The Role of Legislation, if any, in the Development of the Law of Evidence

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Introduction to the workshop chaired by Louise Viau

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The *Canada Evidence Act*[1] was enacted in 1893. Although it has been amended from time to time, it has essentially retained the same format so that it still leaves considerable room for the common law. In the last twenty years, quite a few members of the legal profession in Canada - legal practitioners, judges or university professors - have come out in favour of a thorough revision of the law of evidence. Until now, their hopes have not become reality. To understand the context in which the theme of this workshop arises, "The Role of Legislation, if any, in the Development of the Law of Evidence", we must first recall the reform options that have been discussed since the mid-1970s and the difficulties they encountered, and second, the limits on the power of judges to change the common law.

I. THE REFORM OPTIONS DISCUSSED IN THE LAST TWENTY YEARS

The idea of reforming the law of evidence was first proposed by the Law Reform Commission of Canada, and was then taken up by the Federal/Provincial Task Force on Uniform Rules of Evidence. For various reasons, their proposals ran into opposition in the legal community.

In retrospect, it might be that the proposal presented by the Law Reform Commission of Canada was very much ahead of its time, not only because it proposed the enactment of a true *Code of Evidence*, which would have put an end to the rule of precedent, but also because it recommended major changes in the approach that the courts should take in terms of the rules as to both the admissibility of evidence and the introduction of evidence.

The proposals put forward by the Federal/Provincial Task Force on Uniform Rules of Evidence were intended to structure and codify the common law rules on the questions of the admissibility and introduction of evidence as they had been developed by the courts, subject to a number of points on which it was proposed to amend the common law rule. They were also intended to incorporate a modernized version of the *Evidence Act* into the *Uniform Evidence Act.*

This rather traditional approach also prompted a public protest when Bill S-33 was referred to the Senate for study. Just the idea of codifying the common law was seen at that time as a pointless and even dangerous undertaking, since it was believed that it was likely to petrify the law. In addition, the Bill ran into fierce opposition from defence lawyers who would, as a result, be losing some of the advantages they had acquired through hotly contested court battles.

An amended version of this Bill was prepared in 1986 and circulated among a small group in the legal profession. That version had been agreed to by defence lawyers, who would be regaining the ground lost in Bill S-33. However, this Bill was never presented in either the House of Commons or the Senate.

II. LIMITATION OF THE POWER OF JUDGES TO CHANGE THE COMMON LAW

The Supreme Court of Canada believes that the role assigned to judges by the common law permits them not only to determine what the common law is, but also to change it where necessary. It has in fact made use of this role on several occasions. We would refer, for example, to the Court's decisions in respect to hearsay: *Ares* v. *Venner*;[2] *R.* v. *O'Brien*;[3] *Lucier* v. *The Queen*;[4] *R.* v. *Khan*;[5] *R.* v. *Smith.*[6]

However, the Supreme Court itself recognizes the limits of this power. In *R.* v. *Salituro*,[7] Mr. Justice Iacobucci, delivering the judgment of the Court, wrote:

> *Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in* Watkins, supra, *in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are*

necessary to keep the common law in step with the dynamic and evolving fabric of our society.[8]

In that case, the Supreme Court concluded that the accused's spouse, who was separated from the accused with no hope of reconciliation, was a competent witness for the Crown since in that situation, the inherent reason for the incompetence rule did not justify depriving the spouse of the right to testify, if the spouse so chose. The Court believes, however, that it is up to Parliament to determine whether such a spouse should be made not only competent but also compellable, since there are principles involved that must be examined in depth. Thus, Parliament will ultimately have to make a political choice between two options, each of which offers advantages and disadvantages.

The decision in *Salituro* militates in favour of legislative action to modernize our law of evidence to bring it into line with the government's objectives in respect of the implementation of *Justice 2000.*

The centennial of the *Evidence Act* and the very favourable response received by the working paper dealing with the codification of the general principles of criminal responsibility suggest that an extensive revision of the *Evidence Act* may have a chance of succeeding. In view of the substantial changes that have been made to the law of evidence over the last few years, *inter alia* because of the numerous decisions of the Supreme Court of Canada interpreting the legal rights guaranteed by the *Canadian Charter of Rights and Freedoms*,[9] it would be wise to reexamine the present law in light of these legal changes, and social reality.

The purpose of the workshop is to learn the opinions of the panellists who have been closely associated with the work of the Law Reform Commission of Canada, in the case of Professor Delisle, and of the Task Force, in the case of Mr. Handfield, and also to learn the opinions of all the participants, in order to broaden our examination of the role the government should play in reforming the law of evidence.

FOOTNOTES

1. *Canada Evidence Act,* R.S.C. 1985, c. C-5.

2. *Ares* v. *Venner,* [1970] S.C.R. 608.

3. *R.* v. *O'Brien,* [1978] 1 S.C.R. 591.

4. *Lucier* v. *The Quee*n, [1982] 1 S.C.R. 28.

5. *R.* v. *Khan,* [1990] 2 S.C.R. 531.

6. *R.* v. *Smith,* [1992] 2 S.C.R. 915.

7. *R.* v. *Salituro,* [1991] 3 S.C.R. 654.

8. *Ibid.* at 670.

9. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.