

# Developing the Law of Evidence: a Proposal

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*Parliament should enact a clear and comprehensive statement of the rules of evidence. The present case-by-case method of developing the law of evidence contributes to confusion, to lengthy trials, and to delayed justice. Canada was close to enacting such a statement in the 1980s, but the effort was abandoned and has for the most part been forgotten. It is time to renew efforts to produce a legislative statement of the rules of evidence. This paper suggests that the Supreme Court of Canada could play a role in developing the rules outside its normal judicial process, perhaps using the auspices of the Canadian Judicial Council or the National Judicial Institute. This is the technique now successfully used by the Supreme Court of the United States to develop the Federal Rules of Evidence, which Congress accepts unless there is a negative vote to reject the changes.*

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*Le Parlement devrait édicter un énoncé clair et complet des règles de preuve. La méthode actuelle d'élaboration des règles de preuve au cas par cas engendre la confusion, les procès interminables et des retards dans le processus judiciaire. Le Canada a presque édicté un tel énoncé dans les années 80, mais l'initiative a depuis été abandonnée et oubliée par plusieurs. Il est temps de ressusciter les travaux pour produire un énoncé législatif concernant les règles de preuve. Dans cet article, l'auteur suggère que la Cour suprême du Canada joue un rôle dans le processus d'élaboration de ces règles en dehors de son cadre judiciaire normal, peut-être même sous les auspices du Conseil canadien de la magistrature ou de l'Institut national de la magistrature. Cette technique est utilisée avec succès par la Cour suprême des États-Unis pour l'élaboration de leurs règles fédérales de preuve, que le Congrès accepte à moins qu'il n'y ait un vote négatif visant à rejeter les modifications.*

## 1. INTRODUCTION

The Law of evidence still develops in Canada today in much the same way that it evolved in the nineteenth century — through case law, with occasional statu-

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tory changes. The *Canada Evidence Act*<sup>1</sup> contains only a minor portion of the rules of evidence, and many of the sections in the Act are widely acknowledged to need legislative restatement. The result is that there are many evidentiary points that have to go up to the Supreme Court of Canada for development or clarification — in some cases more than once. Not only does this use valuable judicial and legal resources, but the appellate court decisions are often complex and difficult for judges and lawyers to unravel, particularly if the issue arises during a trial. And, of course, it is almost impossible for an unrepresented litigant — an increasingly common occurrence — to understand and effectively use the rules of evidence under the current system. Further, if it is a jury case, the jury members have to leave the courtroom, often for lengthy periods. Cases have to be cited and analyzed during the proceedings. Hours — sometimes days — have to be set aside for the hearing of an evidentiary issue. As in other areas of the law, the Supreme Court normally favours a multi-factorial approach to decision-making in applying the rules of evidence. The court lists a number of factors that have to be taken into account by a trial judge. The list normally provides examples of factors and is not exclusive. Prior cases have to be carefully examined. The decision on whether to admit a piece of evidence is in a sense treated as a matter of law, not as a matter of fact. This process necessarily adds to the complexity of trials and their length. A clear comprehensive restatement of the rules of evidence is required.

The influential 2008 report on complex criminal cases by Patrick LeSage and Michael Code<sup>2</sup> identified the development of evidence law by the Supreme Court of Canada as playing “a significant role in transforming the modern criminal trial, from the short efficient examination of guilt or innocence that existed in the 1970s, to the long complex process”<sup>3</sup> that is found in Canada today. Their report on so-called mega trials states that the Supreme Court’s reforms “had the general effect of broadening the scope of admissibility by replacing the old rules-based approach of the common law with a much more flexible principles-based approach”. Reforming the law of hearsay and privilege are given in the report as examples of this approach. “The hearsay rule”, the report states, “was significantly changed such that certain out-of-court statements that would never have been admissible under the pre-existing common law now became admissible.”<sup>4</sup> Similarly, “the law of privilege was reformed pursuant to the ‘principled approach’ so that exceptions to existing privileges could be developed and new claims of privilege or even ‘partial privilege’ could be recognized, based on ‘the particular circumstances of each case’.” This resulted in a large increase in complicated motions on questions of admissibility. “It became very hard to predict the likely result of one of these motions,” LeSage/Code state, “and a great deal of evidence was often led on the motion itself because the factors were so uncertain and so case specific.”

The LeSage/Code recommendations on case management have now been im-

<sup>1</sup> *Canada Evidence Act*, R.S.C., 1985, c. C-5.

<sup>2</sup> Patrick J. LeSage and Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (Ontario Ministry of the Attorney General, 2008).

<sup>3</sup> *Ibid.* at 7–9 for this and other quotes from the LeSage/Code Report.

<sup>4</sup> See *R. v. Khelawon*, 2006 SCC 57, 2006 CarswellOnt 7825, 2006 CarswellOnt 7826, [2006] 2 S.C.R. 787, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, and cases cited therein.

plemented by legislation<sup>5</sup> and facilitate decision-making prior to the trial on evidentiary and other issues. Nothing has been done, however, to make the rules of evidence any clearer and thus to enable counsel to predict the outcome of a motion to exclude or include evidence. Indeed, Michael Code now suggests that the result of the changes seems to be to delay resolution discussions and the trial itself.<sup>6</sup>

Case-by-case development was also the way it was done in the United States until the 1970s when the United States Supreme Court used its rule-making authority to propose a code setting out the rules of evidence. The judiciary, academics, and practicing lawyers in the United States had recognized over many earlier decades that the case-by-case method was not a sensible way to develop a rational and comprehensive system of evidence. The story of the enactment of the United States Federal Rules of Evidence, discussed below, which has now been adopted by most states,<sup>7</sup> can provide useful lessons for Canada in developing our law of evidence.<sup>8</sup>

This article will concentrate on techniques that Canada might use to enact a statement of the principles of evidence. It will not delve into what a restatement or code should contain. There are a number of good models in Canada and elsewhere from which the drafters can draw. The difficulty is finding a means to bring the rules into operation.

The next section of this paper looks at how evidence law developed in Canada during the last fifty years and how the attempt to codify the law of evidence in Canada has now largely been abandoned. The American experience leading to its Federal Rules of Evidence is then explored, and finally I offer some suggestions on how Canada could get back on track.

## 2. A CANADIAN CODE OF EVIDENCE

One of the first topics taken up by the Law Reform Commission of Canada in the early 1970s was the law of evidence.<sup>9</sup> I was a member of the original Law Reform Commission, established in 1971, and became part of the team studying the topic. I had taught evidence for a number of years when teaching at Osgoode Hall Law School and was interested in the reform of the law of evidence. An Ontario Provincial Court Judge, René Marin, was given leave from the bench to head up the project. Ed Tollefson, a former academic, who had moved to the Department of Justice in Ottawa, joined the team on a part-time basis. Neil Brooks, now at Osgoode Hall Law School, who had clerked with Emmett Hall at the Supreme Court, did much of the groundwork for the project. Tony Doob, a psychologist at the University of Toronto, also joined the team. And, of course, the president and vice-

<sup>5</sup> *Fair and Efficient Criminal Trials Act*, Stat. Can. 2011, c. 4, amending Part XVIII.1 of the *Criminal Code*.

<sup>6</sup> Conversation with Michael Code, September 14, 2011.

<sup>7</sup> Eileen A. Scallen, "Proceeding with Caution: Making and Amending the Federal Rules of Evidence" (2008) 36 Sw. U.L. Rev. 601 at 605.

<sup>8</sup> Some of the many articles on the American experience are listed below.

<sup>9</sup> See chapter 10, "The Law Reform Commission of Canada" in Martin L. Friedland, *My Life in Crime and Other Academic Adventures* (University of Toronto Press, 2007) at 170 *et seq.*

president of the Commission, Pat Hartt and Tony Lamer, both knowledgeable superior court judges, took a strong interest in the project. The Commission made good progress on developing a comprehensive code that could be used for both civil and criminal matters.

At the same time, the Ontario Law Reform Commission was developing principles of evidence for use in civil matters in Ontario. The Ontario Commission was further ahead on its project than the Law Reform Commission of Canada and was "reluctant to delay their work to conduct some form of joint study".<sup>10</sup> The Ontario Commission had engaged University of Toronto's Alan Mewett, a noted evidence scholar, as its project director. The commissioner in charge of the project was the former chief justice of Ontario, J.C. McRuer, who was not an easy person to push around.<sup>11</sup> As a result of the dual effort, two documents appeared in the mid-1970s, the Law Reform Commission of Canada's code in December 1975<sup>12</sup> and the Ontario Law Reform Commission's statement of principles six months later — in June 1976.<sup>13</sup>

The Federal Department of Justice wanted to move ahead with a new Canadian restatement of the law of evidence. Ken Chasse, a Crown attorney in Toronto, joined the federal department of justice and over the next few years undertook extensive consultations across Canada on what the legal profession wanted in the way of evidence reform.<sup>14</sup> There was, however, no clear consensus. Some wanted a code like the federal Law Reform Commission's code, which was patterned after the recently enacted American Federal Rules of Evidence. But some took a more conservative approach, echoing that of the Ontario Law Reform Commission, which had rejected full codification, stating "that it would be unwise to reform the law in radically new directions, alien to the tradition of the common law . . ."<sup>15</sup> Chasse concluded in 1978 that the majority of persons he had consulted with did not want full codification. Instead, they wanted legislative changes in some specific rules and they also wanted a "comprehensive statement of the existing law of evidence", but they were split on whether the comprehensive statement should be a legislated or non-legislated one.<sup>16</sup>

The handwriting was on the wall. The Law Reform Commission of Canada's code was not going to be enacted. In late 1977 a federal/provincial task force was created, with the support of the federal government, under the umbrella of the Uniform Law Conference of Canada, to develop a uniform statement of the rules of

<sup>10</sup> Friedland, *My Life in Crime*, at 176.

<sup>11</sup> See Patrick Boyer, *A Passion for Justice: The Legacy of James Chalmers McRuer* (University of Toronto Press, 1994) at 360.

<sup>12</sup> Law Reform Commission of Canada, *Report on Evidence* (Ottawa: Information Canada, 1975).

<sup>13</sup> Ontario Law Reform Commission, *Report on the Law of Evidence* (Toronto: Ministry of the Attorney General, 1976).

<sup>14</sup> See generally Ken Chasse, "Canada's Evidence Code?" (2006) 64 Advocate 659. I am grateful to Mr. Chasse for giving me access to documents and providing helpful background information.

<sup>15</sup> Ontario Law Reform Commission *Report* at xi. See Chasse at 662.

<sup>16</sup> Chasse, "Canada's Evidence Code" at 667.

evidence to be adopted across Canada, rather than be split into federal and provincial codes of criminal and civil evidence. The task force — the principal writer was Tony Sheppard of the University of British Columbia — produced its report on Uniform Rules of Evidence in 1981, which was approved by the Uniformity Commissioners that same year.<sup>17</sup> The body wisely did not call the document a code, often a lightning rod for criticism. To many people, the word “code” gives the impression of a document carved in stone and not as easily changed or developed as something called “rules” or “principles”.

A government bill implementing the *Uniform Evidence Act* was introduced in the Senate in November 1982 by Trudeau’s Liberals, but died on the order paper.<sup>18</sup> Some of those who appeared before the Senate’s Standing Committee on Legal and Constitutional Affairs objected to setting out the law of evidence in a statute.<sup>19</sup> And there were other matters to occupy the attention of the department of justice. Work on the new *Constitution Act*<sup>20</sup> with its amending formula and a *Charter of Rights and Freedoms* consumed most of the energy of the department of justice in those years. The *Charter* was, in fact, enacted six months later. The *Evidence Act* was put on the back burner. In early 1987, Mulroney’s conservatives circulated for discussion a slightly revised version of the Act, but it was never introduced into Parliament.<sup>21</sup> It is not clear why it was not pursued further. The head of the department’s criminal justice policy section at the time, Richard Mosley, now a Federal Court judge, recalls in a recent conversation,<sup>22</sup> that at a federal/provincial meeting of justice ministers the Ontario Minister of Justice Ian Scott had other issues that he was more concerned with advancing, such as legal aid and court unification.<sup>23</sup> Frank Iacobucci, the Deputy Minister of Justice in Ottawa at the time, recalls that his minister, Ray Hnatyshyn, was also not keen on proceeding.<sup>24</sup> As we know, law

<sup>17</sup> Chasse, “Canada’s Evidence Code?” at 667-8.

<sup>18</sup> Bill S-33, *An Act to give effect, for Canada, to the Uniform Evidence Act adopted by the Uniform Law Conference of Canada*: see Chasse, “Canada’s Evidence Code?” at 668.

<sup>19</sup> See, for example, Stanley Schiff’s evidence on June 14, 1983: “It is my conclusion that Canada does not need and Canada should not have what is substantially a statutory statement of the law of evidence.”

<sup>20</sup> *Constitution Act, 1982*, as enacted by the *Canada Act 1982* (U.K.), c.11.

<sup>21</sup> Chasse, “Canada’s Evidence Code?” at 668. Australia has had more success in implementing its *Uniform Evidence Act*, which now applies to the Commonwealth of Australia (1995), New South Wales (1995), Tasmania (2001), and Victoria (2009). See generally, Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts*, 5th ed. (Australia: LexisNexis, 2010).

<sup>22</sup> Conversation on May 3, 2011. This is also the recollection of Donald Piragoff, now the head of criminal justice policy: conversation October 21, 2011.

<sup>23</sup> See Ian Scott, *To Make a Difference* (Toronto: Stoddart, 2001) who does not mention the law of evidence, but discusses legal aid at 174 and court structure at 176.

<sup>24</sup> Conversation with Frank Iacobucci on June 28, 2011. Nor was his successor as minister of justice, John Crosbie.

reform often depends on the personalities of those involved.<sup>25</sup>

Very little has happened in Canada since then, except some statutory changes relating to evidence and electronic data.<sup>26</sup> In 1998, Queen's University Law School tried to get the ball rolling again with a conference and a publication on codification of the criminal law.<sup>27</sup> Ron Delisle, who had produced a code for the Canadian military, put that code forward as a possible model for adoption throughout Canada.<sup>28</sup> Since then there has been little action.

Let us now look at how a statement of the rules of evidence was produced in the United States.

### 3. THE AMERICAN FEDERAL RULES OF EVIDENCE

Today, proposed changes in the rules of evidence at the federal level in the United States are sent to Congress by the Supreme Court of the United States and become law if after six months they are not voted *against* by Congress. A positive vote in favour of the rules is not required. The process is set out in section 2072 of the U.S. Code:<sup>29</sup>

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

There is a long history behind the section and many law review articles.<sup>30</sup> One 1982 article in the *University of Pennsylvania Law Review* is over 180 pages in

<sup>25</sup> See the discussion of codification in, Friedland, *My Life in Crime* at 268–279.

<sup>26</sup> See the amendments to the *Canada Evidence Act* in 2000, relating to electronic documents: Chasse, “Canada’s Evidence Code?” at 668.

<sup>27</sup> See Don Stuart, R.J. Delisle, and Allan Manson, editors, *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999).

<sup>28</sup> *Ibid.* at 1 *et seq.*

<sup>29</sup> 28 USC §2072.

<sup>30</sup> See, for example, in chronological order, Jack B. Weinstein, “Reform of Federal Court Rulemaking Procedures” (1976) 76 Colum. L. Rev. 905; Jack B. Weinstein, *Reform of Court Rule-Making Procedures* (Ohio State University Press, 1977); Stephen B. Burbank, “The Rules Enabling Act of 1934” (1982) U. Pa. L. Rev. 1015; Peter G. McCabe, “Renewal of the Federal Rulemaking Process” (1995) 44 Am. U. L. Rev. 1655; Charles Gardner Geyh, “Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress” (1996) 71 N.Y.U. L. Rev. 1165; Paul R. Rice and Neals-Erik William Delker, “Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence” (2000) 191 Federal Rules Decisions 678; Eileen A. Scallen, “Analyzing ‘The Politics of [Evidence] Rulemaking’” (2002) 53 Hastings L.J. 843; Rosanna Cavallaro, “Federal Rules of Evidence 413–415 and the Struggle for Rulemaking Pre-eminence” (2008) 98 J. Crim. L. & Criminology 31; Eileen A. Scallen, “Proceeding with Caution: Making and Amending the Federal Rules of Evidence” (2008) 36 S.W.U. L. Rev. 601.



length and contains almost 800 footnotes.<sup>31</sup> It will be hard to do justice to these learned debates in this paper, but I'll try. I'll begin this story with Roscoe Pound.

Like many other developments in the law concerning the administration of justice in the United States, the ideas of Roscoe Pound, the Dean of the Harvard Law School, brought the issue of rule-making by the courts to the fore in America. In a 1926 speech to the annual meeting of the American Bar Association entitled "The Rule-Making Power of the Courts", Pound stated:<sup>32</sup>

Experience shows abundantly that regulation of procedure by rules of court is the way to insure a simple effective procedure, attained by gradual and conservative overhauling and reshaping of existing practice. It shows that in this way new demands upon the machinery of judicial administration may be met promptly by the ordinary means of legal growth, instead of waiting vainly for years for intervention of the legislative *deus ex machina*. . . .

Legislatures today are so busy, the pressure of work is so heavy, the demands of legislation in matters of state finance, of economic and social legislation . . . are so multifarious, that it is idle to expect legislatures to take a real interest in anything so remote from newspaper interest, so technical, and so recondite as legal procedure. I grant that the courts are busy too. But rules of procedure are in the line of their business. . . . When rules of procedure are made by judges, they will grow out of experience, not out of the ax-grinding desires of particular law-makers.

In 1934 Congress enacted the *Rules Enabling Act*,<sup>33</sup> giving the United States Supreme Court power to enact rules of "practice and procedure in civil actions at law". The original legislation was was therefore narrower than the present section, cited above. It did not cover criminal rules — these were added in 1940<sup>34</sup> — and it did not specifically mention the law of evidence.

What was the meaning of "practice and procedure?" The issue was controversial. In one U.S. Supreme Court case<sup>35</sup> in 1941 dealing with certain civil rules, where the rules were not objected to by Congress but were later challenged in the courts, the Supreme Court split 5-4, the majority stating: "That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted."<sup>36</sup> The four-person minority, consisting of Justices Frankfurter, Black, Douglas, and Murphy, dissented, stating: "to make the drastic change that [the rule] sought to introduce would require explicit legislation."<sup>37</sup>

The court and its advisory committee acted cautiously in proposing new rules relating to evidence, confining the new rules to regulating the mode of taking and obtaining evidence and not making rules on the admissibility of evidence. It should be noted that this is much the way that Ontario has interpreted its rule-making

<sup>31</sup> Burbank, "The *Rules Enabling Act*".

<sup>32</sup> Roscoe Pound, "The Rule-Making Power of the Courts" (1926) 12 ABA J. 566.

<sup>33</sup> Act of June 19, 1934, ch. 651, 48 Stat. 1064.

<sup>34</sup> Act of June 29, 1940, ch. 445, 54 Stat. 688.

<sup>35</sup> *Sibbach v. Wilson & Co.* (1941), 12 U.S. 1.

<sup>36</sup> *Ibid.* at 16.

<sup>37</sup> *Ibid.* at 18.

power with respect to civil rules of court.<sup>38</sup>

Chief Justice Earl Warren, who had been appointed chief justice in 1953 was, as we know, a more activist Chief Justice than his predecessors. In 1956 he discharged the Rules Advisory Committee that had operated until then and two years later Congress brought the Federal Judicial Conference into the picture.<sup>39</sup> That body, much like the Canadian Judicial Council, was made up of chief judges and others from the various federal judicial circuits. The Conference was charged with studying the operation and effect of the federal rules and with recommending appropriate amendments to the rules. The Supreme Court, however, still remained the body that approved the rules that were sent to Congress.

Pressure had been mounting to have a code of evidence. In 1939 the American Law Institute had undertaken the preparation of a Model Code of Evidence, which was published in 1942.<sup>40</sup> It was widely criticized.<sup>41</sup> Some objected, for example, to the removal of the hearsay rule. Dean John Wigmore — the leading American evidence scholar — was highly critical of the code because of its lack of detail.<sup>42</sup> No state adopted the code. The ALI code served, however, as a starting point for the Uniform Rules of Evidence project started in 1949 by the National Conference of Commissioners on Uniform State Laws, which looked for “acceptability and uniformity” rather than thorough reform.<sup>43</sup> These rules — it was not called a code — were published in 1953 and were adopted by 38 states.<sup>44</sup> There was, however, as yet no code or statement at the federal level.

In 1961 both the Judicial Conference and Chief Justice Warren established committees to determine whether the 1934 Act would allow the development of federal rules of evidence. Warren’s Special Committee on Evidence concluded later that year that the Act could be used to develop the rules of evidence, stating that “the formulation of uniform rules of evidence for the Federal courts is both feasible and desirable.”<sup>45</sup>

A strong 15-person committee, composed of judges and lawyers, was appointed by Chief Justice Warren in 1965, with Professor Edward Cleary, the general editor of *McCormick on Evidence*, as the reporter and principal draftsman. Its 1971 report was approved by the Supreme Court in late 1972 and sent by the court to Congress in 1973 (with Justice Douglas dissenting, as he had 30 years earlier).<sup>46</sup>

What might have happened in normal times is uncertain, but 1972 was not a

<sup>38</sup> See generally, Paul Perell, “The Authority of the Superior Court of Justice, the Legislature and the Civil Rules Committee to Make Rules of Civil Procedure” (2006) 31 *Advocates Q.* 185. The same approach is taken with respect to Federal Court rules: see Allan Lutfy and Emily McCarthy, “Rule-Making in a Mixed Jurisdiction. The Federal Court (Canada)” (2010) 49 *Sup. Ct. L. Rev.* 313.

<sup>39</sup> Geyh, “Paradise Lost” at 1186.

<sup>40</sup> Scallen (2008), “Proceeding with Caution” at 603.

<sup>41</sup> *Ibid.* at 604.

<sup>42</sup> *Ibid.* at 603.

<sup>43</sup> *Ibid.* at 604.

<sup>44</sup> *Ibid.* at 605.

<sup>45</sup> Rice and Delker, “Federal Rules of Evidence Advisory Committee” at 685.

<sup>46</sup> Cavallaro, “Federal Rules of Evidence 413-415” at 46.



normal year. It was the year of the Watergate break-in and President Nixon was claiming executive privilege, a privilege that had actually been widened by the Federal Rules. Eileen Scallen writes: "Timing, they say, is everything, and 1972 was not a good year for Congress to be considering the newly promulgated Federal Rules of Evidence. The Watergate scandal unfolded, with President Nixon asserting broad executive privilege at the same time Congress was considering the proposed Evidence Rules which contained proposals for expanded governmental privileges."<sup>47</sup> As a result, Congress postponed dealing with the Federal Rules of Evidence and took over the positive enactment of a modified version of the rules, which were eventually passed as a federal statute.

The 1934 *Rules Enabling Act* continues to operate today to change the law of evidence. Indeed, the Act was clarified by legislation in 1988 to make it clear that the rules of evidence could be included in rule-making.<sup>48</sup> The amendments also made the process of proposing rules more transparent. Changes to the rules still become law when not rejected by Congress. Rule-making is still the principal means of reforming the rules of evidence in the United States. The Federal Rules of Evidence has now been adopted by the majority of American states. That is where the matter now stands.

Several months ago, while researching the topic of codification of the criminal law and the law of evidence, I went through all the relatively recent law and criminal justice journals in the libraries of the Faculty of Law and the Centre of Criminology at the University of Toronto. It was clearly not a scientific study, but was designed to get me up to speed on what had been written in the past half dozen years. I was struck by the number of learned articles in Canada on the law of evidence and the relatively few that I found in the American journals. The reason for this is probably that law professors like to write articles dealing with judicial decisions and there are now relatively few important judicial decisions in the United States devoted to the law of evidence. It was not until I did further research that I realized — I must admit that I did not know about this, or if I did, had forgotten it — that the reason for the lack of scholarly writing was likely because of the 1934 *Rules Enabling Act*, as amended, which permits the courts to develop evidentiary rules outside the case-by-case process.

#### 4. A PROPOSAL

The case-by-case method is still, of course, the process used for developing the law of evidence in Canada. Canada should learn from the American experience. The Supreme Court of Canada should play a role outside of the usual judicial common law process in developing a statement of the principles of evidence. The court has the authority and prestige to carry the project through to completion. It should specifically be given the power to take on the task by a simple amendment to the *Supreme Court Act*. The court would not have to do anything, if it chose not to. It could, however, start with certain areas, such as hearsay. Or it could decide to tackle the whole body of evidence, although it is likely to move cautiously if it was

<sup>47</sup> Scallen (2002), "Analyzing" at 854; see also Rice and Delker, "Federal Rules of Evidence Advisory Committee" at 687.

<sup>48</sup> 28 U.S.C §2074 (b) (1988).

given this new rule-making power.

The Supreme Court, I assume, would not be the body to prepare the statement of principles. It has other important tasks to perform. It could, as the U.S. does with the Judicial Conference, use the Canadian Judicial Council to handle the project. The Council has successfully produced a statement of the principles of ethics for judges and has developed model jury charges. The Council is made up of all the federally-appointed chief justices and associate chief justices across the country. Or the task could be given to the National Judicial Institute, which is responsible for judicial education for federally and provincially appointed judges, and involves the provincially appointed judges in the administration of the Institute. In either case, a special allocation of federal funds would have to be provided to ensure that the work was done in a timely and effective manner. The budget for such a project would likely be less than the true cost of a couple of evidence cases decided by the Supreme Court of Canada.

Whatever body prepares the rules, it should be the Supreme Court of Canada that sends them on for parliamentary approval. The amendment to the *Supreme Court Act* should make clear that the rules or principles would apply to all criminal trials in all courts in Canada under the federal criminal law power. It should also apply to civil cases in the Federal Court of Canada. Provincial governments could then adopt the rules for the provincial courts (including the provincial Superior Courts) by legislation, or the provincial courts could do so under their own rule-making authority, assuming the courts were given such powers.

The approach suggested here would be preferable to starting again with an evidence project though a new federal Law Commission or through the Uniformity Commissioners. Of course the Law Reform Commission of Canada's Code, the Ontario Law Reform Commission's Rules, the Uniformity Commissioner's proposal, Ron Delisle's Military Tribunal Code, and the accumulated cases from the Supreme Court of Canada and other courts would all be good starting points. The committee assembled to do the work and prepare the rules should be representative of various groups across the country: judges, lawyers, academics, and knowledgeable lay persons.

As noted above, I believe that it would be wise to develop the statement of the rules through the Supreme Court's rule-making power, using the American technique of assumed Congressional approval unless rejected — which is also the way English court rules are handled<sup>49</sup> — or it could be by approval of the Governor

<sup>49</sup> See the British *Constitutional Reform Act 2005*, section 12, which replaces the *Judicature Act* and which uses a negative resolution procedure for judicial rule-making. Schedule 1, part 1, section 4(2) provides: "A statutory instrument containing designated rules is subject to annulment in pursuance of a resolution of either House of Parliament." Canada also uses "negative resolutions", although not for court rules, which are approved by the Cabinet and are laid before the House. The negative resolution procedure is used in other contexts in Canada, but not often. See section 39(c) of the *Interpretation Act*, R.S.C. 1985, c. I-21: "the expression 'subject to negative resolution of Parliament', when used in relation to any regulation, means that the regulation shall be laid before Parliament within fifteen days next thereafter that Parliament is sitting and may be annulled by a resolution of both Houses of Parliament introduced and passed in accordance with the rules of those Houses." The procedure has only been

General in Council, i.e., the cabinet, through regulations and not through legislation, or it could require both approval by cabinet and a lack of a negative vote by Parliament. Or, of course, it could require approval by Parliament in the regular manner. But, something should be done. The result would likely be a clearer statement of the rules of evidence than now exists, prepared under the auspices of the judiciary, the persons most knowledgeable about evidentiary rules. The rules would then be available to lawyers and litigants in a comprehensive and accessible form, which would help control the length and cost of both civil and criminal trials.

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