1976

An Evidence Code: The American Experience

Paul F. Rothstein
Georgetown University Law Center, rothstei@law.georgetown.edu

This paper can be downloaded free of charge from:
http://scholarship.law.georgetown.edu/facpub/1480
http://ssrn.com/abstract=2602787

36 Crim. L. Reports New Series 274-296 (1977)
On ne peut pas prétendre non plus que tout autre employeur, placé dans une même situation de faits, n’aurait pu obtenir de meilleurs résultats dans ses démarches.

Si tant est que la défense d’impossibilité puisse à l’occasion constituer un moyen de défense valable contre une infraction de ce genre, j’en viens à la conclusion ici que l’appelante n’a pas fait la démonstration d’une impossibilité qui puisse donner ouverture à pareille excuse.

Par ces motifs, le tribunal declare l’inculpée coupable de l’infraction et la condamne aux frais du présent appel.

Vu qu’il n’y a pas appel de la peine imposée, le tribunal rend exécutoire immédiatement la peine imposée en première instance.

AN EVIDENCE CODE: THE AMERICAN EXPERIENCE

by

PAUL ROTHSTEIN*

An address opening the Conference on Current Trends in Evidence, Dalhousie University, 26th November 1976**

Let me say how pleased I am to be here in Canada and how pleased I am at the hospitality that’s been shown me thus far. I think it’s most indulgent of you to consider the American Evidence Code which, I think, does have more relevance than might appear at first glance. This is because our Code, called the Federal Rules of Evidence, is about 50 per cent or perhaps even 60 or 70 per cent, the same as your proposed Code. Much of it is almost verbatim.

*Professor of Law, Georgetown University, Washington, D.C., author of books and articles on evidence and trials, advisor to the United States Senate Judiciary Committee in a number of projects, including the Federal Rules of Evidence, consultant and reporter for the National Conference of Commissioners on Uniform State Laws, and various law revision and legal education projects.

**Editor's note: Professor Rothstein's address was the first of a group of excellent addresses given at the conference by practitioners, judges and professors concerning the present law of evidence and the Law Reform Commission of Canada’s Evidence Code. These papers will be published shortly in book form and will be available from the Public Services Committee at Dalhousie Law School.
We have had this Code in operation now in the United States for about a year and a half. So in many ways it's a little early to be examining its effects. Nevertheless we do have some base of experience under it, from which to speak.

I am going to be somewhat unorthodox and take things out of order. I will reserve discussion of the background of our Code, how it came to be, and what courts it governs, until the end of my remarks. Right now I will discuss a specific area of our Code, the sections dealing with expert testimony and opinion evidence which are almost precisely identical in our Code and your proposed Code. In our Code it's called Article 7. You will understand that when I refer to Article 7, I am also referring to your sections 67 to 73, which are the analogous sections.

I will not say now why I am going to take things out of order. That will emerge as we proceed.

**PROVISIONS ON OPINIONS AND EXPERTS**

Let me briefly outline how Article 7 and your analogous provisions operate. I will, in this outline, present a composite picture which includes a reading of the sections in Article 7 as they operate together as an integrated whole, rather than a section-by-section treatment. The picture will also be based on relevant case interpretations, which I assume would be similar under your Code.

Proceeding, then, along these lines, reading Article 7 from its four corners, putting it all together and cranking into it the case interpretations, I see in Article 7 and your analogous provisions seven great liberalizations over traditional existing evidence law in the area of experts and opinions. By liberalization, I mean a broadening, an increase in admissibility.

The first great liberalization has to do with lay opinions. Lay opinions under the new Code are allowed whenever they would be "helpful", provided that they are rationally based in the witness's perception. All that latter requirement means is that the witness must have first-hand, personal knowledge of the matter that he is speaking about. Thus, we now allow into evidence opinions on the part of lay persons, in a much freer fashion than formerly. No longer is the rule the traditional restrictive "collective facts" rule. That was the former rule in the United States that a lay person could only express an opinion on the stand if it was impossible or terribly imprac-
tical to express what he has observed in any other fashion. A lay person was allowed to say that so-and-so was joking; that so-and-so looked like he was dying; that such-and-such produce was rotten; that such-and-such was a strong fence or a strong person; or that so-and-so appeared sane. These are all conclusions, inferences or opinions, and they would have been barred but for the fact that they were held to come within the collective facts rule. They are a shorthand rendition of some underlying, practically inarticulable facts. The only time a lay person could express an opinion was when a shorthand rendition was absolutely necessary and essential and very difficult or impossible to express any other way. This is no longer the law. The new rule permits the opinion whenever the opinion would be “helpful”. This is the very word used.

The second great liberalization expands who will be considered “experts”. The category will include not just professionals, scientists and people with specialized university degrees. It will include also the so-called “skilled” witnesses, such as bankers, farmers, police patrolmen or home owners, testifying in their particular area of experience.

The third great liberalization expands what subjects are proper subjects for expert testimony. It used to be in the United States that the only proper subjects for expert testimony were matters that were totally beyond lay ken. That’s the way the test read, totally beyond lay ken. If a lay person knew anything about the area, had any knowledge in the area, then an expert could not testify in that area. Such testimony would be considered an invasion of the province of the jury. The new test is that an expert may testify in any area where he has “specialized knowledge” which would be “of assistance” to the jury or to the judge — a very broad, liberal, highly discretionary test.

The fourth great liberalization has to do with the much maligned and much touted hypothetical question. Under the Federal Rules of Evidence and your analogous provisions, no longer need expert testimony be presented in the stilted format of the hypothetical question. A hypothetical question usually takes something like the following form: “Now, assuming, doctor, that a patient comes to you with such-and-such and so-and-so and has a history of such-and-such and so-and-so, do you have an opinion, doctor, as to whether this will be permanent?” “Yes, I do.” “What is that opinion?” (These hypothetical questions often run on for pages and pages,
Lawyers are fond of building into the hypothetical every con­ceivable favourable fact in the case, using this as early argumentation and propaganda.) No longer is that a necessary format for expressing expert opinion.

There are now six alternative formats. I am putting together the cases and the wording of several of the sections in the Article. The six alternative formats are these: first of all, the traditional hypothetical given at trial; secondly, a hypothetical given to the expert before trial, perhaps in the privacy of the lawyers office, the expert then testifying on the stand based on that; thirdly, the expert’s testimony can be based upon personal knowledge, for example, he may be a doctor who has made a personal examination of the patient and he testifies based upon that; fourthly, he might testify based upon reading the transcript in the case; fifthly, he may testify based on his attendance at the trial, sitting in the audience and listening to the fact witnesses; and sixthly, he can testify based upon a mixture of any of the above. Thus, the stilted hypothetical question is no longer a necessity.

The fifth great liberalization is that an expert on the stand may rely on unadmitted and inadmissible materials in giving his opinion if they are of the kind that are “reasonably relied upon” by experts in the field. Thus he may base his opinion on inadmissible evidence, hearsay, documents that are not in evidence, documents that violate the best evidence or the authentication rule — any kind of inadmissible evidence — provided that it is the kind that is “reasonably relied upon by experts in the particular field in forming inferences or opinions on the subject.” Thus, a judgment of reasonableness has to be made here by the judge. A question could be raised: “Reasonable for whom? — the court or these experts?” “Reasonableness” has usually been held synonymous with “customary”.

You will notice that this principle is an end run around the hearsay rule. If an attorney has a piece of hearsay and has trouble getting it into evidence under the hearsay rule and cannot find an exception to the hearsay rule for it, then he might endeavour to find an expert who will base his opinion on the inadmissible hearsay. The attorney might then put the expert on the stand to recount not only his opinion but also the hearsay basis of his opinion. This has tremendous implications for getting into evidence studies; polls; surveys; second-hand statements, say, by patients, consultations with other doctors; books; articles; and other things of that sort that might otherwise be inadmissible hearsay.
A primordial case interpreting this provision came down some months back. A police officer from the drug enforcement administration was allowed to testify as to the selling price of heroin in various cities of the world. He had found out the prices from other agents. Subsequent cases admitted studies — government studies, private studies, university studies — and polls and surveys, even though the hearsay rule would have barred them. The idea is not new, but the new rules button it down.

The sixth great liberalization has to do with disclosure of the facts and materials upon which the expert witness bases his opinion. It used to be in the United States, and probably here as well, that it was required that the expert give the basis for his opinion in the direct examination, so that the cross-examiner had some advanced warning and could decide whether or not to cross-examine, and if he decided to cross-examine, what tack to take. Sometimes it's the better part of discretion not to cross-examine an articulate expert. Our rules of evidence now say that this is no longer required; that the direct examination does not need to include the basis of the expert's opinion. The expert can give a bare opinion. Admittedly, in many cases the direct examiner will not proceed this way because a bare opinion is not very persuasive. But on occasion the direct examiner will not put a basis in on the direct examination, either because there is no very good basis or because there is a great basis and he would like the cross-examiner to trigger it. He may know from past experience with this cross-examiner that he can depend upon the cross-examiner to do just that. The cross-examiner can't keep his mouth shut. If the cross-examiner triggers the basis, it's very effective for the direct examiner, because it makes the expert look especially good, much better than if the basis had been put in on the direct examination. Under the new rule it is no longer required to put the basis in during the direct examination.

Your rule is a little better on this score than ours. Your rule provides that the judge may or may not order that the basis be put in on the direct examination, and does not slant the language to indicate that such an order is the extraordinary case. In addition, yours provides for the parties to exchange in advance written summaries of expert testimony and its grounds, something that appears in our civil procedure law (but not our criminal procedure law). This has often proved inadequate because the statement in practice is frequently perfunctory.
The seventh great liberalization has to do with the so-called ultimate issue rule. This was the rule that provided that an opinion, be it an expert opinion or a lay opinion, could not be given in terms that smacked of, that sounded of, an ultimate issue in the case. This has been abolished by our new rules and your proposed rules. There is no longer a ban on opinions by experts or lay people expressed in terms of the ultimate issue in the case.

That is the final liberalization that I want to address in outlining the way that these provisions operate.

Let us see how these seven great liberalizations interrelate with each other to produce results in particular cases. Let us take an automobile accidentologist. We seem to have a growing class of people called accident reconstruction experts in the United States, accidentologists, in many different areas, including industrial mishaps and collisions. Let us say that he wants to take the stand to testify about who caused an automobile accident. And he wants to say the Ford was at fault, or wasn't keeping a proper lookout. He wants to testify based not upon any personal observation that he had of the automobile accident, but based primarily upon bystanders' statements. He has interviewed the bystanders and they tell him lots of things. He puts them all together. Are there any impediments to this sort of thing coming in? It seems to be hearsay; and he seems to be an expert of somewhat specious qualifications. Nevertheless with an appropriate judge he could overcome all the hurdles and get his evidence in. He could, first of all, convince the judge that this is a recognized field of expertise that has something "helpful", something "of assistance", to offer the trier of fact. He could convince the judge that he does indeed have some "specialized knowledge". That's all that's required under the rule regarding his qualifications and the area he can testify in. It seems to me that he could convince the judge that it would be more "helpful", of more "assistance", to have this testimony than to not have it. So he meets that test. In addition, we have learned that he is allowed to base his testimony on hearsay, provided that he convinces the judge that experts in this field reasonably rely upon this kind of hearsay, bystanders' statements. Let us say that he does so convince the judge. He says, "All us accidentologists rely all the time on this kind of bystanders' statements." The final impediment seems to be that he is expressing his conclusion in terms of the ultimate issue in the case. He says the Ford was at fault; the Ford didn't keep a proper lookout. Well,
we saw that there is no longer a ban on ultimate opinions, opinions on the ultimate issue in the case. So he overcomes that hurdle too.

One additional hurdle might be mentioned. We have something in our rules near the outset, rule 403 (you have an analogous rule), which I call "the big override". It states that notwithstanding anything else the rules provide, the judge can keep evidence out if in his discretion he finds that the probative is substantially outweighed by the prejudice, the time consumption, the confusion, the misleadingness or similar factors. This is a very broad rule, phrased just like that, and the judge has discretion to exercise it. But it seems to me that a judge might well decide — having made all these determinations that Article 7 relating to experts is complied with in the case of this accidentologist — that the "big override", rule 403, is also complied with. He would admit the testimony into evidence. (While the drafter's comments try to assure us that it is not contemplated that such evidence should be admitted, there are no assurances in the text of the rules.)

Let us take another case. Suppose a financial investigator from our Internal Revenue Service (our income tax people) takes the stand to testify that Mr. so-and-so is guilty of tax fraud, in just those terms. His conclusion, let us further assume, is based upon his examination of bank records, i.e., documents that are not here, haven't been admitted, may not even be admissible, are not authenticated and don't comply with the best evidence rule. They may be hearsay and may not really meet the requirements of any exception, for all we know. And he works for the government — a party in interest. The rules are broad enough to permit this testimony, even though he is expressing an ultimate opinion that so-and-so is guilty of tax fraud.

A fortiori he could testify that Mr. so-and-so owns certain funds. Let us say that is an important allegation in the case; that they are the defendant's funds and that the defendant tried to cover them up by all kinds of dummy corporations. The investigator could testify in terms of these allegations — that the funds were Mr. so-and-so's, who tried to cover up with dummy corporations. The expert may never specify any facts underlying such a conclusion. Hopefully judges will not allow what we have been talking about, but there is a risk some will.

The witness is testifying based upon inadmissible or unadmitted evidence, but there is no ban on that. There is no
ban on ultimate conclusions. He is a specialist who has specialized knowledge. The judge could feel it is helpful and of assistance to the trier of facts. So it all may come in.

I take it you now have a feeling of disquietude and discomfort. Which brings us to my first reason for putting the early spotlight on Article 7, dealing with opinions and experts. It is my conviction that Article 7 will be the most important article in all the rules in 20th century and 21st century litigation. In today's world of increasing expertise and specialization, and increasingly complex technical issues that are beyond the ability of lay juries to resolve or to resolve expeditiously without expert help, expert testimony will be relied upon more and more as time goes on. At one and the same time Article 7 has the greatest potential for good and also the greatest potential for harm and abuse in all the rules.

On the good side, Article 7 opens the door to all sorts of valuable modern expertise which the courts have been barring by applying 18th century precedents to today's vastly more complex problems. Article 7 thus laudably brings courts into the 20th century. But in opening the door wider to expertise, more charlatans are also going to get in. There will be an avalanche of sociologists, economists, safety experts, employment discrimination experts, psychologists, etc. — some of them good and some of them bad. These rules give the court no concrete guidance in distinguishing the charlatans from the savants. Now, of course, a top-notch judge usually can distinguish between them under the standards provided in the rules. But in any system of law, are all the judges going to be top-notch? And we should remember that in the United States, while these rules bind only federal judges, they are being adopted in an increasing rate by the states. Many states that haven't adopted them are using them in an advisory fashion. In addition, administrative agencies are using them in an advisory capacity. Eventually many administrative agencies will probably adopt them. Especially with respect to the states, you have to realize that judges who are on a very high level, and judges on the lower levels, are going to be using these rules. Both your highest, most learned judges and your J.P.'s are going to be using these rules.

What the rules are saying here, and what I've illustrated with the accidentologist case and the bank examiner case, is that the rules ask you to trust the judge, trust the jury and trust the lawyers. Trust the judge to keep out unworthy ev-
idence. Trust the jury to spot weaknesses in evidence that is admitted and to assess its weight correctly. Most importantly, trust the lawyers to point out the weaknesses in the evidence so that the judge and jury can spot them. So there is a heavy onus on the lawyers when these rules go into effect.

It's obvious that the quality of the bench and bar is critical under these new rules. I know the quality of our federal bench and our federal bar and I know that it is very high. I assume the same is true of the courts that will be using your proposed rules. I leave it to you as to whether you feel that these provisions that I've outlined can be administered properly. I might point out that while these rules may seem to give the judge too much flexibility, I would warn against the opposite extreme — a rigid specification that unduly hems him in. I leave it to you to ask yourselves whether you think these provisions that I have outlined draw the right balance between too much rigid specificity (which would unduly tie the hands of the judge) and uncontrolled discretion. Do they draw the line between the two in the proper place?

TRENDS IN THE RULES AS A WHOLE

All of this brings me to my main reason for addressing Article 7, dealing with opinions and experts. My main reason is this: that what is true of Article 7, in the senses that I have addressed, is also true throughout the entire body of the rules, both yours and ours. I see two themes in the new rules, yours and ours, that are strongly illustrated by Article 7 and the analogous provisions in your Code. These two themes are admissibility and discretion. Throughout their length and breadth these rules favour admissibility and grant strong doses of discretion.

Admissibility is manifest right in the fundamental definition of relevance in both Codes. Your Code says relevant evidence is evidence that has any tendency in reason to persuade. This is a very low threshold favouring admissibility. Ours says any evidence that has any tendency to increase in any degree the probability of a provable proposition being true or untrue is relevant. All it has to do is increase or decrease the probability in any degree — a fraction of 1 per cent — and it's relevant. In addition, before the judge can exclude evidence pursuant to the "big override" referred to earlier, he must find that the relevance, or probativity, is substantially outweighed — not just outweighed — by the other policy factors (time prejudice, etc.). This is so in both Codes.
The admissibility theme is further illustrated in both Codes by the fact that they severely limit witness incompetencies. And both allow you to impeach your own witness, contrary to former law. Both substantially erode the hearsay rule. The authentication of documents requirement is whittled down in both. There is an expanded list of self-authenticating documents, documents that on their face are authenticated. The best evidence rule is radically altered — xeroxes, photocopies, are freely admitted on a par with originals in most cases.

All this means admissibility. And there are many, many more provisions that increase admissibility, in addition to the opinions and experts sections that I previously addressed.

What about the theme of discretion? The knell of discretion is sounded near the very beginning of your rules and ours, in what I have called the "big override", which grants the judge wide discretion to balance probativity against prejudice, time consumption, misleadingness and similar factors. In another section in both Codes the judge is given discretion over the order and manner of presentation of evidence and the examination of witnesses. That's your rule 58 — we have the same thing. This means he has discretion over the scope of cross-examination, the scope and permissibility of rebuttal and surrebuttal, the number of witnesses and things of that nature. And he has in both Codes discretion over whether or not and when to allow leading questions. He's given some guidance but not too much.

Your privilege provisions are a prime example of what we are addressing at this point. Under some of the privilege provisions in your Code the judge is to weigh the need for the testimony against the public interest in privacy. Under others he is to weigh the public interest in privacy against the public interest in the administration of justice. Under your sections on illegally obtained evidence, he is to balance human dignity, social values and the administration of justice against the seriousness of the case and the need for the evidence. At one point under illegally obtained evidence, the judge is to gauge whether the administration of justice would be thrown into disrepute, a factor which cuts both ways, depending upon whether one thinks letting a criminal off, or using illegally obtained evidence, is the more disreputable, something upon which opinion seems divided. I am using the actual words of your Code. They are broad, engendering much discretion.

Discretion and breadth of phrasing engendering discretion appear at every turn, not merely in the sections on experts and
opinions and the other sections I have referred to. Indeed, in the United States people have called our Federal Rules of Evidence the "Federal Non-Rules of Evidence". I think that is an exaggeration. But it is true that these rules are actually not rules but guidelines, standards, only.

These twin themes of admissibility and discretion have certain implications in addition to those I've already mentioned. The ones I've already mentioned are the three "trusts" (trust the judge, trust the jury and trust the lawyers) and the importance of the quality of the bench and the bar. Let me mention some other implications.

First of all, it seems to me that broad discretion means that even under the Code there will still be considerable diversity from circuit to circuit, district to district, judge to judge, which rules and codes are meant to eliminate. Discretion and broad phrases engender differences of opinion as to how it should be exercised.

Secondly, discretion means that all of evidence law will not be between the two covers of the Code. Old cases and new cases will still play a tremendous role, despite some exaggerated promises for a code. It is fatuous to say, as the beginning of your Code seems to imply, that the common law is abolished. It cannot be abolished where you have broad provisions and discretion like this. You have got to give such rules content by reference to the old cases and the new cases.

The next implication that I see is that discretion means that dissatisfied litigants will be able to focus much of their dissatisfaction on the judge personally. He cannot say that the result was entirely compelled by law. The litigant can say, "Wait a minute, you've been given tremendous discretion to exercise as you want here." This is somewhat contrary to the historical trend toward a rule of law and not of men — a trend that, admittedly, has not been constant and perhaps cannot or should not be carried to an extreme.

The next implication is that while discretion gives the trial judge much more latitude than he formerly had, it also gives some new licence to appellate judges. They will be allowed to reverse distasteful decisions for nothing more precise than abuse of discretion, in many instances.

Fifthly, it seems to me that as lawyers, your ability to plan, predict and advise; to proportion expenses to a case in advance; and to give a reading of what it will cost and of the
probabilities of outcome, is impaired under a code that gives 
broads discretion, because dis­
cretion means uncertainty. How 
can you precisely plan your case if you don't know what ev­i­
dence is going to be admissible because it turns on the dis­
cretion of the judge? How can you predict for your client with 
any degree of probability what the result will be when that 
all depends on what evidence is admissible and you don't know 
precisely what will be admissible? How can you advise the 
client as to whether to go into litigation or not, and how much 
to spend? How can you give a reading as to how much it will 
cost, and plan the costs? All this depends upon what evidence 
will be admitted at trial. You are somewhat impaired to the 
extent that there is discretion and uncertainty.

And, finally, there are going to be more appeals, at least 
in the short run. You've got a lot of broad phrases; a lot of 
discretion. We're going to have to get appellate courts to tell 
us what are the limits of the discretion, what is an abuse of 
discretion, what the broad phrases mean. Furthermore, when­
ever you enact a new code, lawyers have a heightened sense of 
the subject, of evidence. For example, in the United States we 
have been giving lectures all over the country — lawyers are 
suddenly very interested in evidence. They might never have 
been interested in it before but we have a new Code, so they're 
very interested. Therefore, they study it, they go to seminars. 
they read books. They have a heightened awareness of ev­
dence matters. It makes them more appeal-minded. Codes use 
new words. Nobody knows for sure what the new words mean. 
So they say, "Let's ask the appellate court." There are going 
to be more appeals for a while.

This is a pretty gloomy picture. I seem to be saying that the 
new rules are and will be a failure; that they will not accom­
plish what codification is intended to accomplish. But that is 
not my message. Rather, I am pleading for a realistic rather 
than an exaggerated expectation as to what rules of this kind 
will accomplish. They may not accomplish the goals of codi­
fication 100 per cent. They may only accomplish it 50 or 70 
per cent. Perhaps they will need amending before enactment 
and from time to time after enactment as they operate and 
problems are revealed. But, nevertheless, codified rules of 
evidence of some kind are, on the whole, desirable and salutary 
in my view. Codified rules at the very least cause all the judges 
to shoot toward the same target. Authority will all be gathered 
together in convenient annotations to rules by the glossators. 
Law students will study the Code, which is a very effective
teaching tool. They will probably learn better, and it will be uniform law they will be learning and subsequently spreading. They will be equipped to practise under it. It will be a convenient focus for law schools and for the continuing legal education of practitioners. Interest in learning the law of evidence with precision will be stimulated. Thus, I think that under a code, the system will tend towards simplification, uniformity, professionalism and expedition, though the goals will never be accomplished 100 per cent.

In the meantime, when a code is adopted, I urge that lawyers not give up arguing the fine points of interpretation for their clients and that they not give up engaging in the sophisticated use and distinguishing of case decisions in order to give content to generalized words like "helpful", "of assistance" and the other broad words that constantly recur throughout the Code. The reason I say that lawyers should continue to do this is so that the courts may ultimately decide what is the best interpretation of each provision in the Code, and so that the drafters may make amendments when needed. It is a lawyer's duty, not only to his client but to society as well, to do this. Only then can we be confident that the courts have been presented with all the alternative interpretations of a word or phrase and that they have been adequately argued. Only then can we feel assured that the court has selected the right alternative and that we have the best interpretation possible. If this is re-introducing technicality into a code that was meant to sweep away technicality, then so be it. It is a good thing, I say. And it is unavoidable in a code using such broad phrases.

I know I don't need to exhort lawyers to do this. A vigorous bar will do this kind of argumentation wherever there is vague-ness or generality in a code or any possible ambiguity. They will argue the pros and cons of past resolutions from the old cases and from the common law. And there are bound to be conflicting cases coming down under the Code which lawyers can also argue from, because ambiguity, broad phrases, or discretion engender conflicting differences of opinion by different judges. This process is sometimes referred to as undue technicality. But the needs and problems giving rise to it cannot be ignored and will not go away. It is unavoidable unless the Code is so detailed as to answer every question in advance. Such specificity is impossible and undesirable for a number of reasons, not the least of which is that the drafters cannot possibly foresee every contingency or be alerted to all the pros and
cons of every interpretation in advance. Neither Code attempts anything like that.

SOME EFFECTS ON THE DAY-TO-DAY PRACTICE OF LAW

I would like to turn for a moment to the practical effects that our Code has had on the practice of litigation law and that your Code can be expected to have. My own experience, plus my interviews with other attorneys, tells me that one principal effect of the new Code is that more preparation of cases is required. Certain sloppy practices which were always dangerous to the sloppy practitioner who practised them have been rendered doubly dangerous under the Code. This will be true of your Code as well as ours because the provisions I am going to address are virtually the same.

Let me illustrate what I mean. Your opponents' experts will no longer have to give you their basis — their materials and their facts — on the direct examination. I have already adverted to this. It means that if you're going to make an informed decision as to whether or not to cross-examine and what line of attack to take in your cross-examination, you're going to have to do some homework (probably beyond the cursory summary of expert testimony and grounds your opponent may have provided). You can't say "I can rely on my wits and listen to the direct examination, that's enough to supplement the summary, and I'll fashion my cross-examination on my feet." You can't do that anymore. I know none of you do this kind of thing. But some cases aren't expensive enough, do not have big enough stakes, to warrant spending the client's money on tremendous pre-trial investigation and discovery; or the client may be impecunious. So sometimes you will be tempted, perhaps even somewhat justifiably, into one of these practices to some extent. But it must be recognized that such a practice is more disadvantageous than ever under the Code. Criminal cases are especially troublesome on this score in the United States because pre-trial investigation and discovery by the accused is handicapped not only by lack of funds, normally, but also by inadequate legal procedures for discovery.

What about opponents' lay witnesses? Can you sit back and say, "I won't do very much homework and discovery, I'll just listen to what he says on direct examination and then I'll cross-examine him based on that. I can rely on my wits." Can you do that safely? No, you can't, because of something that I call "the case of the invisible witness". It goes as follows. The lay
witness on the stand may say not “I saw the Ford go through the red light”, but rather “Mr. Jones told me the Ford went through the red light.” You can’t cross-examine Mr. Jones. He isn’t here. He’s the invisible witness. So you cross-examine this witness who is on the stand. But the witness on the stand says “I don’t know. Don’t ask me those questions. Mr. Jones said it. I don’t know.” It is apparent that you can’t effectively cross-examine concerning the matter. Now you say to me, “Wait a minute, that’s hearsay.” But the point is that the new Codes, both of them, yours and ours, restrict the hearsay rule. More of this type of secondhand material by invisible witnesses is going to get into evidence. Thus, you’ve been caught unawares. You haven’t done your pre-trial discovery and investigation, which would have shown you that this witness is going to testify to hearsay. It would have identified for you the declarant, Mr. Jones, the invisible witness. Then you could go get him, depose him, interview him, perhaps bring him to trial, or at least gather evidence on his credibility and the circumstances surrounding him and the observations he made. If you had done your homework properly that’s what you could do. But you didn’t. You sat back, you said, “Well, I’m going to learn it all in the direct examination just on my wits, do the whole case in a really great cross-examination like Perry Mason.” You can’t do that with impunity, especially under the new Code. The cross-examination will be ineffective in this kind of situation, which can be expected to recur frequently. Once again, little allowance is made for cases where it may be impractical or impossible to conduct extensive investigation and discovery.

To the extent that the Codes provide for notice to the other side of hearsay that will be used, the problems respecting “invisible witnesses” spoken of above are somewhat, but not entirely, alleviated. While the notice may identify the declarant (the “invisible witness”) and furnish something of the substance of his statement, discovery and investigation is still needed to ferret out any weaknesses in it, and calling or investigating the declarant still entails trouble and expense and it may even prove to be impossible. Further, not all situations where hearsay can be used are covered by the notice requirement, although the notice requirement in your Code is broader than the one in ours.

What about documents? How about the lawyer who says, “I’m not going to do too much homework and discovery on my opponent’s documents. When my opponent brings in the
documents, I'll have enough to prepare a good attack on the documents. After all, he's got to present me with the original. The original prevents double xeroxing, reveals any fraudulence, displays for close scrutiny the original signature, reveals any erasures, etc. Furthermore, he's got to present an authenticating witness for the document, so I'll cross-examine that authenticating witness and that will reveal any problems. Why should I do pre-trial discovery, investigation and other homework?" The problem with this approach is that the new rules do not require an authenticating witness for an expanded list of self-authenticating documents, and the new rules do not require the production of the original. Xerox will do the trick in most cases. So this lawyer is out of luck. Again, it is probably no excuse that there may have been practical reasons for failure to investigate and discover, although the judge has some discretion to require originals.

Turning to the next practice, some of you may have said to yourself, "I'm not going to waste the client's and my resources by preparing my own expert witness very thoroughly. After all, he is extremely intelligent and articulate. I have worked with him before. He's appeared in cases for me before. I'll just hand him my file on the case and I'll tell him to go home and prepare from it. Then he can come and testify. That's an economical way to do it." This is very risky under the new Codes, because they provide that documents used by witnesses to prepare themselves, either before taking the stand or on the stand, may be inspected by the adverse party. By giving the witness your case file, you risk exposing it to adverse inspection. Our Code states that adverse inspection of documents used to prepare before taking the stand is discretionary with the judge. Your Code makes it mandatory if requested. So this practice is especially risky under your Code. Neither Code tells us what to do if privilege conflicts with this rule. What if there is a privilege surrounding parts of this file? (The most common privileges invoked here might be the privilege for the attorney's work-product and the attorney-client communications privilege; but other privileges are also conceivable.) The rules themselves are silent on this question. I would assume you've waived privilege by giving the file to a witness to prepare himself. (We have one cryptic and inconclusive reference to this problem in our legislative history of the rule.)

I suggest that you don't prepare lay witnesses in this fashion either. I know there's a tendency to do that sometimes if you think the witness is intelligent, but the same risk applies.
There is another practice, too, I would like to mention, which is affected by the new rules. Suppose that you have an expert witness and again you want to save time and money, yours and the client's, and you don't want to work with the witness extensively before trial. So you tell him to sit in the courtroom and listen to the other witnesses as they testify. That will give him a good picture of the case and then he can give his opinion on the stand based upon what he's heard. The difficulty is, you might run up against the sequestration rule. Both your Code and ours have a sequestration rule that provides that witnesses may not listen to each other. If a request is made, sequestration is mandatory; the judge has no discretion. The mandatory feature is odd. Under former law the judge had discretion. The theme of the Code in general is discretion. Yet here, where discretion would be appropriate, the Code removes the judge's discretion. (Your rule is more precise than ours in one respect: it extends sequestration to provide for an order that a witness shall not be informed by other persons what the witnesses in the courtroom said. That is a logical extension of the sequestration rule. If we are going to bar witnesses from sitting in the courtroom, we should also instruct that they are not to be informed of what went on in the courtroom secondhand. Our rule does not expressly state the latter, so it is possible one might circumvent our sequestration rule by informing the witness out in the hall what is going on in the courtroom. A question can be raised also as to the permissibility of a witness reading transcripts, attending depositions, etc.)

This sequestration rule might bar your expert from sitting in and listening to witnesses. There is an exception to the sequestration rule under both Codes, for the situation where it is “essential” that the witness sit in. But I can see a judge taking the position that there are other ways for your expert to testify. For example, the expert can be given a hypothetical question. So it is not “essential” that he sit in. Furthermore, the attorney may not need the expert's advice throughout the case because it may not be a very technical case. So his presence in the courtroom isn't “essential” in that sense. And the point your expert is going to testify on may not be a critically central point. So it is not “essential” in that sense either. Therefore he might well be barred from the courtroom.

I would suggest that the way around this is to argue that the opinion and expert rules, which I addressed earlier, actually contemplate this efficient economical way of presenting expert testimony. If you want to get away from the hypothetical
question, as those rules attempt to do, one of the best ways to
do it is to let the expert sit in and hear the facts. I would
suggest that the policy of those rules should supervene and
override the policy of the sequestration rule in this kind of
case. Anyway, the policy of the sequestration rule is to prevent
fact witnesses from influencing each other, a danger that is
not really present here.

One other practical effect that the rules have had on the
practising lawyer, that I should mention, is that now lawyers
are finding it more important than ever to obtain and discover
previous statements of witnesses. The taking of or search for
such statements becomes a critical kind of homework, a critical
kind of pre-trial investigation and discovery. For now a case
can be won or lost on those previous statements, because pre­
vious statements of witnesses are admissible substantively, af­
firmatively, under the new Codes. Before, that usage of them
would have been inadmissible hearsay. Under former law all
they could be used for was impeachment and credibility. Im­
peachment and credibility are important but not as tremen­
dously important as being able to use them substantively as
well as for impeachment and credibility. So it's doubly impor­
tant to get those pre-trial statements. I submit to you that
my experience has been that this provision favours the pro­
secution. When you have the burden of proof to prove guilt
beyond a reasonable doubt, the distinction between substantive
use and credibility or impeachment use becomes very impor­
tant. And the prosecution is in a marvellous position to get
former statements of witnesses, to use the grand jury and in­
vestigation to get former statements of witnesses. The pro­
secutors have seen the opportunity under the new Code and
are seizing it.

THE BACKGROUND OF THE AMERICAN CODE

Now I want to talk about background: how our Code came
to be, what courts it governs, that sort of thing.

On 1st July 1975, about a year and a half ago, our federal
courts, not our state courts, went under this new system of
evidence, the new Federal Rules of Evidence, which govern in
all civil and criminal cases. There is very little distinction made
in the new rules between civil and criminal cases.

These new rules replaced our uncodified system of common
law evidence rulings in federal courts, which rulings often
varied from district to district and circuit to circuit, penalizing
the attorney who ventured to practise outside his home territory and inhibiting the rotation of judges amongst the federal courts around the country. On evidence matters, sometimes the federal courts resorted to state precedent, sometimes to federal precedent, sometimes to a mixture. This was the situation before the Code. The law was hard to find and older attorneys familiar with local peculiarities had a definite advantage over newcomers. I venture to say this situation that I’ve sketched in the United States before the Code is probably the situation that exists here in Canada now, to a somewhat lesser degree.

The new rules in the United States only govern proceedings in federal courts. But they govern virtually all proceedings in federal courts. Federal courts in our system entertain basically three types of cases: (1) criminal violations of federal statutes, i.e., statutes passed by Congress in areas that our constitution specially gives over to the federal legislature (the Congress), such as the federal income tax or the regulation of interstate commerce, including such things as securities law, anti-trust and the regulation of common carriers; (2) civil cases that involve what is called a federal question, e.g., civil suits under any of the congressional statutes that I have just mentioned, or a suit involving our constitution; and (3) civil cases that do not involve any federal congressional or federal constitutional law and by all rights would be in a state court but for the fact that the parties are citizens of different states. The Federal Rules of Evidence govern all of these cases in federal courts. Virtually all other cases are in state courts. These include, generally speaking, criminal violations of state-enacted statutes, ordinary civil tort, contract and property suits, matters of family law and ordinary commercial litigation. Now, the state courts are not bound by the new Federal Rules of Evidence but six of the states have recently enacted evidence codes similar to the Federal Rules of Evidence and three more are very close to doing so. Since these codes are patterned on the Federal Rules of Evidence, they should facilitate the ability of state practitioners to function in federal courts and vice versa, and I think that is an important and salutary by-product.

I should add that state judges in states that are not adopting the codes are nevertheless using the Federal Rules of Evidence in an advisory capacity as a sort of textbook. Federal courts were doing this before the formal enactment of the Federal Rules of Evidence, and federal administrative tribunals are
doing it today, even though the administrative tribunals are not formally covered by the new rules. Eventually they may adopt some rules of their own very like these.

What is the background of evidence codification in the United States? The literature of the early 1930's reveals that scholars and practitioners in appreciable numbers in the United States found it deplorable that each state and each federal circuit seemed to have its own common law of evidence even though they shared a common core. This dissatisfaction with the existing system led to the drafting, in the next several decades, of two documents: the Model Code of Evidence and the Uniform Rules of Evidence, by two prestigious groups of academicians and lawyers. These groups were the American Law Institute and the National Conference of Commissioners on Uniform State Laws respectively. These two groups are prestigious, essentially private or semi-private organizations dedicated to law reform. The Model Code was regarded as somewhat radical in its proposals and therefore the Uniform Rules of Evidence were drafted to be more practical and superseded it, while preserving much that was good from it. Your Code incorporates several of the features of the Model Code, even some superceded ones, as well as of the Uniform Rules (and, of course, the English reforms). These Codes, particularly the Uniform Rules, were recommended by their drafters to the states and the federal government for adoption, but very few states formally subscribed, although judges have often used them as influential textbook-type statements.

In the late 1960's California did its own thorough-going revision and codification of its own evidence law, using, principally, the Uniform Rules as a point of departure. But the final California product made many modifications.

In 1961 the federal people got into the act. The formal administrative organ of the federal courts, known as the Judicial Conference, issued a report concluding that a uniform body of federal rules of evidence was desirable for federal courts. In 1965 the Chief Justice of the United States therefore appointed a drafting committee known as the Advisory Committee which between 1968 and 1972 circulated to the bench and bar for comments two successive drafts of the Federal Rules of Evidence. The principal difference between the two drafts was in the hearsay rule. The first draft just about abolished the hearsay rule, and in this respect it is somewhat similar to your proposed Code. This met with considerable opposition on the
part of the practising bar, and so a second draft came out that substantially reinstated the hearsay rule, but in considerably eroded form compared with its common law contours.

Representatives of nearly every aspect of trial-related law were on the Advisory Committee — academicians, judges, civil and criminal trial lawyers from both sides of the case, etc. Their drafts of the Federal Rules of Evidence owe an appreciable debt to the Uniform Rules and to the California Code. Indeed, some of the same drafters of the three earlier codes also sat on the Federal Rules of Evidence Advisory Committee.

In November 1972 the drafts of the Federal Rules of Evidence seemed to be ready for finality, and so the Supreme Court of the United States approved the draft for use in all federal courts, to take effect automatically without further enactment on the following 1st July, which would be 1st July 1973.

But then the rules hit a snag. Before their automatic effective date, Congress got into the act. Congress suspended the rules until Congress could take a closer look at them and examine each of them in detail. Congress's dissatisfaction centered primarily on the privilege and hearsay provisions. Some congressmen still didn't like it that the hearsay rule was being restricted. The trial lawyers in Congress loved the old hearsay rule and didn't want to see it restricted the way these rules did (and your Code does even more).

Let me examine the problem Congress had with privileges, which was probably the principal problem. The Supreme Court draft of the Federal Rules of Evidence prescribed an exclusive list of privileges much like the ones in your proposed Code. Congress felt that such an approach did not defer enough to the state law of privileges, which many congressmen thought should apply not only in state courts but in federal courts as well. After all, they argued, states have reasons, policies, for having privileges,. For example, lawyer-client privilege. States want to encourage state lawyers and state clients to communicate. Or doctor-patient privilege. The states want to encourage state doctors and state patients to communicate fully in the interests of better health care in the state. They won't communicate fully if they know there's no privilege should the matter get into a federal court. There's a great likelihood matters do get into federal courts. So what good does it do for the state to have a privilege if the federal court doesn't respect it? That was the argument.
In addition, the list of privileges failed to contain some of the privileges that were favoured by many congressmen. A general physician-patient privilege was not there. A general privilege covering interspousal communications in civil and criminal cases was not there. There was no journalist privilege.

Additionally, the draft contained a broad governmental executive information privilege (almost identical to the one in your proposed Code) and this really irriated the congressmen, who were at that time chafing under President Nixon's excessive claims of executive privilege. Some libertarian congressmen felt this broad view of governmental privilege was especially bad because it went hand in hand with a restriction, elsewhere in the draft, of the personal privileges like the husband-and-wife and doctor-and-patient privileges. The rules seemed to be broadening governmental privilege while narrowing personal privileges. You see, the draft did not provide for privileging confidential private citizen relationships except for a very narrow list of specifically enumerated ones. It was not like your Code, which does privilege confidential professional and family relationships quite generally. I might say that your draft would not have satisfied these congressmen because even though your draft does privilege family and professional relationships, it does so only in a half-way fashion. It grants a qualified privilege. The judge can balance various factors to see whether he wants to accord a privilege or not. I submit to you that this really does not effectively foster the policies behind the privileges. The purpose of these privileges is, I assume, largely to encourage full communications. Are people going to be encouraged to communicate when they know that they may or may not have a privilege, depending upon what a judge rules? I do not think so. I think if you really want to encourage them to communicate, you have got to tell them that they definitely have a privilege.

The height of the Watergate affair was a very bad time to put forth a draft with a broad executive privilege. Furthermore, it was probably a Watergate-engendered sensitivity that made Congress reluctant to cede any power to any other branch of government, whether it be to the executive or the judiciary. Thus Congress was not about to allow the judiciary to unilaterally adopt rules of evidence without Congress getting into the picture. Especially was this so since many of the matters in the Code, such as privileges and other provisions, especially provisions applying to criminal cases, were perceived to affect
matters outside technical courtroom conduct, possibly reaching into fundamental liberties in the daily activities of citizens.

For these reasons Congress wanted to play a role. Overlaying it all was a feeling that perhaps codification was not needed, but this did not prevail. New areas of controversy surfaced once Congress opened the rules, but finally, after a House draft, a Senate draft and a compromise draft, the rules were enacted and became effective on 1st July 1975. In broad outline they were about 90 per cent what the Supreme Court draft had provided anyway. They are also very like your Code. About 80 per cent attempts to codify the common law. But you can't codify the common law in the United States. It has many different stands, many conflicting views. In most cases our Code took the majority view; but in many it codifies a minority view. There is very little that is made up out of whole cloth and brand new. Privileges were, under the final enactment, left to common law or to state law, depending on the kind of case; and a compromise was reached cutting back on liberalization of the hearsay rule.

I hope in the time allotted that I have given you at least the general flavour of our Code and a hint of what you can expect from yours based upon our experience. I thank you very much for your indulgence and for inviting me to such an informative and splendidly organized program.

QUEBEC COURT OF APPEAL

Tremblay C.J.Q., Montgomery and Bernier JJ.A.

Re Ouellet; Regina v. Atlantic Sugar Refineries Co. Ltd. et al.

Contempt of court — Not in the face of the court — Procedure — Summary process — Whether appropriate in case of contempt not committed in the face of the court — Whether other procedures available — Whether an indictment may be preferred — The Criminal Code, R.S.C. 1970, c. C-34, s. 8.

Contempt of court — Parliamentary privilege — Whether parliamentary privilege extends to statements made to the press — Whether such are “proceedings in Parliament”.

Contempt of court — Sentence — Contempt by scandalizing the court — Whether public apology and payment of costs to special prosecutor appropriate.

The appellant, a member of Parliament and a cabinet minister, was found guilty of contempt of court “by scandalizing the court” by reason of some comments he made to a journalist with respect to the
Criminal Reports
New Series Annotated

A series of Reports with Annotations and Practice Notes on Criminal Cases arising in the Courts of the various provinces in Canada

VOLUME 36
(Cited 36 C.R.N.S.)

Editor-in-Chief
Kenneth L. Chasse LL.B.

Eastern Editor
W. J. Rankin B.A., LL.B.

Ontario and Western Editor
Kenneth L. Chasse LL.B.

Quebec Editor
Louise Arbour LL.L.

Technical Editor
K. Anne Milner B.A.

1977
The Carswell Company Limited, Toronto
Printed in Canada