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Witnesses: Competence and Credibility

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WITNESSES — COMPETENCE AND CREDIBILITY

By His Honour Judge R. Delisle*

A. INTRODUCTION

It is obvious from the recent efforts undertaken in all common law countries that reform of the law of evidence is necessary. The beauty of the common law, fashioned by judges piecemeal to cope with particular problems which arise under varying societal conditions, can become grotesque if the judiciary abdicates its responsibility for change.[1] Too strict an adherence to precedent can perpetuate rules of evidence which have outlived their meaning. Created singly and appropriately to the facts of a particular case, the rules and exceptions have become so numerous that many have given up trying to know and understand them all. In the United States, the reformers have long sought to bring order to the law of evidence by the codification and restatement of the rules in terms of their purposes. In other jurisdictions the attempt at reform has been by amendment to particular statutory provisions and codification of some common law rules which seek detailed solutions to particular problems. The Proposed Code of the Law Reform Commission of Canada[2] and the Draft Act recommended by the Ontario Law Reform Commission[3] are examples of these two schools of thought. The codification approach of the Law Reform Commission of Canada seeks to gather into one document all the rules of evidence and to deny any future control to the existing common law. The Proposed Federal Code seems to be based on the premise that it is best to openly give discretion to the trial judge in each case to determine the admissibility of evidence depending on his view of the probative force, time requirements and considerations of fairness to the parties and witnesses. The Ontario Law Reform Commission, however, is concerned that such an approach might yield a lack of uniformity and result in confusion. The Commission therefore recommends, where it is able, detailed and definite provisions to govern admissibility, while in other areas it is content that the rules fashioned for particular situations by the common law are satisfactory guidance for the future. It is difficult, if not impossible, to debate the relative merits of the two approaches. It is suggested, however, that a great deal of judicial discretion already exists under the surface of the

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1 Contrast the approach taken in *Myers* v. *D.P.P.*, [1965] A.C. 1001 with that in *Ares* v. *Venner*, [1970] S.C.R. 608; 14 D.L.R. (3d) 4.

2 *Report on the Law of Evidence* (Toronto: Ontario Law Reform Commission, 1976).

3 *Report on Evidence* (Ottawa: Law Reform Commission of Canada, 1975).

present apparently certain rules and that there is more certainty in the Proposed Federal Code than is recognized by the Ontario position.

B. SPOUSES AS WITNESSES

1. *Existing Law*

At common law a party's spouse was incompetent as a witness for or against the other spouse. The only clear exception[4] to this rule was in criminal cases involving personal violence by the accused against his spouse wherein the spouse was both competent and compellable.[5] In civil cases this incompetency has now been abolished by statute and spouses are made competent and compellable[6] with one minor exception.[7] In criminal cases the spouse is made a competent witness for the defence in all cases, and with respect to certain enumerated offences only is made a competent and compellable witness for the prosecution.[8] Despite inconsistent terminology in section 4 of the *Canada Evidence Act*,[9] it does appear plain that competent in section 4(1) includes the concept of compellability.

In *Gosselin* v. *The King*[10] the Supreme Court of Canada interpreted competent in section 4 of the *Canada Evidence Act, 1893*, as including compellable and ruled that the accused's wife could be compelled by the prosecution to give evidence against her husband charged with murder. The wife in that case clearly did not want to testify. The defence had maintained in the Supreme Court that the wife "was not a competent witness for the prosecution, that she was not a compellable though a competent witness for the prisoner . . ."[11] Section 4 at that time did not have the phrase "for the defence" appearing after the word "competent"; that phrase was inserted after the *Gosselin* decision in 1906. The Supreme Court in *Gosselin* specifically refused to read in the words "for the defence," which appeared in the counterpart Imperial statute, and held that competent meant compellable. Therefore, competent in the existing section 4(1) must mean competent and

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[4] See Rupert Cross, *Evidence* (3rd ed. London: Butterworths, 1967) at 142.

[5] Compare *R.* v. *Lapworth*, [1931] 1 K.B. 117; *R.* v. *Lonsdale*, [1947] 2 W.W.R. 157; 24 C.R.N.S. 225; 15 C.C.C.(2d) 201; and *R.* v. *Beam* (1974), 19 C.C.C. (2d) 41. But see *R.* v. *Carter* (1970), 73 W.W.R. 491; 11 C.R.N.S. 118; [1970] 5 C.C.C. 155. For contrasting views of the breadth of the nature of the crime necessary to qualify for this exceptional treatment, compare *R.* v. *Bowles* (1967), 60 W.W.R. 276; 50 C.R. 353; [1967] 3 C.C.C. 61; and *R.* v. *Comiskey* (1973), 12 C.C.C. (2d) 410.

[6] See, for example, *The Evidence Act*, R.S.O. 1970, c. 151, s. 8.

[7] *Id.*, s. 10.

[8] *Canada Evidence Act*, R.S.C. 1970, c. 307, s. 4.

[9] Section 4(2) of the *Canada Evidence Act*, *id.*, speaks of a spouse being "a competent and compellable witness for the prosecution without the consent of the person charged." If competent in a statute means competent and compellable, then why use both words? If the witness is competent and compellable for the prosecution then there is certainly no need to further provide that that is the case "without the consent of the person charged."

[10] (1903), 33 S.C.R. 255; 7 C.C.C. 139.

[11] *Id.* at 279 (S.C.R.); 155 (C.C.C.) *per* Mills J.

compellable for the defence.[12] The spouse then, by section 4(1), is a competent and compellable witness for the defence and remains incompetent for the prosecution except as set out later in the subsections of section 4.

2. *Reforms Suggested*

The Proposed Code of the Law Reform Commission of Canada provides:

> 54. Every person is competent and compellable to testify to any matter, except as provided in this Part or any other Act.
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> 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.

The existing law, which forbids spouses in criminal cases from testifying for the prosecution when they wish to testify and which forbids their being forced to testify in cases other than those enumerated in section 4(2), is *apparently* supported on the basis that to do otherwise would endanger the marital relationship. The word apparently is used advisedly since there does not appear ever to have been a clear value decision made, but rather, like so much of the existing evidence law, the rule developed centuries ago[13] under different societal conditions with varying justifications.[14] Whether present society values the marriage relationship more highly than the worth of convicting the guilty is debatable at the least.

Considering the present inability of the willing spouse to testify for the prosecution, if the rule is designed to foster stable marriage relationships generally by the infrequent example of a witness failing to testify against her spouse, one is bound to wonder respecting its impact. If the rule is meant to protect the individual relationship, one is hard pressed to justify the state's intervention when the spouse's own judgment of the worth of the marriage is such that he or she wishes to testify. It seems preferable to allow the spouse the freedom of choosing to testify after weighing the competing risks

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[12] This view was recently approved in the decision of *R.* v. *Lonsdale*, *supra*, note 5. The Alberta Court of Appeal noted that the *Gosselin* decision, *supra*, note 10, disagreed with the later decision of *Leach* v. *The King*, [1912] A.C. 305, which held that where "competent" appeared in a statute, its meaning was restricted to competency, and therefore did not include compellability. The Supreme Court of Canada, on the other hand, took the view that they were there simply to construe language of the statute as they found it and that the plain language of the statute rendered "competent" to include, as at common law, compellability.

[13] See cases cited in Cross, *supra*, note 4 at 141.

[14] Historically, husband and wife were regarded as one person. Consequently, where the litigant spouse was incompetent to testify because of his or her interest in the outcome, the other spouse was also considered incompetent. Although the scriptural fiction was later abandoned, the incompetency of a spouse was then justified on the ground that he or she had an interest in the law suit prosecuted by the other spouse. Incompetency of a party on the ground of interest was later abolished, and the present rationale put forward.

in the individual case and the Proposed Federal Code's complete abolition of incompetency in this area is obviously a desired reform.

With respect to the compellability of spouses it is difficult to argue with the Proposed Federal Code's explanatory remarks that the present law is arbitrary. The present list of offences in section 4(2) for which the spouse is compellable for the prosecution is largely a list of sexual offences and one wonders if this is based on some belief that a marriage relationship is automatically not worth protecting when a spouse commits a sexual offence with another. Would society agree that a wife ought to be compelled to testify against her husband who has allegedly raped their next door neighbour but that she cannot testify if he allegedly murdered the neighbour? There is arbitrariness in the fact that while a marriage relationship ought to be protected, the other familial relationships are not as deserving. The existing law is arbitrary as well in the type of marriage relationship which will be protected.[15] The Proposed Federal Code eliminates arbitrariness and substitutes for it flexibility on a grand scale. The trial judge in each case will decide the worth of the particular relationship and will decide in advance the probable worth of the testimony. The Federal Code also states that the trial judge must consider the seriousness of the offence; however, it does not state whether the more serious the offence the more probable it is that the evidence will be received or vice versa.

The present procedural rules do not reflect a desirable balance between the goals of efficiency and of fairness to the parties. The elimination of the present rules' arbitrariness is to be applauded since there appears to be little to justify it. However, in an attempt to balance efficiency and fairness the proposed reform has gone too far and has done so needlessly. One must have regard to the frequency with which objections will be taken under the proposed rule with respect to the ability of the individual witness to testify. The Proposed Federal Code speaks of the lack of compellability in relation to other individuals who are related by "family *or* similar ties," yet the Code does not state what individuals might be encompassed within that phrase. The time required to deal adequately with these matters on a *voir dire* will be enormous. The prospective frequency of appeals on individual opinions of worth is staggering. If the marriage relationship is fundamentally a keystone of society it appears that the law-makers might then decide that question and always rule that spouses shall not be compellable witnesses for the prosecution. If society's interest in convicting the guilty is greater than the worth of individual marriage relationships, they can rule spouses compellable. The law-makers can also decide on an applicable definition of marriage and whether other members of the family ought to be made compellable or not. It appears preferable that those questions be decided at one time for all cases in preference to individual decisions by a variety of judges each with their own views.

The Ontario Report concludes that the existing legislation[16] making

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[15] See, for example, *Ex parte Cote* (1971), 5 C.C.C. (2d) 49.

[16] *Supra*, note 6, s. 8.

parties and their spouses competent and compellable is largely satisfactory.[17] They do recommend, however, the abolition of the existing provision[18] respecting proceedings instituted in consequence of adultery both to clarify the existing law and to delete the archaic concept of a privilege against self-incrimination as to adultery. The Ontario Draft Act provides:

> 9(1) The parties to a proceeding and the persons on whose behalf it is brought, instituted, opposed or defended are competent and compellable to give evidence on behalf of themselves or of any of the parties, and the spouses of such parties and persons are competent and compellable to give evidence on behalf of any of the parties.
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> (2) The parties to and witnesses in a proceeding instituted in consequence of adultery and the spouses of such parties may be asked and shall not be excused from answering any question, including any question tending to show that he or she has committed adultery.

The approach of the Ontario Law Reform Commission to the existing sections 6 and 7 of *The Evidence Act* is intriguing. Those sections provide:

> 6. No person offered as a witness in an action shall be excluded from giving evidence by reason of any alleged incapacity from crime or interest.
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> 7. Every person offered as a witness shall be admitted to give evidence notwithstanding that he has an interest in the matter in question or in the event of the action and notwithstanding that he has been previously convicted of a crime or offence.

The Report suggests that these sections, one phrased in exclusionary terms and the other in inclusionary terms, mean the same thing but concludes that "[a]lthough the sections may overlap, they have been part of our law for a long time and we are not convinced that any change of consequence should be made in them."[19] This appears to be a novel approach to be taken by a commission charged with the task of reform.

C. MENTAL CAPACITY OF WITNESSES

1. *Existing Law*

"As to the mental qualities of intelligence and memory, a distinction must be made between attacks on competency and attacks on credibility."[20] The preliminary question of the competency of a person to testify is a question that the judge must determine and the issue of credibility of any witness

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[17] If there has been no evidence of excessive harm to marital relationships as a result of the longstanding rule that spouses are competent and compellable, at the instance of the opposing party, in civil suits and prosecutions for provincial offences, one might reasonably argue that the law-makers could so provide for federal criminal cases.

[18] *Supra*, note 6, s. 10 provides:

> The parties to a proceeding instituted in consequence of adultery and the husbands and wives of such parties are competent to give evidence in such proceedings, but no witness in any such proceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery.

[19] *Supra*, note 2 at 107.

[20] E. Cleary et al., ed., *McCormick's Handbook of the Law of Evidence* (2d ed. St. Paul: West Publishing Co., 1972) at 93.

is for the jury.[21] The competency of a witness may refer to the person's ability to observe, recollect and communicate respecting a past incident or it may refer to the person's ability to take an oath.[22] The person's incompetency in the latter case, which formerly[23] would have barred him from testifying, has now been relieved somewhat by statute[24] and such a person may now affirm. When incompetency in the former sense is put in issue,[25] however, the trial judge is required to make a determination of that issue on the basis of evidence led on a *voir dire*. To be rendered incompetent, the person's derangement or defect must substantially negative trustworthiness upon the specific subject of the testimony. Present insanity need not be a complete bar.[26]

2. *Reforms Suggested*

The Report of the Ontario Law Reform Commission concludes[27] that the existing law is satisfactory and that no statutory provisions are required. The Proposed Federal Code, section 54, appears to recommend that mental maturity be abolished as a requirement to testify with any defects in capacity left to the trier of fact to take into account when assessing the weight to be given to the testimony. The reform is proposed on the basis of the "impossibility of stating and applying a standard of mental immaturity."[28]

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[21] *R.* v. *Hill* (1851), 5 Cox C.C. 259 at 266; 169 E.R. 495 at 498 *per* Lord Campbell C.J. See also s. 7(1) of the Proposed Federal Code, *supra*, note 3.

[22] "If at that stage of the trial . . . the judge had had the benefit of hearing the psychiatrists' testimony . . . he would have been in a better position to appreciate that the issue before him was one which went to the competency of the witness to testify and was not limited to the issue as to whether the witness should be sworn as distinct from affirmed." *R.* v. *Hawke* (1975), 7 O.R. (2d) 145 at 155; 29 C.R.N.S. 1 at 13; 22 C.C.C. (2d) 19 at 28.

[23] *R.* v. *Brasier* (1779), 1 Le. 199; 168 E.R. 202.

[24] *Supra*, note 8, s. 14. Of course, the witness should not give his evidence by affirmation unless the incompetency to take an oath is made out: *R.* v. *Hawke*, *supra*, note 22 at 156 (O.R.); 14 (C.R.N.S.); 30 (C.C.C.).

[25] The capacity of an adult witness is presumed until an objection is raised; see J. Wigmore, *Wigmore on Evidence*, Vol. 2 (3d ed. Boston: Little, Brown, 1940) s. 497.

[26] See *R.* v. *Hill*, *supra*, note 21; see also Wigmore, *id.* Section 497 is quoted with approval in *R.* v. *Hawke*, *supra*, note 22 at 154 (O.R.); 11 (C.R.N.S.); 27 (C.C.C.).

> *First*, the mere fact of derangement or defect does not *in itself exclude* the witness; the various forms of monomania are no longer treated as equivalent to complete lunacy;
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> *Secondly*, the inquiry is always as to the relation of the derangement or defect to the *subject to be testified* about. If on this subject no aberration appears, the person is acceptable, however untrustworthy on other subjects;
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> *Thirdly*, the mere fact of soundness *at the time of trial* is no longer sufficient; for derangement or defect at the time of the events to be testified to may make the person untrustworthy. The inquiry looks to the capacity to observe as well as to the other elements, the capacity to recollect and to narrate.

Wigmore, *supra*, note 25, s. 492.

[27] *Supra*, note 2 at 108.

[28] See the Commission's commentary on s. 54 of the Proposed Federal Code, *supra*, note 3 at 88.

Others[29] as well have suggested that the existing rule which excludes the witness entirely, based on judicial distrust of the jury's ability to adequately assess deficiencies, is too primitive and that, given appropriate cautionary instructions and the opportunity of hearing evidence themselves of the witness' frailties, the jury would be equal to the task.

Whether the Proposed Federal Code has accomplished its aim by the language it has chosen is debatable.[30] Section 54 states that all persons are competent except as provided in Part 2 of Title V of the Code. The only persons rendered incompetent by that Part are the judge and members of the jury at that trial. Section 7 of Title I of the Code provides that the judge shall determine, among other things, the preliminary question of the competency of a person to be a witness. What is there to determine if incompetency is restricted as above? Does section 7 preserve the ability to exclude entirely a mentally defective person as a witness? Does section 5 equip a trial judge with the power to exclude? Section 5 provides:

> 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.

Dean Wigmore notes:

> If it is desired to express the doctrine of testimonial qualifications in terms of relevance it may be thus stated: the fact that an assertion is *made by a person who is sane,* of age, experienced in the subject matter, acquainted with the circumstances and so forth, is relevant to show the truth of the facts asserted.[31]

The large discretion granted the trial judge in section 5, to which all other rules in the Proposed Federal Code are evidently subject, permits exclusion when probative value is substantially outweighed by, *inter alia,* the danger of undue prejudice or undue consumption of time. As Professor McCormick has noted: "The *traditional test* is whether the witness has intelligence enough to make it worthwhile to hear him at all."[32] Despite the avowed object of the drafters of the Proposed Federal Code, could not a trial judge be persuaded to exercise his discretion under section 5 and exclude a person's evidence entirely?

The drafters say they are abolishing the concept because it is impossible to state and apply a standard. That it is possible to state is evident[33] and while it may be difficult to apply,[34] it is no less possible than other preliminary questions given to the trial judge by section 7 of the Proposed Code. To say that "the trend has been to reduce these [earlier] disqualifications . . ."[35] with respect to competency is not a valid argument for eliminating them all.

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[29] See, for example, McCormick, *supra,* note 20 at 141.

[30] A slight quibble perhaps, but mental incapacity might be a better choice than mental immaturity in this context.

[31] Wigmore, *supra,* note 25, s. 475. Emphasis added.

[32] McCormick, *supra,* note 20 at 140.

[33] The Ontario Report, *supra,* note 2 at 108 cites those provisions in the evidence codes of Scotland and of California that attempt to define competence.

[34] *Supra,* note 22.

[35] *Supra,* note 3 at 88.

Given the gradual judicial development of the existing law over a lengthy period of time, an onus lies on the reformer to justify the change and the brief arguments advanced by the Commission are not convincing.[36]

D. CREDIBILITY

1. *Adverse and Hostile Witnesses*

(a) Existing Law

If the witness has been called by the opposing party, it is obvious that cross-examination with respect to a prior inconsistent statement or at large is presently permissible. The procedure for cross-examination on the previous statement as outlined in section 10 of the *Canada Evidence Act*[37] is designed to alleviate those difficulties both for the cross-examiner and for the witness that the common law had produced.[38] By this procedure the witness may be cross-examined respecting an earlier statement without being shown the same, but prior to proving the statement the witness must be given an opportunity of explaining any apparent contradiction. The ability of a party to cross-examine his own witness at large is restricted by the common law and depends on a ruling of hostility which is normally restricted to hostility revealed in the witness box.[39] The ability of a party who has called a witness to prove a prior inconsistent statement is restricted by the provisions of section 9 of the *Canada Evidence Act.* Section 9(1) permits the proof of a prior inconsistent statement as a means of discrediting counsel's own witness provided that the witness proves adverse and provided that the court grants its leave. While the section seems simply to permit proof of the prior statement, it is apparently accepted that if proof is permitted the witness may also be cross-examined with respect to it. This right to cross-examine a party's own witness on a previous statement is apparently derived from the common law.[40] It was recognized in *Wawanesa Mutual Insurance Company* v. *Hanes*[41]

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[36] To be fair, however, it should be noted that over a hundred years ago, the *Report of the Common Law Practice Commissioners* similarly proposed:

> Plain sense and reason would obviously suggest that any living witness who could throw light upon a fact in issue should be heard to state what he knows subject always to observations as may arise as to his means of knowledge or his disposition to tell the truth.

As cited in Wigmore, *supra,* note 25, s. 510.

[37] Section 10 has been copied from England's *The Criminal Procedure Act,* 1865, 28 & 29 Vict., c. 18, s. 5.

[38] Professor Wigmore described the common law rule as a rule which "for unsoundness of principle, impropriety of policy, and practical inconvenience in trials, committed the most notable mistake that can be found among the rulings upon the present subject." *Wigmore on Evidence,* Vol. 4 (3d ed. Boston: Little, Brown, 1940), s. 1259.

See Cross, *supra,* note 4 at 213-15 for a thorough discussion of why the common law rule was changed. The only present difficulty in this area resides in the interpretation of the provincial court judge in British Columbia in *R.* v. *Harbison,* [1972] 6 W.W.R. 501; 20 C.R.N.S. 336; 9 C.C.C. (2d) 259.

[39] See cases collected in P. K. McWilliams, *Canadian Criminal Evidence* (Agincourt: Canada Law Book, 1974) at 612-14. But see *R.* v. *Gushue (No. 4)* (1975), 30 C.R.N.S. 178.

[40] McWilliams, *id.* at 608.

[41] [1961] O.R. 495; 28 D.L.R. (2d) 386; [1963] 1 C.C.C. 176

that while the section only permits proof of the statement,[42] cross-examination thereon is permitted on a declaration of adversity and MacKay J.A. noted:

> This decision [*R.* v. *Hunter*, [1956] V.L.R. 31] points up the difficulty or result of treating the word 'adverse' in the statute as meaning 'hostile' because unquestionably if the witness is 'hostile' the common law rule applies and he is subject to a general cross-examination as to all matters in issue; whereas, under the statute, if he is adverse, the only right given is to prove the prior inconsistent statement and cross-examination should be limited to the prior inconsistent statement only.[43]

The meaning of adverse within the section has produced some controversy since the traditional view had been to equate adverse with hostility of demeanour and the manner in which the witness gives his evidence is therefore all important.[44] The majority of the Ontario Court of Appeal in the *Wawanesa* case recognized that this was the prevailing view but decided that the same word in *The Evidence Act* counterpart of section 9 should be given a broader interpretation, to include not only hostility but also opposed in interest to the party calling him. The court went on to conclude that evidence of a prior inconsistent statement could be taken into account in determining adversity.[45] Despite the seeming circularity of such a position, I suggest that a similar position now exists in the trial of federal cases by virtue of subsection 9(2). I recognize that some believe that subsection 9(2) is a new procedure for discrediting a witness, completely independent of subsection 9(1), but I suggest it is merely a preliminary device to enable counsel to demonstrate the adversity mentioned in 9(1). With adversity established, the court might then permit proof of the prior statement and cross-examination thereon in the presence of the trier of fact. If my suggestion is correct, then despite *R.* v. *Milgaard*,[46] the cross-examination mentioned in subsection 9(2) ought to take place on a *voir dire*. If the trial judge, on witnessing the cross-examination, concludes that the witness is adverse, the party may be granted leave to prove the statement in the trial, in front of the jury if there is one, and to cross-examine thereon. The *Milgaard* case decided that the cross-examination mentioned in subsection 9(2) ought to take place in the presence of the jury. With the greatest respect, to permit this would make subsection 9(1) largely redundant as counsel would thereby normally accomplish what he seeks without the necessity for any ruling of adversity. Subsection 9(1) would only have utility then in cases involving oral statements not reduced to writing. I do not believe that this was the intention of Parliament. This view is reinforced by the concluding words of section 9(2) that "the court may con-

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[42] *Id.* at 528 (O.R.); 419 (D.L.R.); 215 (C.C.C.).

[43] *Id.* at 532 (O.R.); 423 (D.L.R.); 220 (C.C.C.). See also *id.* at 534-35 (O.R.); 425-26 (D.L.R.); 223-25 (C.C.C.); and *R.* v. *Brown*, [1927] 4 D.L.R. 779. But see *R.* v. *Cronshaw and Dupon*, unreported, 1976 (Langdon J., Provincial Court of Ontario).

[44] See, for example, *R.* v. *McIntyre* (1963), 43 C.R. 262; [1963] 2 C.C.C. 38.

[45] See *R.* v. *Collerman* (1964), 46 W.W.R. 300; 43 C.R. 118; [1964] 3 C.C.C. 195, taking a similar position in a criminal case. In *R.* v. *Gushue (No. 4)*, *supra*, note 39 at 183, Graburn Co. Ct. J. states that "adverse" in section 9(1) is not limited to hostility but rather means "opposed in interest or unfavourable in the sense of opposite in position . . ."

[46] [1971] 2 W.W.R. 266; 14 C.R.N.S. 34; 2 C.C.C. (2d) 206. Also see *R.* v. *Tom*, [1976] 3 W.W.R. 391.

sider such cross-examination in determining whether in the opinion of the court the witness is adverse."

The remarks of the then Minister of Justice, Mr. Turner, and the then Director of the Criminal Law Section, Mr. Scollin, when they appeared before the Standing Committee for Justice and Legal Affairs to defend their proposed bill which amended section 9 of the *Canada Evidence Act* by adding subsection (2) in 1969, are helpful in ascertaining Parliament's intention.

> *Mr. Turner*: Mr. Chairman, section 9 of the present Canada Evidence Act prohibits a party producing a witness from impeaching the credit of that witness unless in the opinion of the court the witness proves to be adverse or hostile; and for the purposes of establishing that a witness that a party calls is adverse or hostile, that witness cannot at the moment be cross-examined on any previous inconsistent statement made by him.
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> Therefore, it is proposed to add a new subsection (2) to section 9 of the Act, whereby it will be possible, with leave of the court but without establishing first that a witness is adverse, to cross-examination one's own witness on any previous inconsistent statement that has been reduced to writing.
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> And the court may consider such cross-examination in determining whether in fact the witness is adverse or hostile.
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> In other words, the court will still be able to weigh the demeanour of the witness, or the attitude of the witness, or the bearing of the witness, but it will also now be able to refer to this cross-examine on a previous inconsistent statement reduced to writing.
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> The proposed amendment relates not only to statements made in writing by the witness, or signed by him, but also to statements made by the witness and reduced to writing by some other person — a stenographic record.
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> Representations in support of this proposed amendment have been received from the Manitoba and Saskatchewan association of the Canadian Bar Association. In addition, the following resolution was passed by The Canadian Bar Association at its annual meeting on September 9, 1967:
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> WHEREAS there appear to be conflicting decisions as to whether a party may put to his witness a prior inconsistent statement until after a ruling of adverseness has been made by the Court; RESOLVED: that Section 9 of the Canada Evidence Act be amended to provide (a) that by leave of the Court a party might cross-examine his witness as to prior inconsistent written statements before a finding of adverseness; (b) that such examination might be used by the Court in determining whether a witness is adverse.[47]

Mr. Scollin noted that the restriction to written statements was deliberate and explained:

> *Mr. Scollin*: It was felt that the impeaching of your own witness should be restricted to written statements, or statements reduced to writing, for much the same reasons as those advanced in an appeal to the Judicial Council of the State of New York. It was felt that if one were going to extend the right to prove inconsistent statements to oral statements, the evidence is relatively easily manufactured; that on the question of proof of adversity by restricting the means of proving adversity to written or oral statements reduced to wording [sic], then there was a kind of guarantee that there was something in writing.
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> The feeling was that if you were going to prove previous inconsistent oral statements, what could possibly happen would be that the party producing the

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[47] Minutes of Proceedings and Evidence, No. 6, Standing Committee on Justice and Legal Affairs, Tuesday Jan. 28, 1969 at 109-10 (Ottawa: Queen's Printer, 1969).

witness would, when the witness did not quite come up to his proof, call a halt to the trial and adduce a series of five or six people to say: "Oh, yes; I was in the bar or the saloon when I heard so-and-so say this," and then would produce another oral statement allegedly contradictory. This would result in a rather confused situation relative to previous oral statements. Whereas, if you have your statement in writing, or reduced to writing, you have a fairly firm base for saying to the court, "Here is what he said. Here it is in writing."[48]

It is interesting also to note that whereas *Milgaard* requires production of the earlier statement to the trial judge so that he might determine whether in fact there is an inconsistency prior to cross-examination occurring, such a procedure was perhaps not present in the minds of the drafters as noted by the following exchange from the minutes of the Justice and Legal Affairs Committee:

Mr. McQuaid: Mr. Chairman, I agree with the general purpose of the section, but is enough protection being afforded here to the witness? It says "Where the party producing a witness alleges that the witness made . . . a statement". Should not some provision be put in there requiring more than an allegation? After all, this is a statement in writing. Should there not be a requirement that the statement be produced?

Mr. Hogarth: It is.

Mr. McQuaid: It does not say so, does it?

Mr. Hogarth: How could one cross-examine on the statement if one did not have it?

Mr. McQuaid: All you have to do is allege that he made a statement and then cross-examine him on whether or not he made it. First of all, I think that the statement should be required to be produced in evidence; you have then established that he has made the statement in writing. I consider it rather dangerous just to allow that assumption to be made — to allege that he made the statement, to go no further and then say, "Now we want permission to cross-examine him".

Mr. Turner: Mr. McQuaid, perhaps I should ask Mr. Scollin to refer to section 10 of the Act. It might clarify the point.

Mr. Scollin: Section 10 and 11 are both relevant. Section 10, subsection clause (1) states:

Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him; but, if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him; the judge, at any time during the trial, may require the production of the writing for his inspection, and there upon make such use of it for the purpose of the trial as he thinks fit.

Mr. McQuaid: That takes care of it, Mr. Scollin.[49]

If section 10 is an answer to Mr. McQuaid's concern, one should keep in mind the closing words of section 10 and it might be preferable on the section 9(2) application for the judge to require, along with the allegation of the prior inconsistent statement, the production of the same so that he might ensure the validity of the allegation.

(b) Reforms Suggested

The above area has been dealt with at some length to illustrate the exist-

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[48] *Id.* at 112.

[49] *Id.* at 110-11.

ing confusion generated by an overly technical approach. It is accepted that there are dangers involved in permitting the cross-examination of a party's own witness. The witness may all too readily adopt the suggestions contained in leading questions put to him and the evidence gained may not be that of the witness but of the counsel putting the questions. It is also recognized that, in some instances, it may be unfair to call a witness and then to attack that witness' general character when his testimony is at odds with what counsel expected.[50] Whether it is unfair or improper to put to a witness a previous inconsistent statement and cross-examine thereon when that witness has led counsel to believe he will testify in a certain way is, however, questionable. Given that these thoughts are at the root of the existing rules, it is regrettable that the present law is so difficult to state clearly. The proposals of the Commission are stated in terms of their underlying rationale and will be a welcome relief if enacted. Section 59 of the Proposed Federal Code states rather simply:

> (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.
>
> (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.
>
> (3) "Leading question" means a question that suggests the answer the examining party desires.[51]

Section 59(1) restates the existing law with some liberation from the present constraints. Rather than requiring decisions on hostility or adversity as a pre-condition to leading questions, the proposed rule permits leading questions when the inherent danger seems non-existent. Subsection 59(2) changes the existing law but the logic of the change seems inescapable. If we wish to guard against receiving the evidence of counsel by means of his leading questions, then does it matter that the witness who is ready to accede to counsel's suggestions was called by the other party? It has been expressed that a party who calls a reluctant witness is thereby permanently saddled with him; the fact that opposing counsel has the right to cross-examine a witness who favours his side is simply part of the game and part of the chance that counsel takes. This view, besides aggravating the attitude that a trial is a game, minimizes its truthseeking ability and contradicts the usual expression that there is no property in a witness. The Ontario Report contains no recommendations for change in this area.

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[50] It must be recognized, however, that witnesses called by a party are not called simply as compurgators but rather may be called because they are simply the only witnesses available.

[51] For the ultimate in simplicity, however, see the formulation in (1958) Ala. Code tit. 7, s. 444: "Leading questions are generally allowed in cross-examinations, and only in these; but the court may exercise a discretion in granting the right to the party calling the witness, and in refusing it to the opposite party, when from the conduct of the witness or other reason, justice requires it."

Section 62 of the Proposed Federal Code states:

> 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.

Section 62 provides then, *inter alia,* that the party calling a witness may prove a prior inconsistent statement with no restrictions respecting a declaration of adversity prior thereto. The elimination of that restriction on proof of a prior inconsistent statement is to be admired. The Proposed Federal Code, section 66, retains the existing restrictions on proof. The existing law, which demands that prior to proving a prior inconsistent statement the circumstances surrounding the making of the same, or at least the writing itself, must be brought to the attention of the witness who will be thereby contradicted, provides, in fairness to the witness, an opportunity to explain.

Section 24 of the Ontario Draft Act provides:

> (1) A party producing a witness in a proceeding shall not impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or proof that the witness at some time made a statement inconsistent with his present evidence.
>
> (2) Before proof of a prior inconsistent statement is given in a proceeding the circumstances of it sufficient to designate the particular occasion on which it was made shall be drawn to the attention of the witness and he shall be asked whether or not he made the statement.
>
> (3) No such prior statement is admissible in evidence in a proceeding to prove any fact contained in it.

The Ontario proposal then similarly provides that no restrictions be placed on the right of a party to prove a previous inconsistent statement of his own witness and also retains the requirement of providing the witness with the opportunity of admitting or denying the previous statement.

Section 65 of the Proposed Federal Code provides:

> 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.

This section preserves the existing law[52] that permits cross-examination of a witness on a prior inconsistent statement without first showing such writing to the witness. Preservation of the existing law in this area is appreciated in that counsel's ability to cross-examine a witness on a prior inconsistent statement could be severely crippled if he was commanded to show the statement to the witness before asking him questions about it.

Sections 27 and 28 of the Proposed Federal Code provide:

> 27(1) Hearsay evidence is inadmissible except as provided in this Code or any other Act.
>
> (2) In this Code
>
> (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
>
> (b) "statement" means an oral or written assertion or non-verbal conduct of a person intended by him as an assertion.

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[52] *Supra,* note 8, s. 10.

> 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.

By the existing law, a witness' prior statement, whether consistent or inconsistent with his present testimony, is, when received,[53] only evidence affecting the witness' credibility.[54] The prior statement was not made under oath and was not subject to immediate cross-examination and is presently viewed as inadmissible hearsay if tendered as evidence of its truth. When the prior statement is consistent with present testimony and is received in support of credibility, the distinction between such use and use as evidence of truth may be negligible in practice. The Proposed Federal Code's change in section 28 giving the statement evidential value for its truth probably only brings theory into line with practice.

With respect to prior inconsistent statements, however, the change made by section 28 may be profound. The proposed change seems based on the belief that since both the witness' present testimony and his earlier statement are subject to the same test of cross-examination, they therefore ought to be received equally as substantive evidence. The Report's proposal appears to be based on the thought that while the efficacy of cross-examination is somewhat impaired when it does not immediately follow the making of the statement, the prior statement does bring with it the possibility of greater accuracy since it was made when the event testified to was fresher in memory and prior to the influence of parties or subsequent events. The proposal does not, however, take into account the difficulty counsel might have at trial cross-examining a witness respecting his ability to perceive and recollect an event when the witness is denying its truth; counsel cannot cross-examine a piece of paper. For example, suppose the witness denies making an earlier statement to the police that he saw the accused shoot and kill the victim and

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[53] We have seen above the restrictions on proof of a prior consistent statement. Prior consistent statements are normally rejected as superfluous (Wigmore, *supra*, note 38, s. 1124) although it is sometimes said that they are inadmissible because of the danger that a witness might manufacture evidence for himself. Its superfluity is diminished if there is an attack on credibility by an allegation in cross-examination that the witness has recently invented his story or that his evidence is an afterthought concerning the event. The initial common law position was very strict: *Fox* v. *General Medical Council*, [1960] W.L.R. 1017; *Welstead* v. *Brown*, [1952] 1 S.C.R. 3; [1952] 1 D.L.R. 465; 102 C.C.C. 46 demanded that, prior to receiving the prior statement, the direct accusation of fabrication be put to the witness. More recent cases, however, illustrate a growing latitude in the area. See *R.* v. *Rosik*, [1971] 2 O.R. 47; 13 C.R.N.S. 129; 2 C.C.C. (2d) 351; and *R.* v. *Lalonde*, [1972] 1 O.R. 376 at 389; 15 C.R.N.S. 1 at 14; 5 C.C.C. (2d) 168 at 180-81. There are other areas in which prior inconsistent statements may be received; complaints of victims who have suffered a sexual, or other violent attack (see, for example, *R.* v. *Lebrun*, [1951] O.R. 387; 12 C.R. 31; 100 C.C.C. 16); earlier identifications of the accused (as in *R.* v. *Sutton*, [1970] 2 O.R. 358; 9 C.R.N.S. 45; [1970] 3 C.C.C. 152); and earlier exculpatory statements by an accused charged with possession of stolen goods (see, for example, *R.* v. *Graham*, [1974] 3 S.C.R. 206; 26 D.L.R. (3d) 579; [1972] 4 W.W.R. 488; 19 C.R.N.S. 117; 7 C.C.C. (2d) 93). These restrictions are eliminated by the Proposed Federal Code, s. 62, but a trial judge may of course exercise his discretion under the proposed s. 5 to reject superfluous evidence.

[54] See, for example, *Welstead* v. *Brown*, *id.*

denies any knowledge of the incident. The prior statement is proved to have been made and the jury is then instructed that they are entitled to accept that statement as proof that the accused killed the victim notwithstanding the impossibility of cross-examination respecting its accuracy. The accused cannot cross-examine the witness respecting the lighting conditions at the time of the killing, the amount of time the witness had to observe the event, the chief physical characteristics of the person observed that caused him to say it was the accused and so on.

The recommendations of the Ontario Law Reform Commission are puzzling to say the least. Section 28 of the Draft Act provides:

> (1) A previous consistent statement made by a witness in a proceeding is admissible in evidence to rebut an allegation that his evidence has been fabricated, and such a statement shall be admitted not only to support the credibility of that witness, but also as evidence of any fact contained therein of which direct oral evidence by him would be admissible.
>
> (2) Where corroboration is required by law, a statement admitted under this section shall not be taken as corroborative of the evidence of the witness who made the statement.

This section renders previous consistent statements evidence of the truth of the matter stated and, as suggested above, no real change is thereby effected. Section 24 of the Draft Act states:

> (1) A party producing a witness in a proceeding shall not impeach his credit by general evidence of bad character, but he may contradict him by other evidence or proof that the witness at some other time made a statement inconsistent with his present evidence.
>
> (2) Before proof of a prior inconsistent statement is given in a proceeding, the circumstances of it sufficient to designate the particular occasion on which it was made shall be drawn to the attention of the witness and he shall be asked whether or not he made the statement.
>
> (3) No such prior statement is admissible in evidence in proceedings to prove any fact contained in it.

The Ontario Report itself states:

> We have concluded that it would not be wise to permit counsel calling a witness to adduce evidence of a prior statement inconsistent with the evidence given by the witness at the trial, as proof of the facts contained in the statement. *In our view, proof of such a statement should be permitted only for the purpose of discrediting a witness who has disappointed an examiner.* To admit a prior statement as evidence of the facts contained therein, would permit a statement not given under oath to contradict the evidence of the maker of the statement which has been given under oath.[55] (Emphasis added.)

However, the Draft Act provides:

> 34(1) If in a proceeding a witness upon cross-examination as to a former statement made by him relative to the matter in question and inconsistent with his present testimony does not distinctly admit that he did make such statement, proof may be given that he did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.
>
> (2) Where under this section it is proved that a witness made a statement

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[55] *Supra*, note 2 at 53.

> inconsistent with his present testimony, the statement shall be admitted as evidence of the facts stated therein but only if the witness could have testified as to such facts.

The recommended legislation, section 24, indicates a reluctance to permit a party who calls a witness to gain substantive value from any prior statement when that witness fails to come up to his prior proof. If that witness, however, proves to be hostile and therefore subject to cross-examination, such value can be achieved by section 34. Section 24 removes any requirement of adversity or hostility for the proof of a prior inconsistent statement but imposes such a requirement before the statement can have any value over and above impeaching the witness. Why this solution is adopted is unexplained, though it seems to be based on an abortive attempt at adopting the English position.[56] The Ontario recommendation grants substantive value to the previous inconsistent statement, though elicited from a witness called by the party who proves the statement, if, but only if, the statement is proved after cross-examination of that witness by that party. The English took the position that proof was subject to the trial judge's discretion and believed that such discretion would not be exercised in those cases where the witness simply did not come up to his prior proof.[57] The Ontario recommendation, however, provides for proof without leave in section 24 of the Draft Act. There is some judicial authority[58] that hostility, which permits cross-examination at large, can be found to exist when the witness is opposed in interest as evidenced by a prior inconsistent statement. It is questionable, therefore, whether the Ontario recommendation accomplishes what it set out to do.

2. *Past Character of a Witness*

(a) Existing Law

It has long been recognized that evidence of the past character of a witness may be relevant to his present credibility. It is generally assumed that, though relevant, it may be superfluous if offered to support credibility when there has not been any attack on the credibility of the witness.[59] When offered to attack credibility, or to support credibility after an attack has been made, the manner of its proof is circumscribed.

(i) *Contradicting a Witness on Collateral Facts*

A witness during cross-examination may be led into the position of contradicting his earlier testimony and so his credibility may be affected. The

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[56] A problem in drafting also appears:

> Where on cross-examination a witness admits making a statement inconsistent with his present testimony, or where he does not admit making a statement inconsistent with his present testimony and proof is given that he did in fact make such a statement the statement should be received as evidence of the facts stated therein.

Id. at 55. The amendment suggested, however, seems to confine substantive value to statements proved "under this section," and the legislation produces a result obviously not in accord with the intentions of the Commission.

[57] *Thirteenth Report (Hearsay Evidence in Civil Proceedings)* (1966; Cmnd. 2964) at 51-53.

[58] *R.* v. *Gushue (No. 4)*, *supra*, note 39.

[59] *Supra*, note 20, s. 49.

scope of cross-examination, of course, is such that the contradiction may be with respect to evidence which is not relevant to the subject matter of the case but, nevertheless, the trier of fact may infer that the witness, being shown to be mistaken or confused on some peripheral point, may also be mistaken in his evidence on some material point. Given that counsel in cross-examination is entitled to ask, subject to the trial judge's discretion, all manner of questions which may be relevant to a material issue in the case, what is counsel's entitlement when a witness denies counsel's suggestion and counsel is in a position to lead independent evidence to contradict the denial? The present collateral facts rule precludes the contradiction of a witness' answer by evidence which is irrelevant to any substantive issue.[60] The cross-examiner must accept and live with the denial. By the Phipson formulation of the rule, a fact is collateral if it is not relevant to a substantive issue though exceptions to the rule exist when the fact illustrates matters such as bias in the witness.[61] Another formulation of the collateral facts rule, commonly referred to as the Pollock-Wigmore formulation, is less restrictive of the cross-examiner's ability and permits contradiction if the fact is relevant to a substantive issue or is relevant to a testimonial factor of the witness apart from contradiction *simpliciter*. Testimonial factors provable to discredit the witness apart from contradiction, such as bias, interest or lack of opportunity to truly know the facts to which he has testified, should not be subject to any collateral facts rule limitation. The rule appears simple and is only difficult when one seeks to determine what is a "collateral fact." The technical approach often taken by the courts indicates at times[62] a lack of recognition of the purpose of this rule. The rationale for the limitation on contradiction is not that such contradiction is irrelevant to credibility, but rather that it may produce the dangers of surprise and confusion of issues and may waste time.[63]

(ii) *Witness' Reputation*

Though infrequently done,[64] it is clear that a witness may be called to impugn another witness' character for veracity. Initially[65] it was necessary to

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[60] *Supra*, note 4 at 218-21 for a discussion of the exceptions.

[61] See M. Argyle et al., ed., *Phipson on Evidence* (10th ed. London: Sweet & Maxwell, 1963) ss. 1556-58. But see *R.* v. *Grass* (1972), 7 C.C.C. (2d) 122 respecting contradictions of evidence-in-chief.

[62] See, for example, *Piddington* v. *Bennett and Wood Pty.* (1940), 63 C.L.R. 533.

[63] See the remarks of Rolfe B. in *The Attorney General* v. *Hitchcock* (1847), 154 E.R. 38 at 44:

> If we lived for a thousand years, instead of about sixty or seventy, and every case were of sufficient importance, it might be possible, and perhaps proper to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind find it to be impossible. Therefore, some line must be drawn . . . .

[64] See *Toohey* v. *Metropolitan Police Commissioner*, [1965] A.C. 595 at 605-06 *per* Lord Pearce; but see *R.* v. *F.*, [1968] 1 O.R. 658 (*sub nom. R. v. Forge*); 3 C.R.N.S. 117; [1969] 2 C.C.C. 4.

[65] *Mawson* v. *Hartsink* (1802), 4 Esp. 102; 170 E.R. 656; cited in *Toohey*, *id.* at 606.

ask the witness if he had knowledge of the other witness' reputation for veracity and whether from that knowledge he would believe the witness on oath. This, of course, is consistent with the normal rules of leading character evidence[66] but apparently the rule was later modified to permit the witness to state simply whether he would believe the oath of the person.[67] The witness cannot state the reasons for his opinion in chief, nor relate specific instances of conduct on which the opinion is based, but he may be cross-examined respecting the same.

(iii) *Opinion of Witness' Credibility*

Defects in the capacity of the witness to have actually seen clearly the incident to which he testifies, or to recall the incident with precision or to describe the incident to the court is probably the most fertile ground for examining credibility as these defects are more common than defects in sincerity. The manner in which these defects may be explored is not commonly a matter of evidence law so much as forensic skill. Nevertheless, in the last few years, the ability to lead psychiatric evidence on credibility where the same may be affected by defects in capacity inherent in the witness' mental condition has been established. Perhaps the landmark case in the area is *Toohey* v. *The Metropolitan Police Commissioner*,[68] where the House of Lords recognized the relevance and admissibility of medical evidence to show that a witness suffers from some disease or defect of mind that affects the reliability of his evidence. The House of Lords recognized the logic of such a position with respect to such evidence by analogizing to the evidence of an opthalmologist's testimony that a witness' eyesight prevented the witness from seeing what he said he saw.[69]

(iv) *Witness' Prior Actions*

In *R.* v. *Racco (No. 4)*[70] the traditional view was sanctioned that counsel may in cross-examination ask any questions relevant to credibility notwithstanding that he is not in a position to contradict the witness. Cross-examining counsel need not have "reasonable grounds for thinking that the imputation conveyed by the question is well-founded or true."[71] Judge

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[66] *R.* v. *Rowton* (1865), Le. & Ca. 520; 169 E.R. 1497; cited in *Toohey, supra,* note 64 at 606.

[67] See *R.* v. *Brown and Hedley* (1867), 10 Cox C.C. 453; 16 L.T. 364 approving that form of question; and see *R.* v. *Gunewardene,* [1951] 2 K.B. 600 which denied the ability of medical doctor to express his reasons for his opinion respecting credibility but seemingly approved a bare opinion.

[68] *Toohey, supra,* note 64.

[69] Other recent examples of such evidence being received may be seen in *R.* v. *Dietrich,* [1970] 3 O.R. 725; 11 C.R.N.S. 22; 1 C.C.C. (2d) 49 and *R.* v. *Phillon,* [1973] 2 O.R. 209; 34 D.L.R. (3d) 99; 21 C.R.N.S. 169; 10 C.C.C. (2d) 562. But compare *R.* v. *Kyselka,* [1962] O.W.N. 160; 37 C.R. 391; 133 C.C.C. 103 respecting the offer of such evidence in support of credibility. The law in this area has been thoroughly and recently examined in M. Manning and A. W. Mewett, *Psychiatric Evidence* (1975-76), 18 Crim. L.Q. 325 at 336-42.

[70] (1975), 29 C.R.N.S. 322 *per* Graburn J.

[71] *Id.* at 324.

Graburn relied on the Ontario Court of Appeal decision of *R.* v. *Bencardino*,[72] which in turn quoted from Lord Radcliffe in *Fox* v. *General Medical Council*:

> An advocate is entitled to use his discretion as to whether to put questions in the course of cross-examination which are based on material which he is not in a position to prove directly. The penalty is that, if he gets a denial or some answer that does not suit him, the answer stands against him for what it is worth.
>
> That comment was with respect to disciplinary proceedings against a doctor where the following question and answer occurred: 'Q: Did you seduce her in surgery very soon after that . . . ? A: I did not.' No evidence was adduced to prove the asserted seduction.[73]

The common law earlier provided that a witness might be incompetent to testify if he had been previously convicted of certain infamous crimes. This position was later modified by statute in most common law jurisdictions to permit the witness to testify with his prior conviction left to affect his credibility. For example, section 12 of the existing *Canada Evidence Act* permits counsel to question a witness "as to whether he has been convicted of any offence."[74] If the witness denies the fact or refuses to answer counsel may, as an exception to the collateral facts rule, prove the previous conviction and so contradict the witness. At one time it was arguable that what was relevant to the credibility was the observed question and answer and contradiction but it now appears well-settled that it is the fact of the previous conviction that is relevant to credibility. Although the witness may be questioned as to prior convictions even when the witness is the accused,[75] he is given somewhat greater protection than an ordinary witness.[76] The recent decision of *R.* v. *Davison, DeRosie and McArthur*[77] thoroughly canvasses this area and recognizes the possibility of prejudice to the accused who takes the witness stand in that the trier of fact may improperly use the prior conviction as evidence of his propensity to commit like acts, rather than as affecting his credibility. Mr. Justice Martin noted that such a witness ought not to be "cross-examined with respect to discreditable conduct and associations" unless the same is "directly relevant to prove the falsity of the accused's evidence."[78] Mr. Justice Martin in the *Davison* case "clarified" the position of Mr. Justice Spence in the case of *Colpitts* v. *The Queen*,[79] which appeared to suggest that the accused-witness was open to the same sort of cross-examination respecting past conduct as any other witness and quoted with approval

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[72] (1973), 11 C.C.C. (2d) 549.

[73] *Fox* v. *General Medical Council, supra,* note 53 at 1023.

[74] But note the protection afforded such a witness in England when the accused was made a competent witness: *Criminal Evidence Act,* 1898, 61 & 62 Vict., c. 36, s. 1(f).

[75] *R.* v. *d'Aoust* (1902), 3 D.L.R. 653; 5 C.C.C. 407.

[76] See A. N. Doob and V. P. Hans, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries* (1975-76), 18 Crim. L.Q. 235, confirming by experimental data the dangers to an accused-witness which have always been assumed to exist.

[77] (1975), 6 O.R. (2d) 103; 20 C.C.C. (2d) 424.

[78] *Id.* at 444 (C.C.C.) *per* Martin J.

[79] [1965] S.C.R. 739; 52 D.L.R. (2d) 416; 47 C.R. 175; [1966] 1 C.C.C. 146.

from the restrictive remarks of Taschereau J. in *Koufis* v. *The King*.[80] It is interesting to note however that in *R.* v. *Boyce*,[81] Mr. Justice Martin holds that it is proper under section 12 to inquire not only into the fact of conviction but also to inquire with respect to the penalty imposed on the earlier occasion of that conviction. In *R.* v. *McLaughlan*[82] the court found the cross-examination of the Crown Attorney to be improper where the Crown Attorney dealt at some length with the particulars of each of the offences and the conduct of the accused leading up to his convictions and also with respect to previous charges on which the accused had been acquitted. The danger to an accused-witness is enhanced in those jurisdictions where the question put to the witness embraces within it the details of the past convictions which show that the accused has committed actions in the past strikingly similar to the crime alleged.

It may be arguable that under the present law the trial judge has a discretion to foreclose the questioning mentioned in section 12 when the witness is the accused. The Supreme Court of Canada[83] has preserved the common law discretion to exclude evidence which is of minimum probative value in comparison to the possibility of prejudice to the accused. By prejudice, of course, is meant the improper use of evidence. While the fact of a prior conviction has been held to be relevant to credibility in many cases, the nature of the past offence may limit severely its probative worth. If the prior conviction is for an offence identical to the offence being tried, the prejudice may be extremely high. The trier of fact may improperly use the prior conviction, not for its "tendered" purpose as relevant to credibility, but for the purpose of inferring that the accused, who has acted badly in the past, has acted in conformity with his character. That this is an improper use is, of course, clear from the rules of evidence respecting tendering evidence of character and the limitations on the introduction of similar fact evidence. When an accused is on trial for assault and a prosecutor asks him, pursuant to section 12, if he has been convicted of assault on six occasions within the past eighteen months, one must wonder about the prosecutor's true purpose and query whether the trial judge ought therefore to exercise his discretion.[84]

It is clear that many accused forfeit their right to testify because they fear that disclosure of a past record might prejudice them in the mind of the trier of fact. The stringency of the existing rules respecting the use of character evidence against an accused suggests that we are serious in insisting that an accused be tried for what he has allegedly done in the charge he presently

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[80] [1941] S.C.R. 481; [1941] 3 D.L.R. 657; 76 C.C.C. 161.

[81] (1975), 23 C.C.C. (2d) 16 at 36-37.

[82] (1974), 20 C.C.C. (2d) 59.

[83] *R.* v. *Wray*, [1971] S.C.R. 272; 11 D.L.R. (3d) 673; 11 C.R.N.S. 235; [1970] 4 C.C.C. 1.

[84] See *R.* v. *St. Pierre*, [1973] 1 O.R. 718; 10 C.C.C. (2d) 164, *rev'd* on other grounds (1974), 3 O.R. (2d) 642; 17 C.C.C. (2d) 489. Compare the views of Norris J.A. in *R.* v. *Leforte* (1961), 31 D.L.R. (2d) 1; 36 C.R. 181; 131 C.C.C. 169, and Kerwin C.J.C. on appeal (1962), 31 D.L.R. (2d) 1. Has Kerwin C.J.C. ruled that there is no such discretion? Was the English provision relied on by Norris J.A. truly different from s. 12 of the *Canada Evidence Act*?

faces, and not for what it has been proved he has done in the past. The judicial development of the law surrounding section 12 causes concern respecting our sincerity in that regard.

(b) Reforms Suggested

Section 62 of the Proposed Federal Code states:

> 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.

This section seeks to abolish, *inter alia*, the existing collateral facts rule, the rules presently constraining the types of evidence receivable to support or attack credibility, and the rule against supporting credibility prior to attack. In place of these rules it is suggested that all evidence relevant to credibility is admissible but that the trial judge has a discretion to exercise depending on the facts of the particular case. Section 63 of the Proposed Federal Code provides:

> 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.

and section 58(2) of the Proposed Federal Code provides:

> 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.

Of course, section 5 of the Proposed Federal Code which deals with the general discretion is always available:

> 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.

There is no doubt that the new approach is decidedly more rational than the existing mechanical application of the rules, which at times are artificial, but it demands vigilance on the part of the trial judge to protect unrepresented witnesses from undue harassment or embarrassment and to guard against the great dangers enumerated in section 5. It also requires a practising bar which will exhibit responsibility and restraint. It is only to be hoped that the quality of personnel within the existing system is equal to the large task to be created by the proposed change.

With respect to the evidence of past actions of a witness, the Proposed Federal Code provides in section 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.
>
> (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.

That there ought to be limitations on the cross-examiner's ability in this

area is clear. The limitations suggested by the Proposed Federal Code however are anomalous. There is no limitation within section 64 with respect to the type of activity for which the witness is previously convicted but there is a time limitation. Section 63, however, denies the possibility of introducing evidence of a trait of a witness' character for truthfulness "unless it is of substantial probative value." Presumably section 63 would forbid questions respecting previous convictions for offences which have no direct connection with honesty or truthfulness. However, section 64 then has the single effect of excluding substantially probative evidence when an arbitrary time period has elapsed. By this section a witness who has perjured himself on the only other occasions on which he has testified and who has been convicted of the same, may not be asked about those convictions. In view of the fact that the Federal Code throughout seems to argue in favour of the admission of evidence, subject to the trial judge's discretion, this arbitrary rule, the effect of which can only be the exclusion of substantially relevant evidence, seems strange. It appears odd also that a witness may be asked about previous conduct substantially relevant to credibility and such conduct may be proved, but evidence of previous convictions for that very conduct is inadmissible if barred by time.

Section 64(2) forecloses all evidence attacking the credibility of an accused who chooses to become a witness unless the accused has led evidence to support the same. This proposal offers an accused greater protection than any common law jurisdiction.[85] An accused-witness who has been convicted of perjury on any number of occasions and no matter how recently can keep that evidence from the trier of fact provided that he does not lead evidence to support his own credibility. Again this arbitrary provision appears odd when viewed in the midst of a Code that stresses discretion rather than arbitrary rules. One would have expected in this Code to find a provision similar to that which exists in New South Wales:

> When any question put to a witness in cross-examination is not relevant to the cause or proceeding, except so far as the truth of the matter suggested by the question affects the credit of the witness by injuring his character, the Court shall have a discretion to disallow the question, if in its opinion the matter is so remote in time, or of such a nature that an admission of its truth would not materially affect the credibility of the witness.[86]

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[85] Legislation from a variety of jurisdictions is gathered together in the Ontario Law Reform Commission's report, *supra*, note 2 at 194-98. In England, for example, an accused also loses his protection if his defence involves imputations of the character of the prosecutor or his witnesses (see *Selvey* v. *D.P.P.*, [1970] A.C. 304) or if he has given evidence against another person charged with the same offence: *Criminal Evidence Act*, *supra*, note 74.

[86] *The Evidence Act*, 1898-1973 (No. 11) (N.S.W.) s. 56. The language of this section suggests a problem with respect to the proposed legislation. It seems clear that the proposed section 64(2) seeks to foreclose questioning of the accused with respect to past convictions as well as independent proof of the same. The proposed section may produce unfortunate litigation as to its meaning as some may interpret it to foreclose only independent proof and not questioning. To accomplish the intent of the drafters of the Proposed Federal Code, it may be better to use language such as in that used in the New South Wales provision, for example: "a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, . . . "

While section 64(2) gives blanket protection to the accused who does not lead evidence solely to support credibility, it exposes him to blanket intrusion if he does, and may therefore deny him part of the protection that he enjoys under the existing law. Section 63 provides him with the protection that prior actions proved must be substantially relevant, but existing law appears to protect the accused from such questions and proof unless his actions resulted in convictions. As recently described by Martin J.A.:

> [S]ave for cross-examination as to previous convictions permitted by s. 12 of the Canada Evidence Act, an accused may not be cross-examined with respect to misconduct or discreditable associations unrelated to the charge on which he is being tried for the purpose of leading to the conclusion that by reason of his bad character he is a person whose evidence ought not to be believed. Cross-examination, however, which is *directly relevant* to prove the falsity of the accused's evidence does not fall within the ban, notwithstanding that it may incidentally reflect upon the accused's character by disclosing discreditable conduct on his part.[87]

The Ontario Report recommends the repeal of section 23 of *The Evidence Act* and its replacement with the following:

> 36(1) A witness in a proceeding shall not be asked any question tending to show that he has been convicted of any Federal or provincial offence solely for the purpose of attacking his credibility unless the court finds that the conviction is, because of the nature of the offence and the date of its commission, relevant to the witness' credibility.
>
> (2) Notwithstanding subsection 1, a witness in a proceeding may be asked any question tending to show that he has been convicted of an offence under section 121, 122 or 124 of the Criminal Code (*Canada*).
>
> (3) Notwithstanding subsections 1 and 2, a witness in a proceeding shall not be asked any question tending to show that he has been convicted of any offence for which he has been granted a pardon.
>
> (4) Where a witness in a proceeding is asked a question under subsection 1 or 2 and he either denies the allegation or refuses to answer, the conviction may be proved, and a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted, or by a deputy of the officer, is, upon proof of the identity of the witness as such convict, sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

It is interesting that the Ontario recommendation in this area does not make any distinction between the ordinary witness and the witness who is also the accused, despite the fact that the Report recognizes that it is the latter who runs the greater danger. While the ordinary witness may be embarrassed or unduly harassed, the accused-witness may be improperly convicted of a serious offence. Nevertheless, the approach taken in subsection 1, placing a discretion in the trial judge, seems the only appropriate approach and therefore preferable to the position taken by the Law Reform Commission of Canada. One is intrigued, however, by subsection 2, which appears to exhibit some distrust of the trial judge in providing that, though the previous offence is held to be irrelevant to the witness' credibility, nevertheless it may be in-

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[87] *R.* v. *Davison, De Rosie and MacArthur, supra,* note 77. Leave to appeal to the Supreme Court of Canada was refused December 2, 1974.

troduced if it was in relation to a perjury charge. The Report itself states that the Ontario Law Reform Commission believes there must be some connection between the prior conviction and the issue of credibility. That connection presumably must be one of relevance. It seems odd, therefore, to provide in subsection 2 that notwithstanding a finding of irrelevance the material should nevertheless be receivable.

E. CONCLUSION

The preceding material has attempted to illustrate and compare the approaches taken by the two Commissions with respect to the law of evidence concerning the competency of witnesses. Whichever approach to reform is preferred, it is suggested that no reform at all is better than separate reforms. If the present system is unduly complex or archaic, at least it is common to both provincial and federal matters. It is most regrettable that the reform groups in this country evidently could not cooperate to produce a united effort. If both approaches become law, there is abundant confusion ahead for the profession, the judges and the public.