REFORM OF THE LAW OF EVIDENCE IN CANADA - ROLLING THE STONE OF SISYPHUS

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Some of you will recall the story of King Sisyphus of Corinth, who, having offended the gods, was condemned to a punishment of rolling a great stone that lay in the valley to the top of a high hill. Sisyphus was a strong man and accepted this challenge with the expectation that he could accomplish this task in short order; however, what he found was that the gods had also arranged that whenever he got close to the top something would happen which would cause him to lose his grip, and the great stone would go bouncing, bumpity bump down the hillside into the valley once again.

The Canadian experience with reform of the Law of Evidence is not unlike rolling the Stone of Sisyphus: the task was significant, the effort was great, on more than one occasion the goal was almost achieved but in each case the hopes and expectations of success proved to be only an illusion.

When the Law Reform Commission of Canada was established in 1971, the first item on its agenda was the comprehensive review of the federal Law of Evidence. There was certainly nothing radical about the notion that the Law of Evidence in Canada needed a major overall. Many of the fundamental rules of Evidence - e.g. in relation to Hearsay, Character, Competence and Compellability, Privilege and Documentary Evidence - are based upon social conditions that were current in the 18th and 19th centuries but which have long since ceased to reflect current reality. The Canada Evidence Act was introduced in 1893, and it has undergone only piecemeal amendments since that time. The Act does not provide even a good skeletal framework for the Law of Evidence, which still must be determined from an examination of a multitude of often inconsistent cases. Nor is the situation any better in relation to matters falling within the provincial domain, for most provincial Evidence Acts are likewise inadequate and out of date.

The Law Reform Commission of Canada spent four years studying the problems, consulting with the Bar, the Bench and the academic community and preparing a Report which was published in December, 1975. It recommended the introduction of an Evidence Code, which would replace the

existing legislation and case law. In order to assure that common law precedents did not "rule from the grave" the Report specifically provided in section 3 that "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."

To a large extent, the Code was influenced by the American Federal Rules of Evidence, which had been approved by the Supreme Court of the United States in November, 1972. These Rules were then studied by Congress, eventually passed by both Houses and signed by the President, taking effect July 1, 1975. The Federal Rules provided a logical, coherent framework of simply stated provisions which fitted in with the Commission's belief that the law should be simplified and de-mystified.

When the Minister of Justice received the Report of the Commission, he decided to carry out a series of consultations to determine the reaction to the proposed Evidence Code. To this end, Mr. Kenneth Chasse was employed to conduct seminars across the country to explain the Code and to obtain comments from the Bar and the Bench. The response of the profession to the Code was unfavorable. A number of people objected to the principle of codification on the basis that it would impair the law's ability to adapt to new circumstances. For others, opposition stemmed primarily from an intense dislike of specific provisions rather than of codification per se: in particular, objection was taken to the exclusion of all reference to the antecedent common law in the interpretation of the Code, and to the high degree of generality in the drafting of certain provisions which coupled with an increased role for judicial discretion would tend to make the law less certain in its application. Given the objections of the Bar and Bench, the Minister of Justice concluded that the Commission's Evidence Code could not be put forward as a replacement for the Canada Evidence Act. He therefore had to seek some other solution.

That solution came in the form of a proposal by the provinces at the June, 1977 Conference of Federal and Provincial Ministers of Justice and Attorneys General. The Ontario Law Reform Commission, after nine years of study, had produced its Report on Evidence in 1976, a few months after the publication of the proposed Code of Evidence by the Law Reform Commission of Canada. The two reports were in many respects quite different, and the provinces suggested that an effort should be made to achieve uniformity of evidentiary rules, both federal and

provincial. It was agreed to ask the Uniform Law Conference of Canada to take on this task, and the Conference accepted this challenge at its Annual Meeting in 1977.

To carry out this project the Uniform Law Conference established the Federal-Provincial Task Force on Uniform Rules of Evidence. The Task Force had representation from the federal Department of Justice, and the provinces of British Columbia, Alberta, Ontario, Quebec and Nova Scotia. Its members came from a variety of backgrounds, the Bench, the Crown, civil litigation, legal aid, research and drafting. Its mandate was to study the proposals of the Canada Law Reform Commission, the Ontario Law Reform Commission and other reports and legislation from various parts of the common law world with a view to stating the present law and recommending a Uniform Evidence Act. The Task Force was to complete its work and make a final report within three years.

As originally conceived, the Task Force was to have some full-time members, but in actual operation, all of its members had other obligations and could devote only a limited amount of their time to the Evidence Project. As a result, at the end of two years it became apparent that in the absence of some reorganization there was no hope that the task would be finished within the original three-year time limit. Therefore, at the Annual 1979 Meeting of the Uniform Law Conference, five of the participating jurisdictions, Canada, Ontario, Quebec, Alberta and British Columbia agreed to provide support on either a full-time or a half-time basis in order to get the job done. It was also at this time that the Conference spelled out certain guiding principles to be followed by the Task Force. These principles were aimed at meeting some of the objections that had been noted during the consultation process on the Law Reform Commission's Evidence Code, and also at resolving a major difference of opinion that existed within the Task Force itself which had impeded its progress. The principles were stated as follows:

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

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

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

With the additional resources and a considerable increase in the number and length of the meetings of the Task Force, the work was completed within about a year, with a final Report and a Draft Uniform Evidence Act being submitted to the Uniform Law Conference in January, 1981. The recommendations of the Task Force were studied at a series of extraordinary plenary sessions of the Conference during the months of April, May and June. Further meetings of a Drafting Committee took place in July, 1981. Finally, at the Annual Meeting of the Conference in Whitehorse, a special plenary session was held to consider the proposed Uniform Evidence Act for a last time. This resulted in the adoption of a new Uniform Evidence Act by an overwhelming margin: representatives of all provinces, as well as the federal Government voting in favour. It is my recollection that out of approximately fifty delegates from all jurisdictions only one person voted against the motion to adopt.

In the Fall of 1981, the Minister of Justice indicated at a meeting of federal and provincial Ministers of Justice and Attorneys General that it was his intention to introduce a new Canada Evidence Act, which would represent the federal version of the Uniform Evidence Act. This announcement was apparently greeted with approval from the provincial Ministers. Because of a heavy legislative agenda in the House of Commons, the proposed new Canada Evidence Act was introduced as Bill S-33 in the Senate in November, 1982.

Bill S-33 was referred to the Standing Senate Committee on Legal and Constitutional Affairs for consideration. Between January and June 1983, the Committee heard from a number of witnesses from the federal Department of Justice, the defence bar, the academic community plus some special interest groups. The provincial Attorneys General decided

not to make any submissions. Usually, the non-government groups and individuals who make the effort to appear before a parliamentary committee are the ones who feel they have the most to lose if the legislation goes through in its present form. Their comments therefore tend to be critical. Certainly, the majority of the submissions received on Bill S-33 were negative. The traditionalists objected that a Code, or comprehensive Evidence Act as the Department of Justice called it, was neither necessary nor desirable. All that was needed were a few minor amendments. The defence bar objected that a number of the changes proposed, particularly in relation to character evidence, confessions and alibi evidence, were Crown oriented. Finally, there was the Quebec Bar, which was not so much offended by the contents of the legislation as it was by the way in which the French version was expressed. A number of witnesses stated that they had not had an opportunity to express their views on what needed to be done. When it was pointed out that the Task Force had published its tentative recommendations on its work to date in 1978 and 1979, the response of one witness was that her group had not paid much attention to the Task Force recommendations because they did not think the government would do anything about them anyway.

The Canadian Bar Association appeared twice before the Committee. On the first occasion, the CBA expressed the opinion that a comprehensive Evidence Act was neither wanted nor needed; however, it sought permission to file a fuller submission at a later time. In its second submission, the majority of its delegates appearing before the Committee said that while they thought that Bill S-33 contained a number of flaws, they were personally in favour of the introduction of a comprehensive Canada Evidence Act.

On June 28, 1983, the Chairman of the Standing Committee presented an interim report on its hearings to date, in which it concluded that the most frequent criticism of Bill S-33 was insufficient consultation with academic experts and members of the practicing bar. The Committee expressed the opinion that "while a few witnesses did not see the necessity of a comprehensive statutory statement on the Law of Evidence, most of them would approve or at least accept a Uniform Law of Evidence Act, provided the substantive changes which they recommended were incorporated into it". The Committee therefore recommended that the Department of Justice carry out further consultations with the Canadian Bar Association, professionals and other groups and individuals who had offered their services, with a view to submitting another Bill to Parliament.

In response to the Senate Committee's interim report, the Department of Justice set up a Tripartite Committee, composed of three representatives of the defence bar, three representatives of the provincial Attorneys General and a representative of the federal Department of Justice. The Vice-President of the Law Reform Commission, the late Professor Jacques Fortin, also participated as an observer. This Committee examined the numerous criticisms of Bill S-33 and recommended that certain changes be made, most of which would have the effect of favouring the defence. With these changes the three representatives of the defence bar, plus one of the representatives of the provincial Attorneys General, said that they were happy with the new text. The two remaining representatives of the provincial Attorneys General were generally satisfied, but each had a few points on which they dissented, but they did not agree between themselves as to those few points.

In September, 1984, a federal election brought a new government into power, and a new Minister of Justice, the Honourable John Crosbie. The Department also underwent another change in that Roger Tassé, who had been the Deputy Minister of Justice throughout most of the period since the Law Reform Commission Report on Evidence was published, decided to leave the Public Service and go into private practice. These two events meant that the Department lost, at least temporarily, much of the knowledge of and commitment to the Evidence Project that had existed previously in its most senior positions.

In May, 1985, at a meeting of federal and provincial Deputy Ministers of Justice and Deputy Attorneys General, it appeared that everything was still on track, and that everyone assumed that the federal Government would reintroduce Bill S-33, with modifications reflecting the work of the Tripartite Committee. With this objective in view, the Uniform Law Conference of Canada, at its Annual Meeting in August, 1985, unanimously past a resolution urging the reintroduction of the Evidence Bill. A similar resolution was apparently passed unanimously at the Annual Meeting of Provincial Attorneys General in September, 1985.

With this background, Mr. Crosbie decided to raise the question with his provincial counterparts at a federal-provincial Meeting of Ministers of Justice and Attorneys General in February, 1986. In the meantime, however, there had been some changes at the provincial level, both in terms of Ministers and Deputies. Ontario, which had been one of the strongest supporters of the comprehensive legislative approach, now strenuously opposed

anything more than minimal, necessary changes. British Columbia, whose support for the Evidence Project had been marginal, now came out as strongly opposed. Saskatchewan too wanted to reconsider its position. While strong support was still expressed by Manitoba, Quebec and Newfoundland, Mr. Crosbie concluded that the time was not right for the re-introduction of such legislation, so it was put on the back-burner. Work continued on polishing the legislation (particularly the French version) in the event that there was a change of circumstances. In May, 1987, at the meeting of federal and provincial Ministers of Justice and Attorneys General, it was clear that support for the Uniform Evidence Project had eroded even further. It was therefore agreed that each jurisdiction should feel free to go its own way. While the Uniform Evidence Project as such was pronounced to be officially dead, unofficially some provinces indicated that they might proceed unilaterally to implement the provisions of the Uniform Evidence Act.

What is the future with respect to reform of the Law of Evidence? The trend seems to be away from comprehensive reform projects and in favour of problem-oriented law amendment. The Honourable Doug Lewis, the Minister of Justice, has said in relation to the reform of the criminal law, that it is his intention to concentrate on discrete topics that can be readily dealt - with "digestible chunks" as he puts it. Some Evidence matters may be dealt with in the context of other legislation. For example, the self-incrimination provisions found in section 5 of the Canada Evidence Act have been effectively superseded by section 13 of the Charter. Section 16, dealing with the reception of evidence of children has been repealed and replaced by a new provision found in Bill C-15, dealing with child sexual abuse. The provisions of Bill S-33 relating to the burden of proof of insanity and the proposed new psychiatric privilege, appeared in the Government's 1986 Draft Bill on Mentally Disordered Offenders, and are likely to re-appear in that format, if and when the Mental Disorder Bill is re-introduced.

The courts have also had things to say on problems dealt with Bill S-33. For example, in Vetrovec, [1982] 1 S.C.R. 811, the Supreme Court of Canada decided that in the absence of a legislative provision to the contrary, corroboration warning was not necessary. In Corbett, [1988] 1 S.C.R. 670, the Supreme Court of Canada held that section 12 of the Canada Evidence Act, relating to cross-examination of the accused on his previous criminal record, was not inconsistent with the Charter. No doubt the Corbett decision will have an impact on any future efforts to implement the amendments to this section proposed in Bill S-33.

Some suggest that through an accumulation of amendments and specific court decisions, we will eventually achieve the same objective as the federal and provincial Ministers of Justice and Attorneys General set for themselves more than twelve years ago. I personally doubt it. You can certainly get law reform by a piecemeal approach, but a haphazard collection of individual rules is unlikely to have the internal coherence and cohesiveness that Uniform Evidence Project sought to achieve.

But the Uniform Evidence Project is perhaps too idealistic to be viable in an era when each legislative change has to be weighed against its cost implications. That is not to say that it is impossible to get that great stone - the Evidence Project - moving again, but in order to overcome the fiscally imposed inertia, I think there would have to be a significant effort by the Bar and Bench, who are the users of the Law of Evidence, to convince the legislators that the passage of a comprehensive Evidence Act, consistent with the needs of modern society, would be a good investment in the future of Canadian justice.

E.A. TOLLEFSON

A native of Saskatchewan, E.A. (Ed) Tollefson attended the University of Saskatchewan where he received his B.A. in 1954 and his LL.B in 1956. He won an I.O.D.E. War Memorial Scholarship which permitted him to attend Oxford University, where he graduated with a B.C.L. degree in 1958.

On returning to Canada, he became a member of the faculty of the College of Law at the University of Saskatchewan. He taught a number of subjects, but specialized in Evidence, producing a case-book which has been used in a number of universities. He has a number of other publications, particularly in relation to the legal aspects of medical care insurance.

In 1968-69 he returned to Oxford on a sabbatical year and began working on a study of the history and practical application of the Privilege Against Self-Incrimination in England and Canada. In 1976 he was awarded a Doctor of Philosophy degree by Oxford University for his work on this topic.

In 1971 he left the University of Saskatchewan and joined the Research and Planning Section of the Department of Justice in Ottawa. He became the first Director of the Programmes and Law Information Development Section of the Department in 1974, and in that capacity he was responsible for a number of programmes funded by the Department such as Legal Aid, Compensation of Victims of Crime, Native Courtworkers, the Native Student Law Programme, Civil Law/Common Law Exchange, and the Duff-Rinfret Scholarship Programme for graduate studies in law.

In 1978 he became one of the representatives from the Department of Justice on the Federal/Provincial Task Force on Uniform Rules of Evidence, and the following year was appointed its Chairman. The Task Force submitted its final report to the Uniform Law Conference of Canada in January, 1981, which report became the basis of the new Uniform Evidence Act, approved by the Uniform Law Conference of Canada at its annual meeting in August, 1981. With completion of his work as Chairman of the Task Force, he was named Coordinator of the fundamental review of the Criminal Law within the Department of Justice, which is his present position.

Ed Tollefson was admitted to the Bar of Saskatchewan in 1961 and was named a federal Queen's Counsel in 1980 and a Senior General Counsel for the Department of Justice in 1986.