BOOK REVIEWS

REPORT OF THE FEDERAL/PROVINCIAL TASK FORCE ON UNIFORM RULES OF EVIDENCE. By The Federal/Provincial Task Force on Uniform Rules of Evidence. Carswell, 1982. Pp. xxxiv, 615. ($60.00)

In 1977, the Uniform Law Conference decided that the law of evidence warranted uniform legislation in Canada. A task force was established, composed almost exclusively of government lawyers. It was directed to propose legislative statements of the law where possible, avoiding provisions which created "wide unfettered judicial discretion".[1] By 1981, with the preparation of draft legislation based largely upon the recommendations of the Task Force, its work was completed. In 1982, the background papers and recommendations, accompanied by a copy of the draft Uniform Evidence Act,[2] were published as the *Report of the Federal/Provincial Task Force Uniform Rules of Evidence.*[3]

In the preface to the *Report*, the President of the Uniform Law Conference expressed the hope that it would serve as a general text on Canadian evidence law "for the paramount benefit of law schools and their students, legal practitioners and judges alike".[4] This review begins with a brief evaluation of the suitability of the *Report* as a text, and then proceeds to examine it as a blueprint for legislative reform.

I. THE REPORT AS TEXTBOOK

The *Report* is generally well-written and clear, with occasional flashes of wit.[5] Each chapter deals with a particular subject matter, and generally conforms to the same structure. Beginning with a brief overview of the present law, the chapters articulate the rationale (or competing rationales) for the law, consider the various options for reform that are current in the literature, and conclude with a set of recommendations as to how the law should be. Virtually all major areas of the law are canvassed in the *Report.*

Many will find the *Report* convenient for its concise statements of the law as it is, especially since it is more up to date than are other Canadian texts. Furthermore, if the Uniform Evidence Act becomes the

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[1] P. 2.

[2] App. 4.

[3] Hereafter referred to as the REPORT.

[4] P. iii.

[5] Speaking of the common law incompetency of a witness convicted of an infamous crime, the REPORT, at p. 335, observes that: "When conviction of the infamous crime carried the death penalty, the problem of incompetency was usually a secondary obstacle to calling the convicted person."

law of Canada, the *Report* will prove useful in helping the legal community understand the changes effected by its provisions.[6] Nevertheless, the constraints of the Task Force's mandate diminish the value of the *Report* as a text.

The primary purpose of the Task Force was to recommend legislation that could be enacted uniformly across Canada. As a result, the *Report* neither analyzes the issues in the same depth that one would find in a book written primarily as a text, nor does it canvass as extensive a range of case-law and scholarly writings as would a standard text. As well, the *Report* is fairly lean on the historical background to the various rules under study — a background which appears essential to a proper understanding of the modern law of evidence. Most importantly, the recommendations of the Report had to be acceptable to the legal community across Canada. This limited the Task Force to a consideration of the conventional wisdom on the subject, rendering irrelevant more radical perspectives on the law of evidence. For these reasons, students will not find it as helpful as the other books on the market.[7]

II. THE REPORT AND THE REFORM OF THE LAW OF EVIDENCE

It has been suggested that one should avoid the temptation of reviewing the book that should have been written.[8] As a general rule, this is good advice, but it is difficult to heed in this case. The *Report* is an integral part of a process which appears to be leading to a major legislative change in the law. As such, one's analysis must include the Act as drafted as well as the basic question of whether the law reform exercise was worth the effort. If I have succumbed to temptation in the paragraphs that follow, it is that of reviewing the book that should *not* have been written.

Virtually all trials governed by federal law (including, of course, all criminal trials) apply a uniform body of evidence law. The candidates for uniformity are thus the laws of evidence in force at the provincial level. What problems result from differing evidence law that would justify uniformity? Absent a real problem, diversity in the law ought to be, if not embraced, then at least tolerated in a federal state.

In principle, the problem, if it exists at all, will be a function of the degree of difference that obtains between provincial law, the costs associated with lawyers' mastering these differences and the amount of work

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[6] As this Review was being written, the Uniform Evidence Act was introduced into the Senate for first reading: An Act to give effect, for Canada, to the Uniform Evidence Act adopted by the Uniform Law Conference of Canada, Bill S-33, 32nd Parl., 1st sess., 1980-81-82 (1st reading 18 Nov. 1982).

This Review considers the Act as it is reproduced in the REPORT; no account is taken of any subsequent changes.

[7] In my opinion, the best general text on the law of evidence is MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE (2nd ed. E. Cleary 1972), notwithstanding that it is an American book.

[8] Parker, *A Field Guide to Book Reviewing*, 20 J. OF LEGAL EDUC. 169 (1967).

(especially litigation) undertaken by out-of-province lawyers. For the reasons that follow, I conclude that no such problem exists.[9]

The differences between provincial laws of evidence are negligible. The issue of the compellability of a person charged with an offence under provincial law, oft-cited as an example of differing rules, appears to have been rendered moot by paragraph 11(*c*) of the Canadian Charter of Rights and Freedoms.[10] In the area of the business records exception to the hearsay rule, differences do exist respecting the nature and scope of the activities apparently governed by the rules, the admissibility of double hearsay and statements of opinion, and the requirement in some legislation that the record must have been made contemporaneously with the event recorded. The significance of these differences, however, is difficult to assess. The Task Force notes that there has been "surprisingly little litigation involving the business documents sections",[11] and suggests that this is because lawyers have yet to analyze their meaning as applied to concrete cases.[12] I would explain the lack of litigation differently. Counsel are getting their documents admitted into evidence without much of a fuss, largely because courts pay less attention to the terms of the statute than they do to their general sense of the reliability of a given document tendered to them.[13] If this is true, it suggests that the pursuit of uniformity is doomed to fail. Most trial laywers will admit that the rules of evidence work tolerably well because they are largely ignored. Is it reasonable to expect the world to change because a new piece of legislation has been enacted?

Furthermore, there would not appear to be a great deal of litigation conducted by out-of-province lawyers. Since regulation of the legal profession is a matter within provincial jurisdiction, there is no common market of lawyers in Canada.[14] Moreover, when lawyers do appear out of their jurisdiction, it will likely be because of their special expertise in the subject area in question, an expertise which would tend to include a knowledge of whatever differences exist between the relevant laws of evidence. Given the present uniformity in federal evidence law, the minor differences in detail between provincial laws, and the tiny proportion of

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[9] The Task Force provides no empirical data supporting the need for uniform legislation. One wonders how effective law reform can be absent an analysis of the facts.

[10] Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11. Paragraph 11 (*c*) states that:

> Any person charged with an offence has the right
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> (*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence.

[11] P. 390.

[12] *Id.*

[13] *See, e.g.*, Johnson v. Lutz, 23 N.Y. 124 (1930); Setak Computer Servs. Corp. v. Burroughs Business Machines Ltd., 15 O.R. (2d) 750, 76 D.L.R. (3d) 641 (H.C. 1977).

[14] To appear temporarily in the courts of another province, a lawyer must get the permission of the law society in the province, and, of course must travel to that province to carry the case. This tends to discourage a large-scale traffic across provincial borders; most inter-provincial legal business will tend to involve lawyers in both provinces working co-operatively within their respective jurisdictions.

legal business wherein one could say that a problem with diversity may exist, I conclude that there is no real need for uniformity in the law of evidence in Canada.

Nor would the proposed legislation achieve uniformity. Apart from the obvious question of the inherent manipulability of the rules of evidence, the *Report* would leave a number of areas to the evolution of the common law.[15] It may be asking too much of the Supreme Court of Canada, given its new role under the Charter, to take the time to harmonize conflicting approaches taken by provincial courts. In any event, the *Report* itself contemplates that provinces may legislate as they see fit in certain areas, notably with respect to issues of notice and discovery of documentary evidence in civil litigation,[16] and respecting professional and other privileges.[17] Limited though these areas are, they are by no means unimportant. Whither uniformity?

Although the decision to pursue uniformity cannot be justified, it certainly can be explained. Nothing could be more natural than a Uniform Law Conference so deciding; seeking uniformity is at the core of its *raison d'être*. On a deeper level, the decision can be seen to be a response to the failure of the Law Reform Commission of Canada's Evidence Code[18] to win the acceptance of the bench and bar. Scuttled though it was, largely because it was a Code and one which vested considerable discretion in the trial judge,[19] it effectively demonstrated the irrationality of and potential injustice caused by the present law. Something had to be done, hence the decision of the Conference. After all, providing for uniformity is a form of rationalizing the law, and rationalizing the law is a kind of reform — a reform, moreover, that fits the profession's interest in portraying the law as a rational body of rules. The mandate of the Task Force can thus be seen as being intimately connected with this professional imperative, and in combination, they influenced significantly the shape of the Uniform Evidence Act.

The first point to note is that, in many areas, the Act merely legislates the common law position as it is. Examples include the basic rules respecting the scope of expert opinion,[20] many of the exceptions to the hearsay rule[21] (including the courts' residual discretion to create new exceptions),[22] the basic test for the voluntariness of a confession[23] and the

[15] Examples include the law relating to evidence of similar facts, and the development of testimonial privileges.

[16] P. 386.

[17] Pp. 422 and 468.

[18] LAW REFORM COMMISSION OF CANADA, REPORT ON EVIDENCE (1975).

[19] For a discussion of the approach taken by the Code, and an evaluation of the criticisms directed against it, *see* Brooks, *The Law Reform Commission of Canada's Evidence Code*, 16 OSGOODE HALL L.J., 241 (1978).

[20] Uniform Evidence Act, s. 40. *See* R. v. Fisher, [1961] O.W.N. 94, 34 C.R. 320 (C.A.).

[21] Uniform Evidence Act, ss. 50-65.

[22] Uniform Evidence Act, sub. 49(3). *See* Ares v. Venner, [1970] S.C.R. 608, 14 D.L.R. (3d) 4.

[23] Uniform Evidence Act, s. 66. *See* Ibrahim v. The King, [1914] A.C. 599, 111 L.T. 20 (P.C.).

limited general discretion articulated by the Supreme Court of Canada in *The Queen v. Wray*.[24] In these areas, the Task Force obviously approved of how the common law was evolving. If so, why freeze it in statutory language? To the extent that legislating the common law might inhibit its future evolution, the decision is to be regretted. To the extent that the judges will not feel constrained by the statutory language, the decision was unnecessary. Furthermore, the Act begins to resemble a code of evidence, notwithstanding the intent of the Conference, but this quasi-code retains some of the worst features of the law as it is.

To be fair, some of the changes would be welcome ones, such as the abolition of the concept of corroboration in all cases[25] and the changes to the rules respecting vicarious admissions.[26] In other respects, however, the changes are downright bad or very misleading when examined in isolation from other rules.

Consider first the changes respecting the law of confessions. Under the present law, the prosecution must establish the voluntariness of a confession beyond all reasonable doubt.[27] The Task Force flirted with the idea of changing the burden to one requiring only a preponderance of the evidence, but decided against it.[28] The Uniform Law Conference appeared to have preferred a standard which would have required proof of voluntariness to the "satisfaction of the judge",[29] whatever that means, but in the Act, the Crown need only establish it on a balance of probabilities.[30] Notwithstanding other changes to the law of confessions contemplated in the Act,[31] this basic change makes it easier to admit a confession, and hence, to convict an accused. This is not a desirable change in the law.

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[24] [1971] S.C.R. 272, 11 D.L.R. (3d) 673 (1970). *See* Uniform Evidence Act, sub. 22(2).

[25] Uniform Evidence Act, s. 125. Note, however, that there is a mandatory jury caution contemplated with respect to certain categories of witnesses. This should be contrasted with the decision of the Supreme Court of Canada in R. v. Vetrovec and Gaja, 41 N.R. 606 (1982), wherein the Court abolished the need for special warnings to juries about the danger of founding a conviction on the uncorroborated testimony of an accomplice.

[26] Sub. 64(1) of the Uniform Evidence Act would allow the admission of an employee to bind the employer when the admission concerns a matter within the scope of his employment. This reflects the dissenting opinion of Laskin J.A. (as he then was) in R. v. Strand Elec. Ltd., [1969] 1 O.R. 190, [1969] 2 C.C.C. 264 (C.A. 1968).

[27] Park v. The Queen, 59 C.C.C. (2d) 385, 122 D.L.R. (3d) 1 (S.C.C. 1981).

[28] Pp. 189-91.

[29] P. 513.

[30] Uniform Evidence Act, s. 67.

[31] To be applauded is the abrogation of the rule in DeClercq v. The Queen, [1968] S.C.R. 902, 70 D.L.R. (2d) 530, whereby an accused, on a *voir-dire*, may be asked whether the confession was true (Uniform Evidence Act, s. 68). The changes to the rules respecting the admissibility of those parts of involuntary confessions confirmed by the finding of real evidence are harder to evaluate. The Task Force would have left the law as it is set out in R. v. St. Lawrence, [1949] O.R. 215, 93 C.C.C. 376 (H.C.), approved by the Supreme Court in R. v. Wray, *supra* note 24, but in the Act, the rule is abrogated and, in its place, the Crown is entitled to lead evidence that "the real evidence was found as a result of the statement or that the accused knew of the nature, location or condition of the real evidence" (s. 75). As the Task Force itself remarked, at p. 194, in rejecting this alternative, "it might lead to

When a confession is admitted, it virtually secures the conviction of an accused. This, it is submitted, justifies the requirement that voluntariness be proven beyond all reasonable doubt. Any diminution of this standard entails, in fact, a diminution of the burden of persuasion on the Crown in a criminal case.

One need not look beyond the constitution of the Conference to understand why the change was approved. The decision was taken by a body composed almost exclusively of lawyers employed by government. If law reform is too important to be left only to lawyers, it certainly ought not to be left to a group of government laywers, however competent and fair minded they might be. The composition of the Conference influenced their basic orientation, and it is reflected in their approach to numerous areas of the law.[32] It is fair to say that the Uniform Evidence Act would make it easier to convict accused persons.

Some of the changes are highly misleading. Respecting the use of prior convictions to impugn the credibility of an accused *qua* witness, the present law does not differentiate between various kinds of offences or their remoteness in time from the trial.[33] Nor do courts assume a discretion to exclude such evidence.[34] The Uniform Evidence Act does distinguish between the type and time of offences. An accused may be cross-examined about any convictions for perjury or the giving of contradictory evidence, whenever they occurred,[35] but the Act would otherwise limit such cross-examination to convictions for "an offence involving an element of fraud" so long as these occurred within seven years of the date of the present charge.[36] Whereas it might appear that these changes do temper

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uncontrollable speculation by the jury as to what the accused had said to the police". Finally, the Act excludes from the scope of the confession rule, statements which could be termed *res gestae* (paras. 65(1)(*f*), (*g*), (*h*) and (*i*)), notwithstanding the opinion of Dickson J. in Erven v. The Queen, [1979] 1 S.C.R. 926, at 933, 92 D.L.R. (3d) 507, at 525 (1978), that "[s]tatements should not slip in without a *voir dire* under the pretext that they form part of the *res gestae*". In this respect, the policy of the Act is clear: to limit the scope of the confession rules so that more statements of accused persons can be admitted easily.

[32] *See, e.g.*, the expansion of the dying declaration exception to the hearsay rule (Uniform Evidence Act, sub. 54(1)), the expansion of the "statement in the course of duty" exception (sub. 55(1), admitting collateral matters), the apparent contemplation of the admissibility of policemen's notes under that exception (sub. 55(2)) and the requirement that the defence give notice to the Crown if it plans to rely on documentary evidence (sub. 139(1).

[33] Canada Evidence Act, R.S.C. 1970, c. E-10, s. 12.

[34] R. v. Stratton, 21 O.R. (2d) 258, 42 C.C.C. (2d) 449 (C.A. 1978). The question appears to have been left open (in principle) by the Supreme Court in Morris v. The Queen, [1979] 1 S.C.R. 405, at 433-34, 91 D.L.R. (3d) 161, at 185 (Pratte J.).

[35] Uniform Evidence Act, sub. 124(2).

[36] Uniform Evidence Act, sub. 124(2). If an accused has given evidence against a co-accused, there appears to be no limits as to the convictions about which he can be questioned. Respecting a non-accused witness, the Act is silent about the use of prior convictions to impugn credibility. Section 103 provides that a witness may be cross-examined "on all matters substantially relevant to the credibility of the witness". Does this introduce a discretion to admit evidence of prior convictions?

the unfairness of the law as it is presently,[37] this reform is misleading and ultimately insignificant when one considers how evidence of prior convictions may be admitted against an accused in general.

At present, if an accused "puts his character in issue", the Crown can prove any of his previous convictions, and the use to which they can be put is unlimited.[38] It appears as if the same holds true under the Uniform Evidence Act.[39] So, if an accused, charged with robbery, testifies that he is too nice a person ever to have committed such a crime, his past convictions for a number of drug offences can be proved, without any restriction as to their use. It is small comfort to know that these could not be introduced solely to impugn his credibility. The Act, while appearing to reform the law in one area, leaves the more basic rules as they are, to the prejudice of every accused subject to them. One may think that an accused is going to be treated more fairly, but that is not often going to be the case.[40]

III. CONCLUSION

It is not surprising that the changes effected by the Act are more in the nature of tinkering with detail than they are fundamental departures from the present law. As suggested above, this follows from the mandate and professional orientation of the Task Force and the Conference. The law is accepted in its basic structure — a body of highly complex exclusionary rules. No attention is paid to the ways in which the "law in action" is not represented by the law on paper. No attention is paid to the more general question of whether our justice system as a whole is fair to the people subject to it. Such a focus could not have been expected in a project of this sort; too much was at stake.

It has been observed that lawyers react most defensively to proposed changes in matters of procedural law.[41] This may be explained in terms of

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[37] The unfairness is a function of how the evidence is actually used by a jury. As one study observes, the "[p]resence of record. . . appears to reliably increase the probability that a defendant will be found guilty by a jury, regardless of the evidence". Hans and Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, at 243 (1976).

[38] Criminal Code, R.S.C. 1970, c. C-34, s. 593.

[39] Uniform Evidence Act, subs. 25(2) and (3). What is unclear is whether the old rules respecting what constitutes putting one's character in issue will be carried over to the interpretation of the Act. At present, an accused may put his character in issue by testifying on his own behalf. *See, e.g.*, R. v. McFadden, 33 B.C.L.R. 96, 65 C.C.C. (2d) 9 (C.A. 1981). Under the Uniform Evidence Act, the ability of the Crown to prove prior convictions appears to be conditioned upon the accused leading evidence under s. 24 of the Act, which speaks only of expert opinion and evidence of general reputation.

[40] In this area, the Task Force appears to accept a certain factual assumption which is highly suspect, *i.e.* that a jury can differentiate between evidence admissible to impugn credibility, and evidence admissible without limitation. Although they allude, at p. 342, to problems with this assumption, their recommendations assume that a jury can so differentiate. Moreover, the REPORT, at p. 259, evidences a general faith in the efficacy of judges' limiting instruction in this and other areas. Empirical evidence, however, is to the contrary. *See* Hans and Doob, *supra* note 37.

[41] Gower, *Reflections on Law Reform*, 23 U. TORONTO L.J. 257, at 266 (1973).

their economic interest in the maintenance of a complex body of rules governing the legal process, but most lawyers would reject this explanation. They would argue that the law of evidence, though complex, is necessary to protect the citizen against injustice. Their protests would not be disingenuous; the world-view that they reflect is fundamental to the existence of the profession *qua* profession.

One writer has remarked that "technical law reform, whether or not if fills any general social needs, fills an important need of the profession".[42] Lawyers constitute a privileged class, both in their relative freedom from external regulation and in the level of remuneration they enjoy. They have to justify their special role both to the outside world and to themselves. It would be far too unsettling for the profession to admit to itself that there may be something fundamentally wrong with the law of evidence. To abandon altogether the law as it is would be to give up a part of the justification for the very existence of the profession itself.[43]

At the same time, no lawyer can turn a blind eye to the unhappy state of evidence law. The result is to present the problems, indeed to see them, as ones of detail and craftsmanship, amenable to technical amelioration. In this way the profession feels good about itself, and the public, to the extent that it cares, can see that changes and reforms are being effected.

In this respect, the rules of evidence function like a set of icons for the profession. They distinguish the profession from those who do not have the training which enables them to master and manipulate the rules. As in the case with all articles of faith, especially in a time of skepticism, one can tolerate a measure of revisionism at the margins, so long as the basic faith is maintained and reaffirmed.

Seen in this light, the *Report* and the Act are perfectly understandable, but such an understanding does not entail approval. In my opinion, the search for uniformity in the law of evidence should be abandoned, and tha nature of reform in this area ought to be reconsidered. Most importantly, the Uniform Evidence Act should not be enacted into law.

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[42] Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U.L.J. 351, at 357 (1968).

[43] Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, at 165 (1979).

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