LAW REFORM COMMISSION OF BRITISH COLUMBIA

INTERIM REPORT ON THE LAW OF EVIDENCE

(PROJECT NO. 10)

LRC 11

1973

The Law Reform Commission of British Columbia was established by the Law Reform Commission Act in 1969 and began functioning in 1970.

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TO THE HONOURABLE ALEX B. MACDONALD, Q.C.,
ATTORNEY-GENERAL FOR BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

INTERIM REPORT ON THE LAW OF EVIDENCE

This interim Report has been prepared in the Commission's study on the Law of Evidence which was added to the Commission's Approved Programme as Project No. 10 in 1972. The Commission's study of the Law of Evidence is being carried on in conjunction with the National Law Reform Commission. Since May of 1972, this Commission has been studying and making prepublication submissions to the national Law Reform Commission on the content of that Commission's study papers on various aspects of the law of evidence. Because evidence is a field of law in which uniformity is desirable, it was felt that this approach to the Project would be likely to yield the most satisfactory results.

It is anticipated that from the series of study papers being prepared by the National Commission will emerge recommendations to the Parliament of Canada for a Draft Federal Evidence Code and that certain major changes in the present laws of evidence will be recommended in the course of that Draft. It is hoped that a greater degree of uniformity in the provisions of the various *Provincial Evidence Acts* and between the Federal and Provincial laws of evidence will result from a study of the Federal Draft Code.

Completion of this study is still at some distance in the future, but at this juncture the Commission wishes to recommend certain interim changes to be made to the *Evidence Act* to improve the present law of evidence as it affects this Province. The changes which are recommended in this Report deal with the topics of proof of the records of financial institutions, expert witnesses and contradiction of witnesses. While these recommendations cover relatively narrow aspects of the overall Project, they do represent conclusions which emerged early and which could be separately and conveniently dealt with in an interim report. These recommendations will not, in our opinion, impede the later development of uniformity between the laws of evidence of British Columbia and those in other Provinces and the Federal laws of evidence.

While it is the usual policy of the Commission to circulate a working paper containing tentative conclusions and proposals for reform before making a final report, that has not been done with respect to this Report. The Commission feels that the recommendations which are made are noncontentious and that a working paper would be unlikely to elicit any significant amount of critical response.

When the Commission commenced its study on the law of evidence, it retained Mr. John Spencer, of the Vancouver Bar, as an adviser on the overall Project. Mr. Spencer, as part of his services, has been evaluating the study papers prepared by the national Commission and, in addition, has submitted the basic material for this Report. The Commission wishes to express its gratitude to Mr. Spencer for his contribution to this Project.

CHAPTER I PROOF OF THE RECORDS OF FINANCIAL INSTITUTIONS

Section 36 of the *Evidence Act*[1] provides a simple, convenient method of proving the contents of bank records. It permits a copy of an entry in a book or record kept in a bank to be received as *prima facie* evidence of the entry and of the matters, transactions and accounts recorded; subject to satisfactory proof of such facts as authenticity and custody.[2] Evidence of the latter facts may be given by the manager or accountant of the bank by Affidavit.

That provision was first introduced into the *Evidence Act* in 1927[3] and is based on the English *Bankers' Books Evidence Act*, 1879.[4] Before section 36 was added to the *Evidence Act,* bankers' books could only be proved by production of the originals on *subpoena duces tecum* and calling the clerks who made the entries.[5] The enactment of section 36, therefore, represented a most welcome reform.

Section 36 defines "Bank" to mean any Bank or branch thereof to which the *Bank Act* of Canada applies. At the time of its enactment that definition was a sensible one as chartered banks were almost the only institutions which accepted deposits of money from the public and were subject to stringent statutory audit requirements. In the last 50 years, however, our financial landscape has changed, and seen the growth of "near banks" such as trust companies, credit unions, caisses populaires, and Provincial Treasury Branches. Section 36 does not, however, extend to proof of the contents of their records. There should be no magic in the records of a Federally Chartered Bank which makes them more accurate than those of a trust company or a credit union. In any event, the records, whether of a bank, trust company, credit union, or other financial institution, would be *prima facie* evidence only of the truth of their contents, and always subject to contradiction by other evidence. The Commission, therefore, favours the extension of section 36 of the *Evidence Act* to encompass the records kept in "near banks."

Recent amendments to the *Canada Evidence Act*[6] provide a suitable model for reform. That Act has long contained, in its section 29, a provision comparable to section 36

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1. R.S.B.C. 1960, c. 134.
2. S.36 of the *Evidence Act* is set out in its entirety as an Appendix to this Report.
3. *See Evidence Act Amendment Act, 1927* S.B.C. 1926-27, C. 21.
4. 42 Vict. c. 11.
5. *See Phipson on Evidence*, 495 (11th ed. 1970).
6. R.S.C. 1970, c. E-10.

of the *British Columbia Act*.[7] In 1969 section 29 was amended so as, *inter alia*, to expand its scope to include the "near banks."[8] The new section 29 uses the words "financial institution" throughout instead of the word "bank." The definition section provides:[9]

> ... "financial institution" means the Bank of Canada, the Industrial Development Bank and any institution incorporated in Canada that accepts deposits of money from its members or the public, and includes a branch, agency or office of any such bank or institution.

There is some question, however, whether that definition is broad enough to encompass Provincial Treasury Branches such as those which exist in Alberta which accept money on deposit from members of the public. The definition could usefully be clarified in that regard.

The 1969 amendments to the *Canada Evidence Act*[10] also included a provision which would afford a simple means of proving the absence of an account in a financial institution. Section 29(3) of the *Canada Evidence Act* now provides:

> Where a cheque has been drawn on any financial institution or branch thereof by any person, an affidavit of the manager or accountant of the financial institution or branch, sworn before any commissioner or other person authorized to take affidavits, setting out that he is the manager or accountant, that he has made a careful examination and search of the books and records for the purpose of ascertaining whether or not such person has an account with the financial institution or branch, and that he has been unable to find such an account, shall be received in evidence as *prima facie* evidence that such person has no account in the financial institution or branch.

The Commission feels that such a provision could usefully be added to the British Columbia *Evidence Act*. Again, evidence received under such a provision would be *prima facie* only, and subject to contradiction by other evidence.

The Commission recommends:

1. *Section 36 of the* Evidence Act *be amended by*

   (a) *deleting the word "bank" wherever it appears in that section and substituting the words "financial institution" therefor;*

   (b) *by deleting the definition of "bank" and substituting therefor a definition of "financial institution" comparable to that set out in section 29(8) of the* Canada Evidence Act *but modified so as to include Treasury Branches of a Province of Canada which accept money on deposit from members of the public.*

2. *The* Evidence Act *be amended so as to include a provision comparable to section 29(3) of the* Canada

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7. *See Canada Evidence Act,* R.S.C. 1952, c. 307, s. 29.

8. *Canada Evidence Act (Amendment Act),* S.C. 1968-69, c, 14,

9. *Ibid.* s. 29(7).

10. *Supra* note 8.

Evidence Act.

CHAPTER II EXPERT WITNESSES

It is said that: "The opinions of skilled witnesses are admissible whenever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience."[1] *Phipson* on *Evidence* states:[2]

> When the subject is one upon which the jury is as capable of forming an opinion as the witness, the reason for the admission of such evidence fails, and it will be rejected. So, also, when the court is assisted by assessors, as in Admiralty cases involving questions of nautical skill ...[3]

That common law rule that the evidence of expert witnesses may not be received at a trial with assessors, was apparently viewed by the framers of the British Columbia *Supreme Court Rules* as a defective one because a Rule was inserted to provide:[4]

> Expert witnesses may be called by either party in all trials with assessors, but the judge may by order made at any time before or at the trial, upon or without the application of either party, limit the number of expert witnesses that may be called on behalf of each party to the action, cause, matter, or issue which is to be tried with assessors as aforesaid.

While the substance of the Rule cannot be criticized, the passage of time has isolated the Rule from, and obscured, its origins. This leads the Commission to feel that both the wording and location of the provision are now inappropriate.

The wording is such that it may lead persons to believe that it is only where an assessor is sitting with a judge that expert witnesses may be called. Such, of course, is not the law but the present Rule taken by itself is misleading. It is also felt that such a provision should properly be located in the *Evidence Act*. This would have the virtue of locating it in a logical place where practitioners or other persons interested may expect to see the matter dealt with and extending the scope of the Rule to all Provincial hearings, whether or not they are court trials with a judge.

The Commission recommends:

1. *Order 36 Rule 43A of the* Supreme Court Rules *be deleted by an appropriate Order in Council.*

2. *The* Evidence Act *be amended by inserting a new section to provide that expert witnesses may be called by either party in all trials, arbitrations or other hearings, with or without assessors, but the judge or other person conducting such trial, arbitration or hearing, may at any time before or at the trial, arbitration or hearing, upon or without the application of either party, limit*

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1. *Phipson on Evidence*, 507 (11th ed. 1970).
2. *Ibid.*
3. *See also, The Kestrel*, (1881) 6 P.D., 182.
4. British Columbia Supreme Court Rules, Order 36 Rule 43A, M.R. 467a.

the number of expert witnesses that may be called on behalf of each party to the action, cause, matter or issue.

CHAPTER III CONTRADICTION OF WITNESSES

The Commission feels that amendment is required of the section of the *Evidence Act* which deals with the extent to which a party may lead evidence which contradicts that given by an earlier witness for that party. Section 19 presently provides:

> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but in case the witness, in the opinion of the Judge or other person presiding over the proceedings, proves adverse, such party may contradict him by other evidence, or, by leave of the Judge or other person, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and be shall be asked whether or not he did make such statement.

This provision has its origin in the English *Common Law Procedure Act, 1854*.[1] That section became part of the law of Ontario in 1855[2] and was introduced into the British Columbia Statutes in 1894.[3]

This provision does not conform to the present trial practice in British Columbia. By way of example, the Commission notes that at present counsel may call a doctor who attended an injured plaintiff at the time of his injuries, and that doctor may describe the injuries and give a prognosis that they will have no permanent effect on the plaintiff, and his counsel may then go on to call a medical specialist who did not see the injuries at the time they were suffered but who, on the basis of his later attendance for examination of the plaintiff, gives his prognosis that they will result in a permanent disability. Under the present wording of section 19, the plaintiff should not be able to contradict his first witness without a ruling that he is adverse.

The wording of that provision was the subject of sharp criticism as early as 1859. In *Greenough* v. *Eccles*,[4] *Chief Justice Cockburn observed*:

> Looking at the 22nd section of the Common Law Procedure Act, 1854, I think it is clear that there has been a great blunder in the drawing of it, and on the part of those who adopted it. The first two branches of the section were evidently intended to be declaratory of the existing law, but the third branch goes far beyond it. It was intended to give a party producing a witness an opportunity, with the leave of the judge, if the witness should prove adverse ... of showing that he had previously made a statement contradictory to his then testimony. But,

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1. 17 & 18 Vict., c.125, s. 22.
2. S.C. 19 Vict., c. 43, s. 159.
3. *See Evidence Act, 1894*, S.B.C. 1894, c. 13, s. 31.
4. 5 C.B.(N.S.) 786 at p. 806; 141 E.R. 315 at p. 323 (Common Pleas, 1859.)

> unfortunately, the word "adverse," instead of preceding the third branch of the section only, is made to precede the second branch, which is clearly declaratory of the existing law; so that, if the word "adverse" in the second branch of the section is to receive the same interpretation which it is now considered it ought in the third branch to bear, there would be imposed an additional restriction to that which existed before the statute, upon the right of the party calling the witness to show by other evidence facts which the witness had contradicted.

What is clearly required is a change in the positioning of the requirement that the witness be ruled adverse so the section would clearly permit counsel to call two or more different witnesses to various facts, each of whom may give a different account of some area of evidence common to them all. Counsel could then seek to persuade the judge by argument which witness' evidence on the common point he should accept. The *Evidence Act* of Ontario was amended to achieve that purpose in 1909.[5] Section 24 of the Ontario Act presently provides:[6]

> A party producing a witness shall not be allowed to impeach his credit by general evidence of had character, but he may contradict him by other evidence, or if the witness in the opinion of the judge or other person presiding proves adverse, such party may; by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall he asked whether or not he did make such statement.

The Commission feels that such a provision could usefully be adopted in British Columbia to bring the letter of the law into conformity with the actual trial practice.

The Commission recommends:

Section 19 of the Evidence Act *be repealed and replaced with a provision comparable to section 24 of* The Evidence Act *of Ontario.*

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5. *See,* S.O. 1909, c. 43, s. 20.

6. R.S.O. 1970, c. 151, s. 24.

CHAPTER IV CONCLUSION

The Commission's recommendations in this Report may be summarized as follows:

1. *Section 36 of the* Evidence Act *be amended by*

   (a) *deleting the word "bank" wherever it appears in that section and substituting the words "financial institution" therefor;*

   (b) *by deleting the definition of "bank" and substituting therefor a definition of "financial institution" comparable to that set out in section 29(8) of the Canada* Evidence Act *but modified so as to include Treasury Branches of a Province of Canada which accept money on deposit from members of the public.*

2. *The Evidence Act be amended so as to include a provision comparable to section 29(3) of the Canada Evidence Act.*

3. *Order 36 Rule 43A of the* Supreme Court Rules *be deleted by an appropriate Order in Council.*

4. *The* Evidence Act *be amended by inserting a new section to provide that expert witnesses may be called by either party in all trials, arbitrations, or other hearings, with or without assessors, but the judge or other person conducting such trial, arbitration or hearing, may at any time before or at the trial, arbitration or hearing, upon or without the application of either party, limit the number of expert witnesses that may be called on behalf of each party to the action, cause, matter or issue.*

5. *Section 19 of the* Evidence Act *be repealed and replaced with a provision comparable to section 24 of The* Evidence Act *of Ontario.*

This is an interim Report only, but the recommendations made are capable of implementation, and deserving of mention, at this time. The Commission takes the liberty of emphasizing that while these recommendations are small in size and number, if they are to be enacted in to law, they should be affected not by inclusion within a general statute law amendment Act, but rather by specific amendments to the *Supreme Court Rules* and the *Evidence Act.*

E. D. FULTON,
Chairman

J. NOEL LYON
Commissioner

RONALD C. BRAY
Commissioner

February 20, 1973