provided with little protection against rape. The Project therefore is now recommending that in cases involving sex offences, the defence not be permitted to adduce evidence of the bad character of the victim either on cross-examination or in its case in chief." It is possible that this section may even accentuate this undesirable situation by requiring the victim to be subjected to a still further round of questioning at the *voir dire*, in addition to that by the police, at the preliminary hearing and at the trial proper.

Section 18: Under present law (and under section 17(1)) evidence of an accused's past conduct is inadmissible to prove his character for the purpose of raising an inference that he acted

on a specific occasion consistent with that character. But if evidence of his past conduct is relevant for any other purpose, such as proof of motive or identity, then it is admissible even though it has the effect of revealing his character. The assumption is that if it is relevant for one of these other purposes it is of much greater probative value than if it was relevant solely to prove character; therefore, its probative value generally outweighs its prejudicial value. This section preserves the present law.

Section 19: Character traits in law and in ordinary usage refer to a person's responses to whole areas of behaviour. Typical character traits are honesty, truthfulness and aggressiveness. A person's habit and routine practice on the other hand refers to his habitual responses to particular situations, such as the fact that a person always closes the door. A person's habits by definition are usually conformed to and are therefore highly predictive of his behaviour on a particular occasion. This section simply makes it clear that relevant evidence of a person's habit or routine practice is admissible notwithstanding section 17.

Section 20: This section permits a trait of a person's character, when admissible, to be proved by any relevant means. Under the present law character, unless it is a fact in issue, can only be proved by evidence of the person's reputation, in some cases by the opinion of experts, and by evidence of the person's previous convictions. Evidence of specific instances of his past conduct not resulting in a conviction is excluded on the grounds that it is too prejudicial and time-consuming. Such evidence, however, might be very probative of a person's character. Therefore this section sanctions the use of specific instances of past conduct in proving character. The trial judge will of course be able to control the admissibility of such evidence under section 5.

Preventive Actions

Section 21: This section codifies the common law position that evidence of subsequent repairs is not admissible to prove negligence. Such evidence is of only slight probative value in proving negligence since a person might make repairs after an accident out of an

abundance of caution. More importantly, the desirability of not discouraging people from taking precautionary measures after an accident by using such evidence against them outweighs whatever probative value the evidence has.

Section 22: The fact that a party is insured against liability is under the present law inadmissible as evidence tending to prove that he was guilty of negligence. There is nothing to suggest that a person who is insured against liability for his own negligent conduct is less careful than he would otherwise be. Therefore evidence of insurance is usually irrelevant. Its exclusion is also rationalized on the ground that if the trier of fact hears that one party has insurance and is, therefore, better able to absorb the loss involved in the lawsuit, he might decide the case on an improper basis.

However, now that liability insurance is almost universally held the prejudice caused by its admission is not nearly as great as it was when liability insurance was rare. Most triers of fact undoubtedly make assumptions about its presence in the case. As well, it might be highly probative in a case, for example, in which it is alleged that the defendant wilfully destroyed his property in order to realize his insurance. Therefore the section provides the trial judge with a discretion to admit it in cases where its probative value substantially outweighs the danger of undue prejudice.

Section 23: People should not be discouraged from assisting others involved in an accident by fear that such conduct may later be regarded as an admission of liability. Thus this section renders the offer of payment of medical assistance inadmissible to prove liability.

Compromise

Section 24: Offers of compromise as circumstantial evidence tending to prove liability were regularly excluded at common law. Such offers are often of little probative value, since a person might make or accept such an offer simply to avoid expensive or prolonged litigation. But even where they are of probative value they are excluded in order to further the policy of encouraging out-of-court settlement of disputes. To ensure that offers of com-

promise or statements made in the course of compromise negotiations are not construed as admissions of liability lawyers frequently preface discussions on these matters as being "without prejudice". The section would make such a disclaimer unnecessary. All offers and acceptances of compromise as well as all conduct and statements made in the course of compromise negotiations are excluded. If the parties are engaged in negotiations, courts should not have to distinguish between admissions and hypothetical statements made by the parties.

Section 25: It would be most unfair to the accused to admit against him a plea of guilty that had been withdrawn. Indeed the right to have a plea withdrawn would be illusory if it could be used against the accused at a subsequent trial.

Offers to plead guilty are excluded on the same basis as offers to compromise. To avoid a criminal trial an accused might offer to plead guilty to an offence that is less serious than the one he is charged with even though he is not in fact guilty. As well, the exclusion of offers to plead guilty promotes the disposition of criminal cases without trial by permitting compromise negotiations before trial.

Section 26: The Commission has recommended the increased use of pre-trial settlements of criminal complaints as being, in many cases, more socially productive in less serious criminal complaints than prosecution through the criminal courts. To promote this policy, statements made in the course of such negotiations are made inadmissible against the accused.

Hearsay

Section 27: Hearsay is commonly understood as a statement of fact made by a person who did not personally witness the fact, but was told about it by someone else. Hearsay has the same meaning in law, and section 27(2)(a) so defines it.

Hearsay statements are excluded from evidence in trials because of the difficulty of testing their reliability. If a person who actually observed a fact is not in court, but a statement he made to someone about it is introduced in evidence, there is no way

of inquiring into that person's perception, memory, narration or sincerity. His statement about the fact might be false because he misperceived it or did not remember it correctly, or he may have misled the person to whom it was made because he used words not commonly used, or he may simply have lied about it. These factors, which determine the reliability of his statement, can only be tested if he is in the courtroom and subject to cross-examination. Obviously these dangers rendering the statement unreliable are only of concern where the statement is offered to prove the truth of the matter asserted in it. Thus, like the present law, hearsay is defined to mean statements introduced for this purpose.

In section 27(2)(b), statement is defined to include any assertive conduct. Obviously evidence of conduct intended as a substitute for words should be treated in the same way as evidence of verbal statements. Under the definition, however, a person's words or conduct are not hearsay if he did not intend them to be assertive. In assessing the reliability of such evidence account may have to be taken of the dangers of hearsay evidence. However, unlike conscious assertions, a person is seldom likely to be deliberately misleading when he engaged in non-assertive activity, which is the most important danger associated with hearsay. In defining hearsay to exclude non-assertive conduct the Code follows the better view of the present law.

Although the following sections substantially broaden the hearsay exceptions under present law, the general rule remains the same that hearsay evidence is inadmissible (subsection (1)). The hearsay rule is at once the most characteristic and the most confusing and complex rule of our system of evidence. It often prevents witnesses from giving their testimony in a natural manner, thus perplexing and annoying them; if the declarant is unavailable, it sometimes results in the exclusion of the best evidence; if he is available, although a prior statement made by him might be admissible, the hearsay rule prevents the trier of fact from using it for its most logical purpose, namely as proof of the facts asserted in it; finally, the rule greatly complicates the law of evidence.

As already mentioned, the purpose of the rule is to ensure that the trier of fact will be able to assess the reliability of a statement by observing the demeanor of the witness and hearing him cross-examined. Under existing law the numerous exceptions to the rule

— some contend there are as many as thirty-one — have been justified on the basis that the conditions upon which they are predicated lend some circumstantial guarantees of trustworthiness to the statement. While it is undoubtedly preferable to have the person who observed an event testify about it in the courtroom, the numerous disadvantages of the present law require its reformulation. Sections 28 and 29 form the keystone of this reform, although further improvements are made under the other sections under this heading.

Section 28: This section provides that any previous statement by a witness is not excluded by the hearsay rule. Under the present law a prior consistent or inconsistent statement made by a witness, when admissible (see comment to section 62), is only admissible as evidence of the witness' credibility, and not to prove the matter asserted in it. This distinction is evidently difficult for a trier of fact to apply. More importantly, if a witness is on the stand and can be cross-examined about a prior statement made by him, there is little reason not to accord this statement the same status as one made by him on the witness stand. In many instances the prior statement will have been made under circumstances that tend to render it more reliable than statements made by him on the witness stand. It might have been made when his memory of the event was fresher, and before he was influenced by the parties or subsequent events. In any case if the prior statement is inconsistent with the witness' present testimony, the witness will have the opportunity of denying it or explaining the inconsistencies. If the prior statement is consistent with the witness' present testimony, the cross-examiner will be able to explore the circumstances surrounding the making of the prior statement to reveal the weight that should be given to it.

Section 29: This section makes a further fundamental change to the hearsay rule. At common law a statement made by a person who is unavailable at trial is only admissible if the statement comes within one of the recognized hearsay exceptions, for instance dying declarations, former testimony, or statements against interest. Yet if a witness is unavailable his statement is often the best evidence of a fact in dispute and equally necessary whether or not it was made under the limited circumstances provided by the common law exceptions. Although these exceptions were designed to ensure that the statement was reliable, they are premised on very primitive

notions of psychology, for example, that dying people are likely to tell only the truth, that only statements against pecuniary or property interests are likely to be reliable. It appears unproductive to attempt to rationalize the common law exceptions. If a person is unavailable, that alone should be sufficient to justify the admission of his previous statements. It makes more sense to weigh the probative value of a statement after it has been made, than to attempt to enumerate beforehand the circumstances under which a statement will be sufficiently reliable to warrant its admission at trial.

Subsection (2) defines "unavailable as a witness" very broadly to include (by virtue of paragraphs (a) to (d)) all situations where a person cannot realistically be called to give evidence in person. Common law exceptions that are made unnecessary by this definition include dying declarations, statements against interest, government statements affecting international relations (such as the status of foreign states, diplomats and national territory), family records and statements in documents affecting property.

By virtue of subsection (2)(e) a person's out-of-court statement will be admitted if the importance of the issue or the added reliability of his testimony in court would not justify the expense or inconvenience of procuring his attendance or, where this is permitted, procuring his disposition. This could effect substantial savings by avoiding the need for the presence of witnesses (such as experts who have carried out routine tests) whose testimony is not really contested. We propose to examine such expert evidence further in our project on discovery.

Subsection (3) provides a safeguard against the possible abuse of the spirit of the section by making a statement inadmissible if the unavailability of the witness was brought about by the proponent of the statement. Subsection (4) provides for advance notice to be given if a statement made by an unavailable witness will be submitted. This ensures that the opposing party can prepare to argue about or to lead evidence relating to its probative value.

Section 30: Most people would regard as fair the right of a party, if it helps his case, to introduce into evidence any statement that has been made, authorized, adopted or agreed to by the other party even though the statement is technically hearsay. Indeed it would

seem strange to permit a person to object to the admissibility of his own statement on the ground that he did not make it in court and has no opportunity to cross-examine. If he wishes to deny or explain the statement, he can always take the stand. Thus, by virtue of paragraph (a), there are virtually no restrictions on the use of a party's out-of-court statements when they are offered in evidence against him. The preliminary fact, in paragraph (a), whether a party by his words or conduct has adopted or agreed to a statement, will of course be determined by the judge. In criminal cases an accuser's statement made out of court to persons in authority will not be admissible unless they also satisfy the requirements of section 16.

Paragraph (b) permits certain statements made by a party's agent to be used against him. Statements made by an agent concerning a matter within the scope and during the continuance of his agency are likely to be reliable, or at least as reliable as statements made by him when testifying against his principal at trial. The same consideration applies to statements by predecessors or others in privity of title (paragraph (c)) or those made by a person engaged in a common enterprise with the party, if the statement was made in pursuance of their common purpose (paragraph (d)).

All aspects of this section have the support of some decisions.

Section 31: Paragraph (a): At common law and by statute various hearsay exceptions have been created for shopkeeper's books, bank books, business records, hospital records and the like. The present law suffers from a morass of details. The proposed section states simply the conditions under which all of these various records kept in the course of a regularly conducted activity will be admissible.

Ultimately, most of the exceptions created for what is often referred to compendiously as business records are founded upon simple necessity. Many business transactions are so complex that it would be prohibitively costly if not impossible to call all the witnesses necessary to reconstruct the transaction from persons with firsthand knowledge. In many cases, of course, the records will be highly reliable. This is particularly true of strictly business records. They are made in the same fashion habitually and systematically, errors are likely to be detected by others relying on the

record, and the entrant is likely to be very careful about the accuracy of the record since his job may depend upon it. However, even under the present law business records are admissible as hearsay evidence even though these safeguards are not present. The necessity of providing a convenient method of proving certain transactions or events simply outweighs the objections to reliability.

The proposed exception retains the essential underlying safeguards of reliability provided by the present law, but at the same time consolidates and greatly simplifies the many hearsay exceptions dealing with the matter, and does away with many of the requirements of the present law that do not add appreciably to the reliability of the record. Thus, for instance, the word "business" is not used in the section, the person making the record does not have to be "under a duty", and the statements made on the record are admitted whether they are statements of an act, event, condition, opinion or diagnosis, so long as they are otherwise admissible. The conditions ensuring the reliability of the record are that it was originally made at or near the time of the matter recorded, that the person making the record or the person who supplied him with the information had personal knowledge, and that the record was made in the course of a regularly conducted activity.

Paragraph (b): A common law exception to the hearsay rule provided for the admissibility of public records and documents made by officials who had a duty to make them. Such evidence was considered reliable since public officials are under a duty to make accurate statements, and if an error is committed public inspection of the document should lead to its correction. As well, there was an element of necessity for such an exception. Many trials involve the work of public officials in some aspect; if they were compelled to testify at these trials it would be extremely disruptive of government services. Furthermore, in most cases little would be gained by compelling the attendance of the official since he would likely have no recollection of the facts recorded.

The admissibility of many kinds of public documents is now regulated by statute. This paragraph provides a simple rule for the admissibility of all types of public documents. It substantially liberalizes the common law; in particular there is no need for the document to be subject to public inspection. While such a require-

ment might provide some added assurance of reliability, it would, if construed narrowly, exclude many records of public officials even though they were made pursuant to an official duty and are thus likely to be reliable. Many public records would be admissible as records made in the course of regularly conducted activities under paragraph (a). However, paragraph (b) ensures that non-routine records and reports made by government officials will be admissible without dispute.

Paragraph (b) admits investigative reports made pursuant to law. In many instances public officials have a duty to investigate and prepare reports. Fire, police, autopsy and chemist reports are illustrative. Under present law most of these could be admitted as evidence, although they are not frequently offered. However, they often have substantial probative value and this paragraph, therefore, provides for their admissibility. The reports are often made immediately after the event by people trained in such investigations. In most cases the investigator will be called to testify. However, the report itself should be admissible as evidence if it is thought unnecessary to call the investigator.

As in the case of other evidence, the trial judge has a discretion under section 5 to exclude a report if he finds that in all the circumstances it is unreliable. Circumstances to be considered will include the manner in which the investigation was conducted, the skill, training and impartiality of the investigator, and the timeliness of the investigation.

Paragraph (c): This paragraph provides for the admissibility of records of vital statistics. These records are invariably the most accurate and often most convenient way of proving deaths, births and marriages. They would not strictly qualify under paragraph (b) as public records, however, since the persons (such as ministers or physicians) reporting them to the appropriate public agency are not public officials.

Paragraph (d): Situations arise in which a record of a regularly conducted activity is silent on a matter of which a record normally would have been made. The absence of the record is clearly relevant as tending to prove that the matter did not take place. Although in most cases this evidence will not be a "statement" as defined in section 27(2)(b), paragraph (d) ensures its admissibility.

Paragraph (e): Marriages can be proved by a public document under paragraph (b). However, the proponent may offer as proof of marriage the document given to the parties by the celebrant of the marriage at the time of the ceremony. If the judge finds that the conditions of this section are met the certificate would appear to be good evidence of the facts stated in it. This applies to other ceremonies and sacraments. This codifies the common law.

Paragraph (f): Under the present law a document that has been in existence for thirty years, whose condition does not create suspicion, and that was in a place where, if authentic, it would likely be, is presumed to be genuine. Under the present law the authorities are divided on whether such a document is also admissible as evidence of the truth of the statements contained in it. We think the better view is that, as well as being presumed authentic, such a document should be admissible as an exception to the hearsay rule. Normally, of course, the authors of the document will be unavailable and it will be admissible under section 29. But even when they are available, such a document has a degree of reliability justifying its admission. It must be twenty years old, and thus inevitably be uncontaminated by the bias of present litigation.

Paragraph (g): Market reports and other commercial tabulations are clearly hearsay when offered to prove matter asserted in them and are consequently inadmissible under present law. However, they appear sufficiently trustworthy and the inconvenience of obtaining the information in other ways is so great that they should be admissible as an exception to the hearsay rule. The authors of the reports are often inaccessible; the reports are relied upon by experts and are therefore prepared with care; and cross-examination would unlikely be effective in further assessing the reliability of the reports.

Paragraph (h): Under present law if a person pleads guilty to an offence or makes admissions in the course of giving testimony, these statements will be admissible in subsequent litigation since they fall within a well recognized hearsay exception—admissions. However, a conviction entered after trial is itself inadmissible to prove the truth of the matters necessarily determined in the proceedings. Thus in a divorce proceeding where the ground for divorce is adultery, the fact that the respondent was convicted

of rape is inadmissible as tending to prove that he committed adultery. The reason most frequently given for the exclusion of such apparently probative evidence is that the trier of fact in the criminal trial was not a witness to the act and, therefore, the conviction is hearsay. However, a previous conviction may have high probative value. The accused usually has strong motives to dispute the facts, and he can only be convicted if the trier of fact is convinced of his guilt beyond a reasonable doubt. Therefore, it makes sense to permit such evidence to be admitted at least in subsequent civil cases as proof of any fact essential to sustain the judgment. The trier of fact may weigh such evidence and, in view of all the evidence, reject it as untrustworthy. This is equally true of a criminal case against the same accused and in a criminal case against any accused if it is the accused who produces this evidence. However, it is of utmost importance that every accused should have the opportunity of thoroughly testing the prosecution's case against him, without having to lead independent evidence of his innocence. This is very difficult if the conviction of another person is introduced as evidence against him. Consequently the previous conviction of another accused cannot be admitted against him by virtue of this paragraph.

Paragraphs (i) to (l): Now that most events of public and even private affairs are recorded, there is little need in judicial trials to resort to evidence of reputation to prove a fact. However, reputation evidence is one of the oldest hearsay exceptions and since there may still be a necessity for it in some trials, we have retained the common law rules — but have removed anomalies in them. At common law these exceptions to the hearsay rule were rationalized on the grounds that often other proof of the matter in dispute was unavailable, and that statements about reputation were likely to be reliable, being the aggregate opinion and judgment of the community about matters that if wrong would have been contradicted and disproved.

Paragraph (i) liberalizes the common law hearsay exception for evidence of the reputation of a person's character, by permitting the admission of evidence not only of the person's reputation in the community, but among his associates. Modern day society is so mobile that people seldom acquire reputations in the com-

munities where they live. However, they might, for instance, acquire a reputation as to their character among those they work with. Paragraph (j) allows reputation of human pedigree to emanate from family members, associates and the community. Reputation in the community as to boundaries or other matters affecting realty, both private and public, is admissible under paragraph (k). And historical facts can be proved by reputation in the community pursuant to paragraph (l).

Privileges

General

Section 32: An evidentiary privilege is generally considered to be the right of a person to prevent a judge from compelling him or some other person to disclose a particular confidential communication. Privileges were created to promote various specific policies of the law that in certain contexts are considered to outweigh the interest in having the truth revealed in judicial proceedings. This section is the key provision. It incorporates the general principle running throughout the Code that all relevant evidence is admissible. Thus there are no privileges except as provided by statute.

Section 33: This section makes it clear that a person who, under the Code, has a privilege against disclosure of a matter may refuse to disclose it or prevent another from doing so.

Section 34: A privilege is personal to its holder. A person may thus assert or waive a privilege. Since the purpose of privileges is to protect the confidentiality of certain information, if the holder of a privilege voluntarily discloses the information there is no longer any reason for the privilege and under this section he will be assumed to have impliedly waived it.

Section 35: Once privileged matter is disclosed the purpose of the privilege is defeated. This section, however, provides a remedy for the party who is wrongfully compelled to disclose privileged information: on a new trial the matter is inadmissible. In the absence of this section if a trial judge ruled that a witness

had no privilege, the witness would have to remain silent and face a charge of contempt if he wished to preserve his privilege. The section permits him to avoid that burden by complying with the trial judge's ruling and yet not be taken to have waived his privilege. It also allows him to assert his privilege if an eavesdropper or other person disclosed the information in court before he could object to its admissibility.

Section 36: Since important social values are protected by privileges, their exercise should not be discouraged by an adverse comment by the judge or counsel or the drawing of an adverse inference by the trier of fact.

Section 37: Privileges, in the main, protect personal rights of the holder. Therefore an appeal on the grounds of an alleged erroneous denial of a privilege can only be taken if the party appealing is the holder of the privilege. An infringement of someone else's right should not be the basis of a party's appeal.

Particular Privileges

Section 38: At common law, a witness had the right to refuse to answer a question on the ground that it might expose him to a criminal charge. The policy grounds for this privilege included the need to encourage people to appear and give testimony at proceedings without fear that they might be compelled to incriminate themselves, and the need to maintain a fair balance between the investigative powers of the state and the individual. Later, however, the absolute privilege of self-incrimination was abolished by statute. The legislature obviously felt that there was a need to balance the interests protected by the privilege against the interest in obtaining all relevant testimony from third-party witnesses in proceedings. It, therefore, provided that the testimony of a witness who objected to answer a question on the grounds that his answer might criminate him could not be used against him in a subsequent criminal proceeding. This section preserves this limited privilege but with an important change. A difficulty with the existing law was that a person who did not know of the privilege might not object to answering a question whose answer might criminate him and the evidence could consequently be used against him. This

resulted in an invidious distinction between those who knew their rights, and those who did not. Under this section the privilege is automatic.

Section 39: Numerous statutes require individuals or organizations to report information to the government. To induce complete disclosure and to protect the person filing the report from having such compelled evidence used against him in subsequent proceedings, many statutes provide that such information cannot be disclosed without the person's permission. If it is a federal statute this privilege will prevail since section 32, which abolishes privileges, expressly excepts privileges granted by other federal statutes. However, provincial statutes also create privileges protecting people against the disclosure of information they are called upon to report. Since provincial statutes have no application in proceedings governed by this Code, such information, though not usable in provincial proceedings could be used in federal proceedings. This section incorporates these provincial privileges into federal law and thus ensures that the policies of the provincial statutes are not defeated by the use of such information in federal proceedings.

Section 40: Under existing law, confidential communications between spouses are privileged. The major purpose of the rule is to foster frankness and candour between spouses, and thereby support the conjugal union. But the privilege applied no matter what the state of the marital union and, oddly enough, the privilege was that of the person receiving the communication, not of the one making it. This section attempts to achieve a better balance between the desirability for confidentiality and the need for obtaining evidence by giving the judge a discretion to allow or disallow the privilege in the light of the circumstances. It rationalizes the law by making the privilege that of the person making the communication. And it extends the privilege to other family and similar relationships.

Comment by Commissioner La Forest

I would restrict this privilege to husbands and wives. I have a general disinclination to extend privileges because of their tendency to conceal the truth. Only in the case of the marital union do I see any compelling reason

for this privilege, namely, that marriage is the cornerstone of society as we know it. I would add that I do not agree with the possible implication in the comments (see also the comments to section 57) that the state of the marriage at the time of the proceeding should be the prime consideration in allowing the privilege. That may be a relevant consideration, but if it is sought to promote candour between spouses it must be by supporting a policy that encourages marital communications when they are made. One cannot make this policy totally dependent on the state of the marriage at the time of the proceeding.

There is also an administrative problem. The more people the privilege applies to, the more often it will be invoked and consequently, in a discretionary privilege of this kind, the more time will be taken by the court in determining whether it applies. A further dimension to this difficulty is that those to whom the privilege applies are not fully defined, and all sorts of nice questions can be raised on this issue. The determination of this issue is not a mere discretionary matter but one going to the meaning of the section and consequently one from which courts of appeal would not discourage appeals. Precedents would then be required in interpreting the rule, and this is the sort of thing the Code generally tries to avoid. This cannot be helped when precise definition is impossible. That is the case, for example, with the general professional privilege where experience (which we now lack) must govern future development. But here the relationships one desires to protect can be spelled out.

Section 41: The common law did not recognize a privilege for confidential communications between clients and such professionals as social workers, medical practitioners, psychiatrists, accountants or clergymen. All these professions contend that their clients should be entitled to claim a privilege for confidential communications made during the course of a professional relationship. The task of deciding whether one or all of these professions should be granted a privilege is most difficult. Inevitably a decision granting an absolute privilege to any group is seen as arbitrary. Because of the strong interest in admitting all relevant evidence, exceptions to a general rule granting such a privilege might engulf the exclusionary rule itself. Since it would be unrealistic to attempt to define the circumstances where the maintenance of confidentiality for communications made in the course of professional relationships outweighs the benefit of their disclosure the section provides that the judge should weigh the competing interests whenever such a privilege is claimed.

Section 42: At common law a person has a privilege against disclosure of confidential communications between him and his lawyer in the course of a professional relationship. A privilege of this kind is obviously required when the subject of the communication relates to contemplated litigation. In an adversary system where lawyers represent parties, it is essential that the parties be able to inform their lawyers of everything related to the case, so that the lawyers can adequately defend them. In time, however, the common law extended the privilege to all confidential communications in the course of a professional relationship, whether made in contemplation of litigation or not. Subsection (1) embodies the original rule, restricting the privilege to communications made in contemplation of litigation. The client has no stronger ground of privilege in respect of other communications made to a lawyer than to those made to other professional persons.

Comment by Commissioner La Forest

I have some technical qualms about restricting the operation of this privilege to communications made in contemplation of litigation. In the first place, one wonders how much difference there will be in the ultimate result, and consequently whether it is worth the additional delays required to determine whether a privilege exists. Moreover, I am concerned about the situation of a lawyer who, having given legal services in respect of a matter, is later called upon to plead a case involving the matter. I agree, of course, that the privilege must, as now, be restricted to communications relating to legal services, not to communications for business reasons, and that can (though less often) lead to similar difficulties. Indeed the underlying rationale of the Commission is so compelling that I hope my reservations will prove unfounded in practice. I think it is worth trying.

To permit a lawyer adequately to defend his client, information obtained or work produced by him or persons assisting him were equally privileged. Subsection (2) retains this privilege in relation to information obtained or work prepared by the lawyer in contemplation of litigation, but it rationalizes the privilege by also making it applicable to information obtained or work prepared in contemplation of litigation by the litigant himself. It is, after all, his privilege, and litigants often prepare their own case. In certain circumstances, e.g., small debts, they must do so since they are not permitted to employ a lawyer.

Legal matters affect a person's estate and persons claiming through him. Subsection (3) provides for the privilege being claimed on his behalf by the various representatives of the claimant.

Subsection (4) sets forth a number of exceptions to the privilege, all of which have their basis in the common law. Paragraph (a) prevents the privilege from being abused by serving as a cloak to commit a crime or civil wrong. The other exceptions are justified by the fact that they are essential in obtaining evidence and do not offend against the fundamental basis of the rule.

Subsection (5) defines "lawyer" to include any person a client reasonably believes has a right to practise law. Thus the policy of the privilege will not be defeated because of a client's doubts about his lawyer's competency to practise. The definition also includes Quebec notaries, who in that province perform some functions usually done by lawyers in other provinces.

Subsection (6) ensures that a person may, under the general professional privilege, claim a privilege in respect of professional communications with a lawyer that were not made in contemplation of litigation.

Section 43: Information in the possession of the government may be relevant in a proceeding. Its disclosure may, however, be harmful to the public interest, for example in the conduct of international relations, national defence or government administration. Thus a balance must be struck between the public interest in maintaining the confidentiality of such government information and that in maintaining fair and efficient litigation. Under the present law it is, in the final analysis, the government itself that makes the decision in individual cases about where this balance should be struck. If a Minister of the Crown alleges that the revelation of information would be injurious to such matters as international relations or national defence, that information need not be disclosed to the court. The present law should be changed. A judge, because he is impartial with respect to the matter, is in a much better position to weigh the competing interests. Thus under subsection (2) the judge will decide the merits of a claim of Crown privilege by the government. And, if the matter is thought sensitive enough, provision is made by subsection (3) to have the issue heard by a judge of the Supreme Court of Canada.

Subsections (4) and (5) establish a procedure for determining whether the privilege should be granted that will ensure that the interests of both the government and litigants are protected to the greatest extent possible. Subsection (6) ensures that federal Crown privileges are governed by this section in any proceeding, federal or provincial.

Section 44: It is a great aid to effective law enforcement if people feel free to reveal information to the police without fear of retaliation. This privilege furthers the effective use of informants in law enforcement by permitting such people to remain anonymous. In some cases, however, the identity of the informant may be essential. Such cases can be accommodated by the discretion given the judge to compel disclosure if, in the circumstances, the interests in maintaining secrecy are outweighed by the interest in arriving at a fair determination of the issues.

Section 45: In patent infringement or unfair competition cases, a trade secret may itself be the subject-matter of the litigation. In tort actions where the negligent manufacture of a product is alleged, a trade secret might become involved. In all cases the common law recognized a privilege for trade secrets. However, the privilege was never absolute since in some cases its disclosure was essential if justice was to be done and fraud prevented. This qualified privilege is recognized in this section.

PART II – AUTHENTICATION AND IDENTIFICATION

Section 46: Often, in order to establish that evidence is relevant, it is necessary to show that the evidence is what it is claimed to be. For example, when a gun that is alleged to belong to the accused or a letter that is alleged to have been written by the defendant are offered in evidence, such articles are obviously only relevant if they are in fact what they are claimed to be. The authentication or identification of evidence is thus simply a particular application of the general rule of conditional relevancy set forth in section 7(2). That is, whenever evidence depends for its relevancy on the existence of a preliminary fact (which might include its authentication or identification), evidence sufficient to support a finding of the existence of the preliminary fact must be introduced before

the offered evidence is admissible. However, where the preliminary fact involves a question of the authentication or identification of evidence, the common law developed a series of rules as to what could constitute sufficient evidence of authenticity or identity. This was particularly true for writings where the identification of a signature, handwriting or the identification of an original was in issue. The reason frequently given for these rigid requirements is that the trier of fact might be susceptible to uncritically accepting writings as genuine. This assumption is highly questionable. This section, therefore, makes it clear that under the Code there are no special requirements of authentication or identification. The evidence introduced to prove that the offered evidence is what it is claimed to be merely has to be sufficient to support such a finding.

Problems of authentication relate largely to the introduction of writings; problems of identification relate largely to the introduction into evidence of other kinds of physical articles (real evidence). However, a problem of identification might also arise with respect to other evidence. Where, for instance, a party testifies about a telephone conversation with a person, some evidence must be introduced that the person he alleges he was conversing with was in fact that person.

Evidence may be authenticated or identified in a variety of ways, for example, by the testimony of expert and non-expert witnesses, by comparison with authenticated matters, by voice identification, by distinctive characteristics, by being filed or recorded where it ought to be, or where the evidence adduced is the result of a mechanical or other process, by showing that the process is accurate. It should be noted that problems of authentication are increasingly avoided in civil cases by requests pursuant to rules of practice to admit documents, and in criminal cases by informal agreements.

Section 47: Both at common law and by statute a number of writings can be admitted at a trial without leading independent evidence to authenticate them. Usually these are writings, whose authentication by independent evidence would be inconvenient, that are unlikely to be forged, or whose forgery, if it did occur, would be relatively easy to detect. It is sometimes said that the

courts take judicial notice of the genuineness of these writings or that their genuineness is presumed. The section makes it clear that while no independent evidence is needed to authenticate them, once admitted their genuineness may be contested.

It is very unlikely that a document bearing an official seal and signature would be forged, and such a forgery can be detected relatively easy. Therefore at common law and by statute a great number of such documents were in effect presumed genuine. Section 47(1)(a) makes any document bearing an official seal and a signature admissible in evidence upon its mere production. Documents bearing the signature of an official certified by another official under seal are equally admitted on production (section 47(1)(b)).

Section 47(1)(c) in essence codifies the common law as restated in numerous statutes. Because of the inconvenience of removing documents from public records the section provides that a copy of a public document can be authenticated in the same manner as the document itself, namely by a signed certificate under seal.

The matters mentioned in section 47(1)(d), (e) and (f) are so likely to be genuine that in the interests of expedition it makes sense to admit them into evidence without requiring their authentication by independent evidence.

Section 47(1)(g) facilitates the authentication of private documents. The acknowledgment under seal, by an officer empowered by law to do so that the signatures on a document were made by the persons whose signatures purport to be, is sufficiently reliable to authenticate the document.

Section 47(1)(h) and section 47(2) and (3) provide a convenient method for authenticating foreign documents. Seals and signatures of foreign officials are easier to forge and their forgery more difficult to detect than those of domestic officials. Therefore rather than providing that they are self-authenticating, section 47(1)(h) provides that, to be admitted, they must be accompanied by a certificate of genuineness as to the signature and identity of the official executing the document or of an official who is entitled to certify the original attestation. This certificate of genuineness may be made by the diplomatic and consular officials of either country

(subsection (2)). This procedure renders the authentication of foreign public documents relatively easy while providing a sufficient guarantee of genuineness. Of course, even though a foreign document is authenticated according to those provisions its genuineness may still be challenged. If because of time constraints or other reason a foreign document cannot be authenticated by obtaining a certificate of genuineness, subsection (3) provides a procedure whereby it may be admitted as authentic.

Section 48: At common law if a witness signed a document for the purpose of indicating that he acknowledged it was signed by the alleged maker, he had to be called to authenticate the document. This rule was long ago abolished by statute, and this section simply continues the abolition.

TITLE V – METHODS OF ESTABLISHING FACTS

PART I – GENERAL

Section 49: In judicial proceedings facts are usually proved by the testimony of witnesses and the presentation of real evidence, i.e., matters submitted for examination by the trier of fact (see section 74(2)). However, a party may admit facts during the course of the proceedings. And, of course, the trier of fact may reasonably infer the existence of one fact on proof of another, or he may be required by law to presume it (see section 14). Finally, the court may take judicial notice of the existence of certain facts and the law (see sections 82 to 85). This section simply sets forth the various ways of establishing facts.

PART II – WITNESSES

General

Section 50: Existing law requires a person to take a religious oath before testifying unless he objects on the ground of conscientious

scruples, in which case he is permitted to make an affirmation. This section would abolish the oath and would require all witnesses to affirm. Forcing a person to publicly decline to take an oath is an invasion of religious privacy; if a witness refuses to take the oath under present law his testimony may be viewed with scepticism by some jurors and judges; in many instances the taking of the religious oath is a meaningless ritual.

Comment by Commissioner La Forest

I would retain the oath. I am convinced that a substantial number of people are more likely to tell the truth, at least the whole truth, if they take the oath. To those who take the oath seriously (and this covers a great many people) the certain demands of conscience are more likely to elicit the exact truth than the highly uncertain threat of a prosecution for perjury. Moreover, one cannot neatly separate man the citizen from the moral man. The Commission has on numerous occasions reiterated that the criminal law should be used to protect the core values of society. These core values are ultimately grounded in the values of the individuals comprising that society. Why should those individual values not be used to buttress society's core values so long as this does not become oppressive?

The minor invasion of privacy is surely outweighed by the need to obtain the truth. Witnesses on the stand must daily reveal far more sensitive matters. And I cannot believe that in this day and age the danger that the testimony of a person who, on the ground of conscientious scruple, refuses to take the oath may be met with skepticism is sufficiently general to outweigh the argument for retaining the oath.

Section 51: This section makes it clear that the judge may give instructions to any witness if he considers it advisable to ensure that the witness understands the necessity to be truthful. This will arise especially in relation to children, but it can apply to others such as mental defectives. Under present law before a child may be sworn the judge must be satisfied that the child understands the nature of the oath. If he does not, his testimony must be corroborated. There are no special rules of competency in the Code with respect to children. The frailties inherent in the testimony of immature witnesses should affect the weight of the evidence rather than its admissibility. However, under this section the judge may give a child instructions, in addition to the affirmation required by section 51, to ensure that the child understands his obligation to tell the truth.

Section 52: One of the most fundamental rules of evidence is that a witness must have personal knowledge of the matter about which he is testifying, unless he is testifying as an expert: see section 71. The rule ensures that the testimony of witnesses has some minimum level of probative value.

Section 53: This section, making interpreters and translators subject to the rules respecting witnesses generally except for a minor modification in their affirmation, codifies existing laws.

Competence and Compellability

Section 54: Except for those specifically mentioned in section 55, this section eliminates the remaining common law grounds rendering a person incompetent to testify at trial. At one time many persons were, for a variety of reasons, disqualified from giving testimony. However the trend has been to reduce these disqualifications. The only significant remaining grounds of incompetency abolished by this section are mental immaturity and marital relationship to the accused. Because of the impossibility of stating and applying a standard of mental immaturity that renders a witness incompetent to testify, it seems preferable simply to let the trier of fact take into account any such incapacity in assessing the weight to be given to the testimony. The other ground of incompetency, marital relationship, is abolished by the section since there seems little reason to prevent a person from testifying for or against their spouse if they so desire and the evidence is sufficiently probative.

The section also provides that generally all witnesses may be compelled to testify. Sections 56 and 57 create exceptions to this general rule in criminal proceedings in respect of an accused or a person related to him. Moreover, a number of immunities exist in respect of the Crown, diplomats and other persons of similar status.

Section 55: Since it is essential that the judge and jury be, and be seen to be impartial, their inability (under subsection (1)) to be witnesses at a trial they are hearing, seems uncontroversial. Subsection (2), which disables a juror from impeaching a verdict, is the common law rule. The rule stems from the need for finality in adjudication and to protect jurors from harassment.

Section 56: Under the present law if the accused takes the stand in his own defence he can be questioned about any previous convictions. Since such evidence is very prejudicial, many accused persons understandably choose not to take the stand. Under those circumstances, comment by the judge or prosecution about the accused's not taking the stand would be unfair. Generally, section 64(2) would permit the accused to take the stand without fear that his previous convictions would become known to the trier of fact. Thus if the accused does not take the stand, it could be inferred that his failure to do so is because he is guilty. Section 56 would permit such an inference to be suggested by the judge and counsel.

The section will not effect a great change in the present law. Under the present law the trier of fact and a court of appeal may consider the accused's silence at trial as evidence of guilt. Furthermore in trials by judge alone, such an inference may be discussed by the judge and counsel in assessing the weight of the evidence. Thus the only change the rule effects is that in jury trials the possibility that such an inference may be drawn may be brought out in the open.

Section 57: Under existing law a spouse is, as a general rule, not competent and cannot be compelled to testify against his or her spouse in a criminal proceeding. The rationale for the rule is the protection of the marital relationship. However, there are some twenty-six statutory and common law exceptions to the rule, which indicates its rigidity and arbitrariness. Accordingly the section requires the judge to weigh the conflicting interests and decide whether the interest in preserving the relationship outweighs the need for the testimony. This allows for the exceptions that must be made in practice, while not excessively cluttering up the law. At present the rule applies to all legal marital relationships even though they have completely broken down or were entered into for the sole purpose of frustrating the prosecution. At times the exceptions appear to be destructive of the rule; for instance if a man is charged with rape, his wife can be forced to testify against him, but not if he is charged with the murder of the same woman.

The existing rule does not apply to other family relationships such as mother and son, father and daughter, brothers and so on,

nor to common law relationships. Such relationships in individual cases may be as important as the marital relationship, and accordingly under this section the judge is given a discretion not to compel a person to testify in such situations.

Comment by Commissioner La Forest

I would limit the application of this section to husbands and wives for the reasons given in my comment to section 40.

Manner of Questioning Witnesses

Section 58: Under the adversary system of trial it is the duty of the parties to present the evidence before an impartial arbiter. Leaving the responsibility for the presentation of the evidence with the parties, it is argued, is the best method of ensuring that all the evidence will be presented and that the trier of fact will remain impartial throughout the proceedings.

But the judge has never been a passive umpire. It was recognized at common law that he has an obligation to see that the trial is conducted fairly, expeditiously and intelligibly. Accordingly he may control such matters as the order in which witnesses may be called, the number of witnesses who may testify respecting a particular matter, the number of counsel who can examine witnesses, and the manner in which counsel may examine and cross-examine witnesses so as to permit the witness to give his evidence in a satisfactory manner, without being misled, intimidated or harassed. Again, the judge may determine the manner and extent to which models, maps, plans, documents and other objects may be used by witnesses, counsel and jury. Similarly, the judge may himself call, recall and question witnesses or otherwise elicit evidence. But, he must exercise this control reasonably and this involves restraint consistent with the primary obligation of the parties to present the evidence and with the judge's obligation to be impartial. The section, in the main, codifies the common law.

Section 59: A witness is usually sympathetic to the case of the party who calls him. Therefore, there is a danger that he will

acquiesce in suggestions that that party makes to him during questioning. This is the reason for the general rule that a party calling a witness cannot ask him leading questions. In order to save time or to fairly elicit testimony, existing law permits him to ask leading questions in relation to introductory or undisputed matters, or where the witness may have difficulty in expressing himself (for example, where he is not familiar with the language in which the proceedings are conducted or because of his mental or physical condition). These matters are codified by subsection (1). Subsection (1) also permits leading questions when the rationale of the prohibition does not apply, namely, where the witness is not sympathetic to the case of the party who called him. The section does not use the word adverse, which is used under the present law to describe such a witness, since that concept has, in some cases, been given a meaning that does not clearly embrace the reason for permitting leading questions.

Leading questions to a witness called by another party are an excellent means of determining whether the witness is telling the truth, or whether he is mistaken or misleading in what he has testified to in direct examination. Accordingly existing law has always permitted such cross-examination, and this is codified by subsection (2). However, if the witness is biased in favour of the cross-examining party, then the dangers that the general prohibition against leading questions is designed to minimize are present and the general rule applies.

Section 60: It is well known that a person's memory may be aided if the person is presented with a document or object, or is asked about matters he associates with a past event. Under existing law only writings proved to have been made or verified by the witness contemporaneously with the events about which he is testifying can be used to refresh his memory. A writing of this kind is probably more likely to accurately set forth the person's recollection at the time, and its accuracy is relevant in determining the extent to which the document can itself be used as evidence: this is dealt with in connection with hearsay. But the writing, whether accurate or not — and for that matter, any object — can serve to refresh memory. Accordingly, the use of any writing should be permitted for this purpose. There is, of course, danger that a person will think he

recalls a written document and parrot what it says. As a safeguard against this danger the section gives the judge a discretion not to have a matter used to refresh a witness' memory if it appears that it will tend to lead the witness into error; subsection (1). Moreover, the other party is permitted to examine anything used to refresh memory and to cross-examine on the basis of it.

Subsection (2) provides that an adverse party may have produced any document used by a witness to refresh his memory, whether before or during the trial. Fairness and the safeguard of cross-examination would appear to compel the disclosure of a document used to refresh memory, whether the document was used by the witness while actually testifying or consulted and memorized by him ten minutes before testifying.

Section 61: A witness hearing another may, intentionally or unintentionally, make his testimony conform. The same may be true if he discusses the evidence given with another witness. Separating the witnesses will not completely avert this danger but will assist in disclosing whether witnesses (by using identical language) are telling a memorized story. For these reasons, existing law gives the judge a discretion to exclude witnesses and to prohibit them from discussing their testimony, subject to the exception that parties and persons essential to the presentation of their case cannot be excluded. The section in substance codifies existing law.

Credibility

Section 62: Nearly all proof in judicial trials ultimately depends on the statement of a witness. Consequently, the credibility of a witness is often crucial. In most cases the testimony of witnesses conflicts, not because of the untruthfulness of one witness, but because of the fallibility of human perception and memory. This section reflects the underlying philosophy of the Code, that generally all relevant evidence, in this instance, to the credibility of a witness should be admissible. It, therefore, abolishes all existing rules excluding evidence respecting credibility. Among matters that may affect a witness' credibility are his opportunity and capacity to observe, his power of recollection and narration, bias, interest,

hostility, previous consistent and inconsistent statements, and his character for truthfulness.

An important effect of the section is to eliminate four existing rules — the collateral facts rule, the rule prohibiting a party from impeaching a witness called by him, the rule that a party cannot support the credibility of a witness called by him by introducing previous statements made by the witness consistent with his story at trial, and the rule limiting the introduction of statements inconsistent with a witness' testimony to those that relate to the subject-matter of the case.

Under existing law the first of these rules prevents a party from contradicting a witness on a collateral matter. The definition of a collateral matter has been the subject of much dispute. Clearly if a witness' testimony relates to the subject-matter of the case it is not collateral and the witness can be contradicted on it. But the notion of non-collateral fact has been broadened by case law to include, as some cases state it, any matter the party could prove as an independent fact. Consequently the following matters have all been held to be non-collateral: bias; interest and corruption; previous convictions; character traits for truthfulness; medical, psychological or other evidence affecting credibility; lack of opportunity for personal knowledge; and any matter testified to by a witness where contradiction is of great probative value in proving the credibility of the witness. The reason for the rule is not that the contradiction of a collateral matter is irrelevant to the issue of the credibility of the witness, but rather that its probative value is usually slight and is outweighed by the dangers of confusing the issues and wasting the time of the court. We concluded, therefore, that rather than have an inflexible rule prohibiting contradiction the matter should be left to the general discretion of the judge under section 5. The present test of collateral matters is elusive and needlessly complicates the law; its many exceptions have almost rendered the rule meaningless. However, in some cases it is still too restrictive and results in the exclusion of evidence that should be admitted.

Under existing law a party is not allowed to impeach the credibility of a witness called by him unless the witness proves adverse, in which case the party can prove that the witness has made a previous statement inconsistent with his present testimony. The

rule may have made sense at a time when witnesses were in effect simply character witnesses. However, today parties often have no choice about whom to call as witnesses and may know little about them except that they witnessed the event. Consequently, the common law rule is no longer justifiable.

Under existing law a witness is not allowed to introduce evidence that he has made prior statements consistent with his testimony for the purpose of supporting his credibility unless the statements satisfy the criteria of certain exceptions, for example, recent complaints in sex cases, the rebuttal of allegations of recent invention, or a witness' prior identification of the accused. The basis for rejecting such evidence is apparently its superfluity and the danger that witnesses may manufacture such evidence. These seem to be matters that can more sensibly be dealt with by means of the judge's general discretion to exclude evidence that involves undue waste of time (section 5), and by the ability of counsel to cross-examine. Thus the existing inflexible rule is abolished.

Finally under existing law a prior statement inconsistent with a witness' testimony is only admissible if, among other things, the statement is "relative to the subject-matter of the case". This requirement could result in the exclusion of important evidence relevant to a witness' credibility. Obviously the same considerations ought to apply in determining the testimony upon which a witness may be contradicted by his own prior statements as apply in determining the testimony upon which he can be contradicted by proof through other witnesses. Consequently, like the "collateral fact" rule, this rigid rule of exclusion is abolished.

This section also has an important effect on the type of evidence that can be adduced respecting a witness' character for truthfulness. If a witness has a motive for lying, a trait of his character for truthfulness or untruthfulness is of obvious value in determining whether his testimony is true or false. Under the present law such a character trait can be proved by evidence of the witness' reputation, by expert opinion evidence, or by asking the witness on cross-examination about specific acts of misconduct that he might have committed. If the specific act of misconduct resulted in a conviction, that can be proved by extrinsic evidence if the witness denies it. This section permits a party to prove a witness' character trait for truthfulness or untruthfulness by any relevant

means. This liberalizes the present law by permitting lay witnesses to give their opinion of other witness' credibility, and by permitting extrinsic proof of a witness' past misconduct that tends to prove his character, if he denies such conduct. This liberalization ensures that evidence relevant to a witness' credibility will not be inadmissible because of an arbitrary rule that prohibits in all cases extrinsic proof of a witness' past misconduct. It also means that qualified witnesses can give their opinion of the credibility of other witnesses straightforwardly, rather than doing so under the guise of giving evidence of that witness' reputation in the community.

Section 63: As noted in the latter part of the comments to section 62, the law respecting admissibility of evidence to establish the character of witnesses has been liberalized by permitting all relevant evidence of this to be admitted. While this liberalization seems desirable to ensure that relevant evidence tending to prove a witness' character is not unnecessarily excluded, in many cases countervailing interests dictate that such character evidence itself should be excluded even though relevant. Often the evidence is not of much probative value and is confusing, time consuming, and perhaps most significantly causes great embarrassment to the witness. Witnesses must feel free to come forward with their testimony without fear of having their character blackened, sometimes completely unjustifiably. The requirement that the evidence be of substantial probative value is an effort to fairly reconcile these competing interests. The judge can also protect the witness from harassment or undue embarrassment by exercising his discretion under section 58(2). Also, of course, the evidence must be relevant for the purpose of proving his character for truthfulness. Under present law evidence about the witness' past misconduct, in particular, previous convictions, are often admitted even though it has no bearing on his character for truthfulness.

Section 64: Subsection (1) is based on the premise that whatever minor probative value a conviction for a crime might have, it is outweighed by the witness' interest in not having crimes revealed for which he has been pardoned or for which he has long ago paid his debt to society.

Many people feel that the unfairness evidence rule presently enforced is the rule that permits the prosecution to attack the

credibility of the accused as a witness by introducing his previous record, if any. Although the jury is instructed that they can use such evidence only to assess the credibility of his testimony, and not to infer the probability of his guilt, common sense tells us that such an instruction is very difficult to follow, and empirical studies support this judgment. The permissible use of such evidence discourages many accused people from taking the stand and severely prejudices those who do. Therefore, subsection (2) prohibits the Crown from introducing evidence of the accused's previous record for the purpose of attacking his credibility, unless the accused first attempts to support his credibility by introducing evidence of his good character. This section, however, does not prevent such evidence from being admitted where it is relevant for some other purpose.

Comment by Vice-Chairman Lamer

I have only one reservation with respect to substance — I would delete subsection (1) of section 64 for the following reasons:

Under section 63, evidence of the criminal conviction of a witness would be admitted only if it were of substantial probative value. Therefore, the only effect of sub-section (1) of section 64 would be to exclude substantially probative evidence of a witness' character trait when such evidence consists of a criminal conviction if pardoned or if five years have elapsed.

I fail to see why the court should not take into account a conviction which has substantial probative value. Furthermore, I disagree with the objective and purely arbitrary norm of five years. Also if the probative value of a conviction is substantial and if this evidence is not excluded under section 5, I fail to see how a measure of clemency could become a valid obstacle to its admissibility as evidence. The rules for "in camera" hearing could very well afford the witness appropriate protection without depriving the court of important evidence in the determination of the innocence or the guilt of an accused.

Furthermore, the combined application of sections 63 and 64 (1) could lead to the anomalous result that the conduct of a witness which resulted in a conviction could be proved, if of substantial probative value, but evidence of the conviction itself could not.

Finally, the only arbitrary rule respecting the admissibility of evidence is to be found in sub-section (1) of section 64. The Code proposed the repeal of all objective rules, such as corroboration, and I fail to understand why the situation provided for in sub-section (1) of section 64 would justify an exception.

Section 65: To ensure full effectiveness of cross-examination it is not necessary to disclose in advance to a witness any information

the examining party may possess respecting a previous statement made by the witness. To this extent this section simply restates the present law. The section also provides, however, that the judge has a discretion to require disclosure of the statement if it appears that counsel's examination of the witness is unfair. If a party wishes to prove by extrinsic evidence that a witness made a prior inconsistent statement, then of course the statement must first be revealed to the witness (see section 66).

Section 66: Before any fact relevant to the credibility of a witness is proved by extrinsic evidence, the witness should in fairness be given an opportunity to deny or explain the fact. This section restates the present law, except that it gives the judge a discretion to admit such evidence where it is impossible or inconvenient to recall the witness or explain the fact. For example, a witness might for one reason or another have become unavailable after the fact was discovered.

Opinion and Expert Evidence

Section 67: Generally a witness must have personal knowledge of the matters to which he testifies: section 52. However, existing law as a general rule excludes a witness' opinion. This exclusion was established at an earlier period when the word "opinion" referred to statements not based on personal knowledge. Later the word came to include inferences or conclusions based on observed facts, but the opinion rule was woodenly applied to exclude that type of opinion as well. The existing rule does not give undue difficulty, both because it is not applied strictly and because it has become riddled with exceptions, for example, in relation to questions of distance, size, identity, age, value or the emotional or physical state of a person. In fact, there is no clearcut distinction between what a witness states as a fact and as an opinion. Both are his personal judgment of what occurred. Moreover the justifications given for the rule do not bear analysis. One is that giving an opinion usurps the function of the trier of fact, but the trier of fact can agree or disagree with the opinion as it can with statements of "fact". It is also said that the witness' opinion is irrelevant, but the reasoned conclusion of a witness who perceived an event is surely relevant.

For example, as a matter of common sense and logic — which is what determines relevance — one would normally give weight to the statement of an eye witness that a road was treacherous. Accordingly, this section renders admissible a witness' inference and opinions so long as they are helpful to an understanding of his testimony or the determination of a matter in issue.

Section 68: It might place a cross-examining party in a difficult position if he were compelled to cross-examine a witness who has simply testified on direct examination that "In my opinion . . .". This of course is unlikely to happen since a party will usually be anxious to elicit all supporting evidence from his own witness. However, this section gives the judge a discretion to require a witness to state the basis of his opinion before he states his opinion if the judge considers such a course necessary to fairly elicit the facts.

Section 69: From the rule that a witness could not give an opinion, the courts in the 19th century developed a separate rule excluding a witness' opinion of the ultimate issue in the case on the ground that such an opinion usurps the functions of the jury. But, as is the case with opinions generally, the jury can ignore any testimony given by a witness. Furthermore, a broad formulation of the rule is unworkable because all evidence must relate to the ultimate issue and a narrow formulation covering such expressions as "the defendant is guilty" is unnecessary because such expressions fail to meet the criteria of helpfulness. The courts have recognized the futility of the rule, but it seems advisable to repeal it expressly.

Section 70: Existing law that experts may be used is codified here, but it is made clear that they may testify not only as to matters beyond the understanding of laymen, but whenever it would be helpful. Because of the expanding need of experts, the rule covers a broad range of possible witnesses.

Section 71: This section largely codifies existing law. Under existing law an expert may base his opinion on personal observation (for instance a physician may testify as to matters that he observed first-hand in treating a patient); facts made known to him before the hearing (for instance in giving his opinion about the condition of a patient he may rely on reports of nurses, technicians or other

specialists); or facts given in evidence and assumed by him to be true, (for instance after listening to the testimony, he may express his opinion about a person based on information given at the trial.)

Paragraph (b) may perhaps extend and qualify the present law. The courts have held that psychiatrists and land valuers may base their opinion on hearsay, such as reports given to them by others, but have not yet had occasion to extend the rule to all experts. This paragraph would permit any expert to base his opinion on hearsay. Such an extension is necessary if the courts are to make the most effective use of expert knowledge. The safeguard against unreliable evidence is the paragraph's requirement that the facts relied upon by the expert must be "of a kind reasonably relied upon by experts in the field in forming opinions or inferences on the subject."

Section 72: Under existing law, at least in criminal cases, there is no requirement to disclose the substance of the testimony of expert witnesses before trial. But the adversary process is predicated on the basis that a party may not only present his case in its most favourable light, but be able to thoroughly challenge his opponent's case. It is particularly difficult to do the latter effectively without advance notice and preparation when experts are called. Moreover, advance notice saves time by assisting in the identification of the contentious issues, and by rendering unnecessary adjournments to permit a party to cope with evidence that takes him by surprise. In civil cases there is a statutory trend in the direction of requiring experts to exchange reports before testifying, and this is increasingly becoming the practice in criminal cases in many jurisdictions.

Section 73: Existing law gives a judge power to call expert witnesses, but the power is rarely used. However, the present practice of having experts called by the parties is subject to the criticism that parties seek only experts favourable to their cause. Accordingly, even though seldom used, the right of the court to appoint experts could be a useful corrective, and is, therefore, retained. The rule is largely self-explanatory but it may be mentioned that if the rule is adopted, provision would have to be made for compensation in criminal matters. The rule does not, of course, affect the right of a party to call expert witnesses of his choice.

PART III – REAL EVIDENCE

General

Section 74: Generally when real evidence, e.g., physical objects, sites, views (see subsection (2)), is presented to the trier of fact, the trier of fact is permitted to draw all reasonable inferences from its examination of that evidence. In the case of certain real evidence, however, such as for example a view of a site or a presentation under certain circumstances of any injury or of motion pictures, the trier of fact may be limited to using the evidence for the purpose of understanding testimonial evidence. This distinction seems unnecessary and in any event it seems doubtful if the trier of fact can properly apply it. Consequently, this section provides that the trier of fact may draw all reasonable inferences from any real evidence.

Proof of Contents of Writings, Recordings and Photographs

Section 75: Lawyers are familiar with the “best evidence rule”. Unfortunately this phrase is misleading in that the rule only applies to matters like written documents. Therefore the title to this part, while it deals with what lawyers refer to as the “best evidence rule”, attempts to state more precisely the scope of the rule.

Basically the best evidence rule is not an exclusionary rule, but one of preference. It requires a party who wishes to prove the content of a written document, recording or photograph to produce the original unless he can satisfactorily explain why he cannot do so. The rule was designed to prevent fraud and to ensure that evidence of the matter recorded in a document was not distorted by faulty recollection or inaccurate reproduction. In civil proceedings, at least, the right to have documents in the possession of the other party produced before trial has greatly reduced the need for the rule. However, in criminal cases and in some instances in civil cases, a rule that compels a party who seeks to prove the contents of a writing or similar matter to produce the original still serves the useful purpose of ensuring that the best evidence is before the court.

The section states the general rule that if a party wishes to prove the contents of a writing, recording or photograph he must produce the original (for a definition, see section 81(b)). Like the present law the rule only applies where it is intended to prove the contents. In some situations, such as proving the terms of a will or deed, the contents of a writing must necessarily be proved. However, in other situations even though there is a relevant writing a party may give testimony that does not involve its contents, and thus the rule does not apply. For example, a witness may give evidence about what he heard another person say without being compelled to produce a transcript of the conversation even though one was made. The witness is giving evidence about what he heard and not about the contents of the writing. Similarly, if the issue is the existence or delivery of a document and not its contents, the rule does not apply.

Section 76: Since the object of the best evidence rule is to ensure the accuracy of evidence about writings, a duplicate, which will always be an accurate reproduction of the original (see the definition in section 81(a)), is given the status of an original except when a question about the authenticity of the original is raised or it would be unfair to admit the duplicate. This rule will save time and expense in the situation, for instance, where a carbon or photocopy of a writing is more convenient to produce than the original.

Section 77: As stated in the comments to section 75, the best evidence rule is a one of preference, not of exclusion. The original is required because it is the best evidence of the contents of the writing, recording or photograph. Where, therefore, the original is lost or cannot be obtained by the party wishing to offer evidence of the contents of a writing, he is permitted to offer other evidence of its contents.

Any such other evidence may be used. It would give rise to unnecessary complexity and inconvenience to grade secondary evidence. Sometimes proof may best be made by a duplicate, at other times by a recorded copy, and sometimes in some other way. The proponent of such evidence will be under pressure to provide the best secondary evidence because his witness can be cross-examined about it.

Paragraphs (a), (b) and (c) set out well established situations where the preference for the best evidence, the original, cannot be met and therefore other evidence of its contents is admissible. Paragraph (d) codifies what has been at least a rule of practice. In the course of giving testimony a witness often incidentally refers to the contents of a writing. To require every such writing to be produced would be a waste of time and would not add appreciably to the accuracy of fact-finding. Therefore, if a writing is not closely related to a controlling issue, the original does not have to be produced.

Sections 78-80: These sections provide for three qualified exceptions to the best evidence rule. Certified copies of public records are admissible since the removal from their proper custody of original public documents is not feasible: section 78.

Summaries of voluminous writings such as account books are admissible. The production and inspection by the court of the original of voluminous writings would often prove inconvenient and a waste of time for the court: section 79. A written or testimonial admission by a party of the contents of a writing is likely to be accurate. Section 80 thus provides for such an exception to the best evidence rule.

Section 81: This section contains a number of essential definitions. This Part applies to writings, recordings and photographs: section 75. These terms are defined to embrace virtually any means of storing information. "Photographs", for example, includes motion pictures, and "writings" and "recordings" include such matters set down by magnetic impulse and electronic recordings.

While what constitutes an original may not be clear in all contexts, the word is given a common legal meaning in paragraph (b). It includes not only the first writing prepared but also every writing the parties intended to have the same effect. Thus if the parties to a contract each take a carbon, photostat or other copy of a contract intending that it shall represent the contract, each copy is an original. While in some contexts the original of a photograph is considered to be the negative, the definition provides that a print taken from the negative is also an original. Finally, the paragraph of necessity provides that a computer printout is an original.

Modern techniques of reproducing writings are highly reliable. Therefore, section 76 treats duplicates as originals except in certain circumstances. Duplicates are defined in section 81(a) to include all counterparts of the original produced by a technique that accurately reproduces the original.

PART IV – JUDICIAL NOTICE

Section 82: The law and some facts need not be proved in court in the usual manner by testimony or by observation of real evidence. The judge or jury is entitled to determine the matter on the basis of their own knowledge or of information informally presented to them. This is referred to as taking “judicial notice” of a matter. This Part of the Code prescribes the matters of which the judge or jury may take judicial notice and the procedure which is to be followed when a matter is judicially noticed.

Section 83: A judge or juror would not be able to understand the evidence presented to them unless they were familiar with and could assume certain facts not proved by the evidence. Thus when a witness testifies that he observed a car in a lot, the judge or jury will necessarily associate an object with the word “car”, even though no evidence was introduced as to its meaning. Evidence would not normally be offered at a trial to prove the proposition that a car travelling eighty miles per hour cannot stop within a distance of ten feet; that a horse is a four-legged animal; that a gun is a dangerous weapon; or that the sun does not shine at midnight in Ottawa. It would consume an endless amount of time if all these facts had to be independently proved. Therefore, the parties are entitled to assume that the trier of fact, be he judge or juror, will bring his common sense and experience to bear in reasoning about the evidence presented. Subsection (1) thus states a necessary rule, that matters of common knowledge must be judicially noticed.

As well as matters known by all persons of average intelligence and experience, some matters are well-known within the territorial jurisdiction of the court or are readily and accurately verifiable by resort to sources whose accuracy cannot be reasonably questioned,

and are, therefore, also not the subject of reasonable dispute. It would be a waste of the court's time to have these facts proved according to the rules of evidence. Subsection (2) thus provides that they may be judicially noticed, and this is made mandatory by section 85(1) if a party requests it and furnishes the judge with sufficient information to do so. These facts may include facts of local history or geography, or scientific, historical, geographical or chronological facts verifiable by reference to such sources as treatises, maps, almanacs or encyclopedias. The concept of judicial notice is obviously an expanding one. Thus a few years ago it was necessary to prove that radar speedmeters can measure the speed of cars; now this can be judicially noticed.

Judges in attempting to discern the policy or purpose behind a law must necessarily have regard to the facts that underlie the formulation of the law. In applying the law they often have to consider the factual consequences of their decision. To ensure that judges are able to inform themselves to the greatest extent possible in deciding questions of law, subsection (3) provides that facts used in determining the law may be judicially noticed.

The general economic and social facts that the judge uses in determining the law have been referred to as legislative facts. In the past judges have most frequently taken judicial notice of them expressly in determining the constitutional validity of statutes. For instance in determining the constitutional validity of a provincial statute imposing a tax on banks, the courts have taken judicial notice of economic facts in assessing the impact of the tax on banks. Also in determining customary international law, courts have taken judicial notice of general and particular acts of state practice.

Section 84: The courts are expected to know the constitution and the general law and have by statute long been required to take judicial notice of matters published in the *Canada Gazette* and the official gazettes of the provinces. However, there are anomalies under existing law regarding the extent to which delegated legislation, private acts and decisional law of the provinces can be judicially noticed. Subsection (1) generally codifies existing law but removes these anomalies.

It would be too burdensome to require the judge to take judicial notice of the less accessible laws and regulations. Existing

law requires most of them to be proved but there are statutory exceptions. Section 84(2)(a) permits all these to be judicially noticed in the judge's discretion, and section 85 makes this mandatory if a party requests it and furnishes the judge with sufficient information to do so.

Under existing law foreign law must be proved as a fact by calling an expert witness; otherwise the judge must apply the law of the court's jurisdiction. Today, however, foreign law is often relatively easy to determine by resort to textbooks and foreign statutes. Therefore, section 84(2)(b), by permitting the judge to take judicial notice of the foreign law, will enable him to decide the most appropriate method of informing himself about it. Section 84(3) goes on to permit the judge to apply local law if he cannot determine the foreign law, or to dismiss the action. Existing law would compel him to apply local law, even if the foreign law was likely to be radically different.

Section 85: It would place an undue burden on the judge to require him on his own initiative to find the necessary information to enable him to take judicial notice of the matters mentioned in sections 83(2) and 84(2). Therefore, judicial notice of these matters is discretionary. However, if a party requests the judge to take judicial notice of any such matter and gives notice of such request to the adverse party and furnishes the necessary information, section 85(1) provides that judicial notice is mandatory.

Subsection (2) provides that the judge may, in considering whether to take judicial notice or what facts to notice, decide in each case the most suitable sources of information to consult.

Subsection (3) recognizes the need for procedural fairness to all parties when a matter is or has been judicially noticed by affording each party the opportunity to be heard regarding the propriety of taking judicial notice and informing him of the sources of information used.

If the judge decides that a matter is to be judicially noticed, a party cannot present evidence disputing the fact before the jury. It would be a waste of time to permit a party to dispute before the jury a fact that the judge has decided is beyond reasonable dispute. The judge must instruct the jury to accept that fact (subsection (4)).

In accord with present practice, subsection (5) provides that judicial notice may be taken at any stage of the proceedings: pre-trial hearings, trial, or on appeal.

TITLE VI – APPLICATION

Section 86: The existing *Canada Evidence Act* prescribes rules of evidence for criminal proceedings and proceedings before the Federal Court and for appeals to the Supreme Court from these. Under subsection (1), the Code is given the same application. The Code has not been extended to such matters of federal jurisdiction as divorce, patents, bills of exchange, patents and bankruptcy because, apart from problems of determining constitutional boundaries in cases arising before provincial courts, these matters must frequently be dealt with in conjunction with matters over which the provinces have exclusive jurisdiction. For example, a person may in the same action seek both a contractual remedy and one under the *Bills of Exchange Act*. To avoid the possibility of two sets of evidence rules, federal and provincial, applying in the same action, the Code was not made applicable to these proceedings.

The rules of evidence (other than the general rules of relevance and of exclusion for undue consumption of time, prejudice and the like, and the rules of privilege) have generally not been applied to the determination of preliminary facts, to the taking of judicial notice and to hearings for the determination of sentences, granting of discharge, issuance of summonses and warrants, release on bail or otherwise, or granting or revoking probation. This is continued by subsection (2).

Section 87: The Code is not generally applied to administrative adjudications, since rules of evidence are largely inappropriate to them. It is, therefore, better for administrative bodies to apply such rules of evidence as may be appropriate. However, the basic rules of relevancy and the exclusion of time-consuming, confusing, misleading or prejudicial evidence should apply to all rational

fact-finding bodies. The rules of privilege, being intended to protect important social values extrinsic to the fact-finding process, should equally be applied. These are made applicable to all federal administrative adjudication by this section.

TITLE VII – ABROGATION AND REPEAL

Section 88: Under existing law, in criminal trials in which the evidence of the criminal act is substantially circumstantial, the jury must be instructed in accordance with the rule in *Hodge's* case. That is, they must be instructed that before they can find the accused guilty they must be satisfied that the circumstances proved in evidence are not only consistent with the accused having committed the act, but also that they are inconsistent with any other rational conclusion than that the accused is the guilty person. Canada appears to be the only jurisdiction in the common law world now requiring this instruction. It adds nothing to the instruction that the trier of fact must be convinced of the accused's guilt beyond reasonable doubt and it very likely simply confuses the jury. Paragraph (a), therefore, abrogates it.

Paragraph (b) abrogates the various rules requiring evidence to be corroborated or requiring the jury to be warned of the danger of uncorroborated evidence. Under the present law an accused cannot be convicted on the strength of the testimony of an unsworn child or of a victim of certain sexual offences unless the testimony of these witnesses is corroborated. With respect to other types of witnesses, accomplices, children who give sworn testimony, and victims in certain other sexual offences, the jury must be cautioned by the judge that although they may convict on the basis of the testimony of these witnesses, it is dangerous to do so unless their testimony is corroborated. Finally, under the present law the testimony of only one witness is insufficient to sustain a conviction for perjury, treason and forgery. We recommend the abolition of all of these exceptions to the general rule that the evidence of a single competent witness is sufficient in law to support a verdict.

The Code throughout is based on the premise that juries have the necessary experience and common sense to evaluate the testimony before them, and in doing so to take into account such matters as its source and the fact that it is unsupported by other evidence. There is no evidence to suggest that juries are more likely to be misled by the evidence of accomplices, the victims of certain sexual offences, or young children than by any other witness. And there is no reason why cross-examination and counsel's argument to the jury cannot expose the frailties of the testimony given by these witnesses as effectively as it exposes the weaknesses in the testimony of any other witnesses.

The necessity of corroboration to support a conviction for the crimes of perjury, treason and forgery is historically anomalous. See Study Paper No. 11, *Corroboration*. No compelling justification remains for treating these crimes differently from any other crime in this regard.

Section 89: The section deals only with directly relevant statutes. No attempt has been made to deal with the many consequential amendments that may be required.

The Code covers most of the material in the *Canada Evidence Act* so it should be repealed. There are, however, a number of provisions of a procedural nature that should be retained in a separate statute. Examples include those governing evidence relating to proceedings in courts out of Canada, those governing the taking of affidavits abroad, and those adopting certain provincial procedures.

Section 41 of the *Federal Court Act* dealing with Crown privileges would be superseded by section 42 of the Code.

The provisions repealed in paragraphs (b) and (d) are rules respecting corroboration discussed in section 88. Section 19(1) of the *Juvenile Delinquents Act* deals with children's oaths and would be superseded by sections 50 and 51 of the Code.

Comments on Structure

There are many ways of structuring a code. All the members of the Commission have agreed to the structure in the report, since it meets in a reasonable way the needs of the various audiences to which it is addressed. The following comments set forth two of the alternatives considered by the Commission.

Comment by Vice-Chairman Lamer

In the first place, Part II of Title I contains only two general provisions and not all the general provisions of the Code of Evidence, as its heading suggests. Also, sections 86 and 87, which appear at the end of the structure proposed below, should preferably be inserted after sections 1 to 3. These two sections also deal with the general application of the provisions which follow. It would seem to me preferable to indicate the exact range of application of the Code at the beginning so that the reader may decide at that point whether or not to continue reading.

Secondly, Title IV deals with the "admissibility" of evidence, Part I of which contains a list of rules of exclusion. For clarity, these rules should be grouped according to the underlying principles, as suggested in the proposed structure. Moreover, this Part is incomplete. It leaves out other rules of exclusion contained in Title V, such as those in sections 62, 63, 64 and 66.

Thirdly, Title IV does not take into account that there are two fundamental rules which govern the admissibility of evidence, admissibility dealt with under Part I of the plan, and compellability and competency dealt with in the proposed plan only under Title V (Methods of Establishing Facts).

Finally, Part II of Title V contains rules which do not relate to methods of establishing facts by witnesses, as was pointed out earlier.

The proposed structure I feel is preferable. Its Title I contains all the general provisions. Title IV, in my opinion, seems to establish more clearly the conditions respecting the form and substance of the admissibility of evidence. In this last regard, it groups the traditional rules of exclusion according to their principal rationale. Finally, Title V, dealing with methods of establishing facts, no longer contains provisions which do not strictly relate to the application of such methods.

EVIDENCE CODE

CONTENTS

	Articles
TITLE I — GENERAL PROVISIONS.....	1 to 3, 86, 87
TITLE II — DECISION MAKING POWERS RESPECTING EVIDENCE.....	6 to 11
TITLE III — BURDENS OF PROOF AND PRESUMPTIONS	
PART I — BURDENS OF PROOF.....	12—13
PART II — PRESUMPTIONS.....	14
TITLE IV — CONDITIONS RESPECTING THE ADMISSIBILITY OF EVIDENCE	
SUB-TITLE I — Authentication and Identification.....	46 to 48
SUB-TITLE II — Rules respecting admissibility	

PART	I — GENERAL PROVISIONS.....	4
PART	II — EXCLUSION OF EVIDENCE FOR THE PROTECTION OF THE ADMINISTRATION OF JUSTICE.....	5, 15, 16
PART	III — EXCLUSION OF EVIDENCE FOR THE PROTECTION OF INDIVIDUAL RIGHTS.....	17 to 20 62 to 64, 66
PART	IV — EXCLUSION OF EVIDENCE FOR LACK OF PROBATIVE VALUE.....	27 to 31
PART	V — EXCLUSION OF EVIDENCE FOR EXTRINSIC POLICY REASONS	
	A — Transactions, compromise, preventive measures.....	21 to 26
	B — Privilege.....	32 to 45
SUB-TITLE	III — Rules respecting compellability and competency.....	54 to 57
TITLE	V — METHODS OF ESTABLISHING FACTS	
PART	I — GENERAL PROVISIONS.....	49
PART	II — WITNESSES	
	A — General provisions.....	50 to 53
	B — Manner of questioning witnesses....	58 to 61, 65
	C — Expert and opinion evidence.....	67 to 73
PART	III — REAL EVIDENCE	
	A — General provisions.....	74
	B — Proof of contents of writings, recordings and photographs.....	75 to 81
PART	IV — JUDICIAL NOTICE.....	82 to 85
TITLE	VI — ABROGATION AND REPEAL.....	88—89

Comment by Commissioner La Forest

The organization of the Code is the culmination of a process in which it was sought to accommodate divergent preferences. Consequently the specific sequence of sections will not be wholly satisfactory to any of the participants. For my part I can live with it. It is a reasonably good arrangement and is logically defensible. If I have decided to comment, it is because it raises a more fundamental issue: how to make laws as intelligible as possible.

I regret that we fell into the trap of a highly structured logical scheme adorned with such legal trappings as interlocking titles and parts. This has a place, no doubt, in organizing massive pieces of legislation such as the Criminal Code. But what I think is called for here is a simple structure that begins with the organizing principles of the subject matter and then deals with specific features in an order that can be easily understood without mastering a pre-conceived logical plan. In doing this logic is a useful tool, but it cannot become the master. The material must govern the organization and not the other way round. And one must have an eye to one's audience.

Various members of the Commission have made much of the necessity of so writing laws that the layman can readily understand them, and we have taken some steps in this regard described in the Introduction. I am perhaps not as sanguine as some of my colleagues about the extent to which this can be done. But I do think it is important to try and that this might incidentally lead to making laws more intelligible to lawyers as well. (This, along with the fact that the Code is our first attempt at drafting legislation, justifies this approach to a matter that is of primary concern to lawyers). I am convinced, however, that if we wish to make laws clearer we will have to be much more concerned about order of presentation than we have been, and we must be prepared to look beyond traditional organizing principles of statutes, whether that tradition be common law or civilian.

The Code, as organized, achieves many of the objectives regarding presentation I have mentioned. Evidence is primarily concerned with the matters that may be considered in determining facts in judicial proceedings. Consistently with this the Code (immediately after dealing with its purpose and construction) sets

forth the cardinal principles of evidence law—that all relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse or take up too much time. One could quite effectively preside over a judicial proceeding by relying on these two principles alone. The Code quite properly deals with a number of general rules inherent in these cardinal principles at a later stage in the appropriate contexts (for example, the rules that, with certain specific exceptions all persons are competent and compellible as witnesses and that witnesses may not refuse to testify on the ground of privilege). In other aspects, however, there are departures from this rather common sense approach; instead there is a too rigid adherence to formalized logic. I can perhaps best elucidate this by explaining what I think is wrong with a rigid logical order from the standpoint of making material readily understandable.

It must be recognized at the outset that a formal logical scheme must necessarily be somewhat arbitrary. Some rules may quite properly be placed in one of several contexts (thus presumptions may be looked upon as an aspect of the burden of proof, or as a mode of proof). Others may serve more than one function (for example, the exclusion of evidence regarding repairs made subsequent to a matter in issue may be justified on the ground that its probative value is generally outweighed by considerations of time, but it may also be justified on the ground extrinsic to the judicial process that certain actions should be encouraged).

More important, when one is locked into a tight logical scheme, matters may be dealt with in an order that rather offends common sense. One minor example in the Code is that it deals with the privileges of witnesses (quite logically as a matter of admissibility) before dealing with witnesses at all. One less addicted to a formal logical scheme would rather expect the reverse. A real lust for linear logic might even require that the informing principles of the Code (sections 4 and 5) be moved down to section 15 under “Admissibility” as we did in an earlier version.

Conversely, rigid adherence to preconceived logic may inhibit postponing treatment of technical or subsidiary matters to the latter portions of the Code. An example is “Authentication and Identification”. Similar, though admittedly more difficult, is the question

of where to put the application sections. Common sense supports logic in putting these first if they are simple, but where they become rather complex and technical (as in the Code), they can be dealt with towards the end as a technical issue. This avoids de-emphasizing the early sections that set forth the general picture. If one feels something should be said immediately to inform the reader about application, a simple "scope" section can be put in as section 1 stating that the Code applies to proceedings governed by the law of Canada to the extent set forth in the appropriate sections. Sections supporting structure are not unknown to a formal logical scheme. Thus section 49 of the Code, which sets forth the modes of establishing facts, adds nothing to section 4; it could appropriately be dealt with in comments.

I find it unnecessary to draw up a specific organization. As I mentioned my main concern is with the general point. I am not really unhappy with the general organization of the Code.

Publications

Many research studies on Evidence were prepared for the commission, of which the following were published as study papers during the period 1972-75:

- Study Paper 1 – Competence and Compellability
- Study Paper 2 – Manner of Questioning Witnesses
- Study Paper 3 – Credibility
- Study Paper 4 – Character
- Study Paper 5 – Compellability of the Accused and the Admissibility of His Statements
- Study Paper 6 – Judicial Notice
- Study Paper 7 – Opinion and Expert Evidence
- Study Paper 8 – Burdens of Proof and Presumptions
- Study Paper 9 – Hearsay
- Study Paper 10 – The Exclusion of Illegally Obtained Evidence
- Study Paper 11 – Corroboration
- Study Paper 12 – Professional Privileges Before the Courts