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HEARSAY EVIDENCE

By E. G. EWASCHUK*

A. INTRODUCTION

The law of evidence has one basic postulate: all evidence that is logically probative is admissible.[1] Admissible evidence must, therefore, be relevant to establish a basic element to be proved. This evidentiary postulate of equating admissibility with relevance is not absolute but is circumscribed by certain limiting doctrines which exclude otherwise relevant evidence, such as hearsay evidence, opinion evidence, character evidence, similar fact evidence and self-serving evidence. Indeed, all of these exclusionary doctrines in turn have exceptions which result in the exceptions being embraced by the basic inclusionary postulate. These exclusionary doctrines emerged from the development of the jury system and essentially were formulated on the premise that the admission of such evidence before a jury of laymen would result in prejudice that would outweigh the benefit of introducing the evidence itself.[2] It was judicial scepticism of the lay juror's ability to judiciously weigh otherwise relevant evidence that resulted in the judicial legislation of the exclusionary rules of evidence. A proper question may be whether judicial distrust of the ability of the lay juror to suppress basic biases and effectively and disinterestedly weigh certain types of evidence is still valid in present times.

Of all the exclusionary rules, the most pervasive and characteristic of the quibbling and nit-picking attitude of lawyers is the hearsay rule. This is not to say that it is not a valid rule. Indeed, Dean Wigmore has termed the hearsay rule, "that most characteristic rule of the Anglo-American Law of Evidence—a rule which may be esteemed next to the jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure."[3] It would seem that both the hearsay and opinion exclusionary rules are subdivisions of the rule that a witness may only testify as to first-hand knowledge. That is, hearsay is usually taken to mean that a witness cannot testify that he has heard someone else say something out of court. The maker of the out-of-court statement, which presumably is relevant to the legal matter in issue, is termed, by most commentators, the declarant. However, stating that what the non-testifying declarant has said is inadmissible is not strictly accurate, since the statement may be tendered not to prove the truth of the contents of the statement but to prove that the statement was in fact made.

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[1] *The Queen* v. *Wray*, [1970] 4 C.C.C. 1 at 22; 11 D.L.R. (3d) 673 at 693; 11 C.R.N.S. 235 at 257; [1971] S.C.R. 272 at 297 per Judson J.

[2] This is a basic theme of Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, and Co., 1896).

[3] Wigmore, *A Treatise On The Anglo-American System of Evidence In Trials of Common Law*, vol. 5 (3d ed. Boston: Little, Brown, and Co., 1940) at 27.

For example, a declarant may state to a third party that the plaintiff in a libel action is a thief. Of course, the plaintiff in leading such evidence is not attempting to establish that he is a thief, for to do so would defeat his own cause. He is simply tendering this hearsay evidence to establish that the libellous statement was in fact made. Similarly, in an application to set aside a will, the applicant, in leading evidence that the deceased testator at the time he made his will, stated he was Napoleon, does not tender that evidence to prove he was Napoleon. Rather, it is led to prove that by making the statement the testator was at that time, mentally incompetent.

Indeed, the general rule that hearsay is inadmissible only when tendered as proof of the assertion contained in the statement and not if tendered to prove that the statement was made emanated from a fact situation where the accused attempted to testify as to threats made to him by terrorists and the perceived need to carry firearms in order to protect himself. The Privy Council, in response, formulated the hearsay rule as follows:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissable when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissable when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made.[4]

Admissible hearsay which is not tendered to establish the verity of a statement is termed 'original' evidence. By contrast, true exceptions to the hearsay rule are tendered to prove the truth of the statements and are not merely original evidence. The 'original' hearsay evidence rule is quite understandable; the difficulty lies in its application, since all counsel tendering otherwise inadmissible hearsay submit to the court that the evidence is not offered to establish the truth of a statement. Often, when pressed, counsel cannot, in fact, state what the other purpose is.

The rationale for excluding hearsay evidence relates to two suspected dangers; first, that the declarant has not pledged his oath as to the truth of his statement and second, that there is no opportunity to cross-examine the declarant.[5] Coke, in his Third Institute, condemned the use of hearsay evidence as "the strange conceit that one may be an accuser by hearsay."[6] By contrast, in continental Europe a system of evaluating witnesses and the type of evidence they tendered was formulated on a quantitative basis, based on a requirement of two witnesses or their fractional equivalent as "full proof" with "one witness upon personal knowledge being equal to two or three upon hearsay."[7] Thus, unlike England, most European legal systems, as a general rule, admit hearsay evidence if that evidence is relevant. The quantitative system of different weight being accorded to different types of evidence has, following the French Civil Code of 1804, been replaced by a system that allows the court to determine in its discretion what weight it will accord to a

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[4] *Subramanian* v. *Public Prosecutor*, [1956] 1 W.L.R. 965 at 969 (P.C.).

[5] *R.* v. *Christie*, [1914] A.C. 545.

[6] Edward W. Cleary, ed., *McCormick's Handbook on the Law of Evidence* (2d ed. St. Paul: West Publishing Co., 1972) at 581.

[7] *Supra*, note 3, para. 1364, at 16, n. 25.

particular piece of evidence[8] and continues the practice of accepting hearsay evidence but giving it secondary weight.

Inherently, hearsay is second-hand evidence which, by definition, contravenes the now withering best evidence rule. If the hearsay is a narration of past facts, as opposed to a spontaneous statement, it admits of possible fabrication. In a criminal or even a civil action, parties have the general right to confront the declarant of potentially adverse evidence. Indeed, Wigmore stated that "cross-examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth. It may be that in more than one sense it takes the place in our system which torture occupied in the medieval system of the civilian."[9] Moreover, by definition, that invaluable instrument of the discovery of truth, cross-examination, is not available against a hearsay declarant.

Skilfully used, cross-examination is especially effective to test the testimonial honesty and accuracy of the testifying witness. The indicia of honesty and accuracy in the testimony include: the opportunity to perceive and actual perception of the event; the memory of the event; the ability to accurately communicate what was perceived; and, the sincerity and honesty of the witness in testifying in respect of the event. Since, again by definition, the witness does not perceive the event and since he attempts to relate second-hand hearsay evidence, the opportunity to cross-examine as to actual perception, memory and communication is not available. Only the witness' sincerity in relaying the hearsay statement, which may suffer from inaccuracy through second-hand transmission, is available to be tested by the crucible of cross-examination.

Phipson lists various other reasons for justifying the exclusion of hearsay evidence:

> In more recent times, rejection, even where such evidence was the 'best' obtainable, has been based on its relative untrustworthiness for judicial purposes owing to
> (1) the irresponsibility of the original declarant, whose statements were made neither on oath nor subject to cross-examination;
> (2) the depreciation of truth (accuracy) in the process of repetition; and
> (3) the opportunities for fraud its admission may open; to which are sometimes added
> (4) the tendency of such evidence to protract legal inquiry; and
> (5) to encourage the substitution of weaker for stronger proof.[10]

Notwithstanding the objections and obvious dangers which exist primarily in relation to the narration of past events, many exceptions to the hearsay rule have been judicially and legislatively created in certain circumstances of necessity, (e.g., a declarant is dead and no other evidence is available) and in certain circumstances of obvious trustworthiness, (e.g., hospital records). When so permitted, this evidence is generally admitted for the truth of the

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[8] For a brief review of the continental rules of evidence see, Ontario Law Reform Commission, *Report on the Law of Evidence* (Toronto: Ministry of the Attorney General, 1975) at 3-6.

[9] *Supra*, note 3, para. 1364 at 16, n. 25.

[10] Phipson, *On Evidence* (12th ed. London: Sweet and Maxwell, 1974) para. 636.

assertions. Numerous as the exceptions are, there is no so-called lynch-pin exception to ensure that the general rule remains that hearsay evidence is inadmissible.

In comparing the treatment of hearsay by the Law Reform Commission of Canada in its Federal Evidence Code,[11] the Report on the Law of Evidence by the Ontario Law Reform Commission[12] and the U.S. Federal Rules of Evidence,[13] the reader is struck simultaneously by the similarity and the dissimilarity of their approaches. It is clear that all three works recognize that the present rules regarding hearsay are restrictive and require liberalization. For the most part, they all recognize the distinctions between first-hand and multiple hearsay, documentary and oral hearsay, and the greater trustworthiness of first-hand and documentary hearsay.

The three works start with the basic premise that the present rules relating to hearsay evidence are antiquated, formalistic and sometimes preclude the reception of otherwise useful, though secondary evidence. They acknowledge that in certain situations the evidence should be admitted but subject to weight limitations. In the main, they recognize the classic and pervasive problem confronting the lay witness who cannot understand why he cannot inform the court what his wife told him when she noticed an incident in progress; the resultant artificiality of the whole situation must be solved.

In an attempt to solve these problems, the Ontario approach results in the most conservative treatment of the hearsay rules. The American approach is midway along the spectrum, whereas the Law Reform Commission of Canada's Federal Code is the most liberal in its approach, although the Commission appears to be so enamoured by the U.S. approach, that it lifts many sections verbatim. The approach of the Federal Code is bolder than the others, yet with respect to certain types of hearsay evidence[14] it is perhaps too bold.

B. THE EVIDENCE CODES

The following topics will be examined in the light of recent case law, the Law Reform Commission of Canada's Federal Code of Evidence, the proposed Ontario Act and the promulgated U.S. Federal Code of Evidence.

1. *The General Rule*

All three works retain the present exclusionary rule.

2. *Available Witnesses*

(a) Existing Law

(i) *Previous Consistent Statements*

The general rule is that a witness may not be asked by the party calling him whether he has formerly made a statement consistent with his present

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[11] Law Reform Commission of Canada, *Report on Evidence* (Ottawa: Ministry of Justice, 1975) sections 27-31.

[12] *Supra*, note 8, sections 16, 17, 22-24, 27, 32-34, 37-41.

[13] Fed. Rules Evid., 28 U.S.C.A., Rules 801-06.

[14] *Supra*, note 11.

testimony. Thus, in *R.* v. *Pappin*[15] the accused, charged with possession of marijuana, attempted to testify that after his arrest he had told the police that he was unaware of the contents of the package. That evidence was rejected at trial; on appeal, the Ontario Court of Appeal held that it was correctly rejected on the basis that it was "self-serving"[16] notwithstanding that the evidence was consistent with his testimony.[17]

As well, the previous consistent statement may not become evidence through the testimony of other witnesses either by direct examination or by cross-examination. A common example occurs where an accused has, after the fact, informed a civilian or, more frequently, a peace officer, that he is not guilty of a crime of which he is accused, or that he has some particular excuse or justification relating to the accusation. The Alberta Court of Appeal in *R.* v. *Keeler*[18] decided that a police officer could not be called by the defence to testify that the accused had told him the same exculpatory story as the accused had given under oath. Usually the defence attempts to elicit such testimony through a peace officer testifying for the Crown so that the accused need not testify.[19]

The rationale for the rejection of this type of evidence is that since it only goes to consistency, the cumulative effect may be completely disproportionate to its actual worth. For example, an accused may tell one hundred neighbours of his alibi and call all one hundred to testify to that effect. In reality, since his declaration to each is after the fact, it is his credibility that is significant and not the number of people to whom he has related that defence. This latter evidence is surplusage. Obviously, in addition to the danger of easy fabrication of false defences, the time consumed in calling the one hundred neighbours may be totally disruptive of and distracting from the main issues of the trial.

This rule against the admissibility of previous consistent statements (also called the rule against self-serving evidence, the rule against narrative or the rule against self-corroboration[20]), admits of certain exceptions. The first exception is that in sexual assaults, including civil suits,[21] what the victim has stated at the first reasonable opportunity and not in response to leading questions about the alleged sexual assault is admissible, but only to prove consistency and not to prove the truth of the statement, as part of the historical

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[15] (1970), 12 C.R.N.S. 287 (Ont. C.A.).

[16] *Id.* at 287.

[17] The application of this principle may be doubtful in light of the later decision of the Supreme Court of Canada in *R.* v. *Risby* (Unreported, March, 1978, S.C.C.), though, *Risby* deals with the eliciting of this type of evidence through a Crown witness.

[18] (1977), 36 C.C.C. (2d) 8 (Alta. C.A.).

[19] Cross, *On Evidence* (4th ed. London: Butterworths, 1974) at 218 states that the accused, as of right, may elicit his statement from the police. This appears contrary to *R.* v. *Roberts*, [1942] 1 All E.R. 187; (1942), 28 Cr. App. R. 102 and was specifically rejected in *R.* v. *Keeler*, *supra*, note 18 and *R.* v. *Waddell* (1976), 28 C.C.C. (2d) 315 (B.C.C.A.).

[20] Cross, *supra*, note 19 at 208.

[21] *Hopkinson* v. *Perdue* (1904), 8 O.L.R. 228 (Ont. Div. Ct.).

"hue and cry" that was required of any victim after ravishment.[22] The recent complaint goes to negate consent and, absent such complaint, it is presumed that there was consent.[23] This exception has been extended to sexual assaults on males.[24] As well, the evidence of the victim and the recipient of the complaint must seemingly be substantially similar as to the sexual aspect of the assault.[25]

The second exception is the doctrine of recent fabrication or invention. The admissibility of the previous consistent statement is dependent on an attack by the opposing party to the effect that the witness has recently contrived his testimony; this allegation opens the issue of the timeliness of the accusation. If such an attack is made, the previous consistent statement is admissible through other witnesses but it is admissible only to rebut the allegation of fabrication and to establish consistency of testimony.[26]

The third exception which permits previous consistent statements is identification evidence.[27] The victim of a robbery is often able to relate to the police a description of the alleged robber. The details of that identification are related to the court by the peace officer who obtained the eye-witnesses' statements, usually without objection by defence counsel. Often that out-of-court identification is much more detailed than what the victim can remember by the time the trial takes place. Presumably the out-of-court identification is admissible as original evidence to demonstrate consistency. In *R.* v. *Clarke*[28] the out-of-court identification and its attendant details were held to be admissible on the basis that they formed part of the *res gestae* and were also admissible to demonstrate consistency.

The more difficult problem is where the victim does not testify or, if he does testify, is not able to identify the accused as the perpetrator of the crime. Obviously, this is not a situation of a previously consistent statement. The English Court of Appeal, Criminal Division, dealt with this problem in *R.* v. *Osborne and R.* v. *Virtue*.[29] Notwithstanding the absence of in-court identification, a police officer who had witnessed the identification of the accused by

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[22] *R.* v. *Lillyman*, [1896] 2 Q.B. 167; and *R.* v. *Osborne*, [1905] 1 K.B. 551.

[23] *R.* v. *Boyce* (1975), 23 C.C.C. (2d) 16; 28 C.R.N.S. 336; 7 O.R. (2d) 561 (Ont. C.A.); *R.* v. *Mace* (1976), 25 C.C.C. (2d) 121 (Ont. C.A.): *R.* v. *Kistendey* (1976), 29 C.C.C. (2d) 382 (Ont. C.A).

[24] *R.* v. *Lebrun* (1951), 100 C.C.C. 16; [1951] O.R. 387; [1951] O.W.N. 397 (Ont. C.A.) and *R.* v. *Hurst and Miller*, [1966] 3 C.C.C. 399; 48 C.R. 238; 55 W.W.R. 358 (B.C.C.A.).

[25] *R.* v. *Shonias* (1975), 21 C.C.C. (2d) 301 (Ont. C.A.). However, because of the trauma and frequent hysteria of, e.g., rape, *R.* v. *Waddell, supra,* note 19, appears better reasoned, i.e., that testimonial inconsistency between the victim and recipient goes to weight and not to admissibility.

[26] *Welstead* v. *Brown* (1951), 102 C.C.C. 46; [1952] 1 D.L.R. 465; [1952] 1 S.C.R. 3 (S.C.C.): *R.* v. *Lalonde* (1971), 5 C.C.C. (2d) 168; [1972] 1 O.R. 376; 15 C.R.N.S. 1 (Ont. H.C.): *R.* v. *Wannebo* (1972), 7 C.C.C. (2d) 266; [1972] 5 W.W.R. 372 (B.C.C.A.).

[27] *Supra,* note 19 at 50.

[28] (1907), 12 C.C.C. 299; 38 N.B.R. 11 (N.B.S.C.).

[29] [1973] 1 All E.R. 649; [1973] 1 Q.B. 678 (C.A.).

two witnesses at an identification parade was allowed to testify to the fact of the identification, which testimony went to the truth of the hearsay identifications. Thus, the out-of-court identifications were held to be admissible hearsay. Cross seems to be of the opinion that this case was rightly decided and confirms the minority view "which may now be taken to represent the law"[30] which certain Law Lords espoused in *R.* v. *Christie*.[31] However, this view is directly opposite to that of the British Columbia Court of Appeal which subsequently decided in *R.* v. *McGuire*[32] that where a witness is unable to identify the accused in court, a peace officer may not testify as to previous out-of-court identification since that testimony would constitute inadmissible hearsay. Unfortunately, neither the *Christie*[33] nor *Osborne* and *Virtue*[34] cases were drawn to the attention of the court.

A fourth exception to the rule against the admissibility of previous consistent statements involves the situation where an accused has made a self-serving statement[35] which forms part of the *res gestae*.[36] The usual fact situation occurs when an accused is found in possession of, or in near proximity to, illegal subject matter. An example is stolen goods. In *R.* v. *Graham*,[37] the Supreme Court of Canada declared that the statement made by an accused upon being questioned by police as to his knowledge of the contents of an attaché case which contained stolen jewellery, was admissible through the cross-examination of the peace officer, who asked for the explanation and who at the time of the cross-examination was a Crown witness. The justification for this exception to the self-serving rule is that an accused is alleged to be in possession of the stolen property at the very moment it is discovered and, therefore, any explanation then offered constitutes part of the *res gestae*,[38] e.g., the possession of goods. In addition, it may be unfair if the Crown could rely on the possession and its factual presumption without in turn allowing the explanation to be immediately given to the court and without requiring the accused to so testify.

This exception has since been extended by the Supreme Court of Canada

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[30] *Supra*, note 19 at 51.

[31] *Supra*, note 5. In *Sparks* v. *The Queen*, [1964] A.C. 964 (P.C.), cross-examination of a third party as to how the victim described her assailant was held inadmissible hearsay, apparently because the statement was not identification evidence. Quaere, whether an accused may elicit an otherwise inadmissible sexual complaint.

[32] (1976), 23 C.C.C. (2d) 385; 29 C.R.N.S. 282; [1975] 4 W.W.R. 124 (B.C.C.A.).

[33] *Supra*, note 5.

[34] *Supra*, note 29.

[35] *R.* v. *Spencer* (1974), 16 C.C.C. (2d) 29 (N.S.C.A.) would extend this rule even to inculpatory statements which may be led by the Crown without the necessity of establishing voluntariness.

[36] The accused may or may not testify, but is available as a witness if he should choose to testify.

[37] (1972), 7 C.C.C. (2d) 93; 26 D.L.R. (3d) 579; 19 C.R.N.S. 117; [1972] 4 W.W.R. 488 (S.C.C.).

[38] Another unusual example of *res gestae* occurred in *R.* v. *Workman and Huculak*, [1963] 1 C.C.C. 297 (Alta. C.A.), aff'd [1963] 2 C.C.C. 1; [1963] S.C.R. 266 (S.C.C.), where a statement by the murder victim of future intention was held admissible as part of the *res gestae*.

in *R.* v. *Risby*[39] where the Court decided that the *res gestae* exception applies to all possession crimes. In that case, the accused was charged with possession of drugs and offered an immediate denial of knowledge when questioned about the drugs. The denial was not admitted during cross-examination of the officer who had questioned the accused and the Supreme Court held that the denial was wrongly disallowed since it was part of the *res gestae.*

(ii) *Previous Inconsistent Statements*

Previous inconsistent statements may involve a witness of the examiner or a witness of the opposing party. Different considerations are applicable.

If a party's own witness has stated something inconsistently on a prior occasion then various options are available. First, the examiner should attempt to refresh the witness' memory so that if the witness, as a result of the stimulus and aid of the prior statement, remembers what he had forgotten then his refreshed memory becomes direct evidence.[40] If the prior evidence is recorded, then the witness, if he can, should read the document silently himself. Secondly, if the witness persists as to his present testimony, then the examiner may ask leave of the Court to cross-examine the witness on the previous inconsistent statement. The general rule is that a party cannot impeach the testimony of his own witness. The exception to this rule is that the examiner may impeach his own witness by cross-examination at large if the witness proves hostile in demeanour.[41] Finally, in the civil case of *Wawanesa Mutual Insurance Co.* v. *Hanes,*[42] the Ontario Court of Appeal liberalized the use of prior inconsistent statements against one's own witness by interpreting the word "adverse" contained in the particular section in question not as meaning hostile but as merely opposed in interest to that of the party calling him. In response to the favourable reaction to the *Hanes* case, the Federal Government in 1969 added the present section 9(2) to the *Canada Evidence Act.*[43] It would thus seem that a party, by leave, may then cross-examine on the previous statement if it is adverse to his position but may only cross-examine at large if the witness proves hostile.[44] If the witness admits making the previous statement, or if it is otherwise proved, it can only be used to impeach the credit of the witness, not as substantive testimony standing on its own, unless the witness retracts and adopts the previous statement as true.[45]

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[39] *Supra,* note 17.

[40] *Reference Re Regina* v. *Coffin* (1956), 116 C.C.C. 215; [1956] S.C.R. 191 (S.C.C.): *Stewart* v. *The Queen* (1977), 31 C.C.C. (2d) 497; 71 D.L.R. (3d) 449; [1976] 6 W.W.R. 644 (S.C.C.).

[41] *Greenough* v. *Eccles* (1859), 5 C.B. (N.S.) 786; 28 L.J.C.P. 160: *R.* v. *May* (1915), 23 C.C.C. 469; 21 D.L.R. 728; 7 W.W.R. 1261; 21 B.C.R. 23 (B.C.C.A.).

[42] [1963] 1 C.C.C. 176; 28 D.L.R. (2d) 386; [1961] O.R. 495 (Ont. C.A.).

[43] R.S.C. 1970, c. E-10, as am. 1976-77, c. 28, s. 14.

[44] The cryptic judgment of the Supreme Court of Canada casts doubt on the validity of the procedure involving section 9(2) as formulated by Culliton C.J.S. in *R.* v. *Milgaard* (1971), 2 C.C.C. (2d) 206; 14 C.R.N.S. 34; [1971] 2 W.W.R. 266 (Sask. C.A.) leave to appeal refused 4 C.C.C. (2d) 566n; [1971] S.C.R. x. See also *R.* v. *Tom,* [1976] 3 W.W.R. 391 (Man. C.A.).

[45] *Deacon* v. *The King* (1947), 89 C.C.C. 1; [1947] 3 D.L.R. 772; [1947] S.C.R. 531 (S.C.C.).

Another alternative is not to confront the witness, especially if he has otherwise assisted the examiner, and the inconsistency is not crucial to the case.[46]

There is no like restriction when cross-examining an opposing witness. That witness may be cross-examined on any previous inconsistent statement he may have made. If he denies the truth of the evidence and if it is established that he made the statement then again it may only go to credibility and not to substantive truth. However, there is a further limitation in that the cross-examiner may not lead evidence to contradict the witness on collateral matters.[47] An example occurred in *R.* v. *Rafael*[48] where the accused was charged with fraud in relation to immigration matters. The accused was cross-examined as to whether he had filed income tax returns over a number of years. He replied that he had and the Crown called evidence in reply to establish that this was not true. The conviction was quashed on the basis that since the matter was collateral, the Crown was bound by his answer irrespective of its truth. Exceptions to this rule include evidence of bad character, bias,[49] previous convictions and physical or mental disability.[50] On the other hand, if the matter has been brought out in examination-in-chief, the cross-examiner is not bound by the answer and reply evidence may be called in respect of any matters that counsel in examination-in-chief elected to introduce.[51] As well, where the cross-examiner elicits a collateral matter not dealt with in examination-in-chief or some aspect which was not dealt with in examination-in-chief, the examiner, as of right, may re-examine on this area without contravening the rule against splitting the case.[52] In other words, the collateral evidence rule only applies against the cross-examiner and not the examiner. The rationale for excluding reply evidence in respect of collateral matters is to avoid the requirement of deciding those side issues and preventing them from detracting from the main issues and from consuming too much overall time of the court.

(b) The Evidence Codes

The approach of the Law Reform Commission of Canada to the question of previous statements by a witness is simply dealt with in one section. By section 28, "a statement previously made by a witness is not excluded by section 27 [hearsay] if the statement would be admissible if made by him while testifying as a witness." Thus, there is no distinction made between consistent and inconsistent statements and on the basis of which party calls

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[46] *R.* v. *Cronshaw and Dupon* (1977), 33 C.C.C. (2d) 183 (Ont. Prov. Ct.).

[47] *Steinberg* v. *The King* (1931), 56 C.C.C. 9 at 38; [1931] 4 D.L.R. 8 at 34 (Ont. C.A.), aff'd [1931] S.C.R. 421 (S.C.C.).

[48] (1972), 7 C.C.C. (2d) 325; [1972] 3 O.R. 238 (Ont. C.A.).

[49] *McDonald* v. *The Queen* (1960), 126 C.C.C. 1; 32 C.R. 101; [1960] S.C.R. 186 (S.C.C.).

[50] McWilliams, *Canadian Criminal Evidence* (Toronto: Canada Law Book Limited, 1974) at 633.

[51] *R.* v. *Gross* (1973), 9 C.C.C. (2d) 122 (Ont. C.A.), contra *R.* v. *Hrechuk* (1950), 98 C.C.C. 44; 10 C.R. 132; [1950] 2 W.W.R. 318 (Man. C.A.).

[52] See *R.* v. *Drake* (1970), 1 C.C.C. (2d) 396; 12 C.R.N.S. 220; [1971] 1 W.W.R. 454 (Sask. Q.B.) and *R.* v. *Ament* (1972), 7 C.C.C. (2d) 83; 19 C.R.N.S. 15 (Ont. H.C.).

the witness. All first-hand hearsay is otherwise admissible. The basis for this is presumably three-fold: first, when the witness himself testifies as to his own previous statements he is under oath and is subject to cross-examination as to his testimonial factors; second, where others testify as to the previous statements, they may do so only after the witness who made the statement has testified; and third, prior statements are closer to the event and consequently are likely to be more accurate and to have been made when there was less likelihood of lying.

This approach renders all previous statements admissible as substantive evidence; the previous statements are not admitted merely to support or impeach. As a result, the present law is completely changed. For example, the rule against self-serving evidence is abolished. An accused person, out of self interest, would be unwise if he did not, each and every time charged, tell all his neighbours that he had an alibi and describe the details thereof. As well, the section is not entirely clear on the question of whether the witness must first testify before the previous statements are admissible. If so, then an accused would not be able to cross-examine Crown witnesses to elicit his previous self-serving statements and would, perforce, be required to call those witnesses as his own, should he desire to confirm his own testimony.

A greater danger occurs with respect to Crown witnesses. A frequent occurrence is the key Crown witness who has changed his testimony whether from fright, bribery or for whatever reason. If the previous statement, which probably was not under oath, was admitted to prove the truth of the matter, an accused could be convicted of a crime on unsworn evidence. It is true that the witness will be examined on the reasons for changing his position, but the stark fact remains that the jury will be entitled to disbelieve the witness as to his sworn testimony and convict the accused on the basis of the unsworn statement. Admittedly, there is more justification for allowing a previous inconsistent statement to be used substantively on the basis that it is more likely that the previous statement was true. However, if the evidence is sparse, there probably should be a mandatory requirement of corroboration of the previous inconsistent statement before a conviction may be founded on that unsworn statement.

As well, the recent complaint, identification evidence, and all statements to police will be admissible as to truth and may be used substantively instead of merely for consistency as is the present rule for the recent sexual complaint. Furthermore, since the rule of collateral evidence is abolished, the cross-examiner is not bound by the answer on collateral matters but may call interminable reply evidence on each matter. This could result in doubling or tripling court time unless there is judicious application of section 5 which allows a court to exclude evidence if its probative value is substantially outweighed by the danger of undue consumption of time. In turn, this decision, which itself involves the hearing of evidence and representations from counsel, will be required each time reply evidence is led in respect of collateral matters.

The Report on the Law of Evidence of the Ontario Law Reform Commission takes a more traditional approach and retains the distinction between previous consistent and inconsistent statements.

It abolishes the needless requirement to obtain leave of the court to

demonstrate that a party's own witness has at some other time made an inconsistent statement.[53] However, the previous inconsistent statement is not admissible to prove any fact that is contains.[54]

With respect to previous consistent statements admitted to rebut an allegation of fabrication, the Ontario Report alters the law so that the previous statement becomes substantive evidence.[55] However, where corroboration is required, the previous statement cannot constitute corroboration.[56]

As for cross-examination on previous inconsistent statements, the previous statements become evidence of the facts contained in those statements if the witness admits that he made those statements or if proof is otherwise established that he did.[57] What is not clear is whether section 34 is restricted to opposing witnesses in the true sense or extends to cross-examination of hostile witnesses. Since there appears to be no section dealing with hostile or adverse witnesses in the sense of permitting cross-examination of one's own witnesses, it would appear that cross-examination of one's own witnesses will never be permitted. If this is so, then the Crown could never obtain a conviction based solely on the unsworn previous inconsistent statement of one of its witnesses, although, by section 24, it may contradict its inconsistent witnesses. In addition no distinction is made between previous inconsistent written and oral statements, notwithstanding that the former is clearly superior in the sense that nothing is lost in the transmission of testimony. As well, the usual safeguard of permitting only statements made *ante litem motam* (before a motive to fabricate exists) to be used substantively is disregarded.

The American Federal Code of Evidence takes a middle approach between the absolute rule of admitting previous statements for substantive purposes, as formulated by the Law Reform Commission of Canada, and the more restrictive approach of the Ontario Law Reform Commission; clearly, however, its approach is closer to that of the Ontario Report. By Rule 801(d), certain statements by witnesses are deemed not to be hearsay and, therefore, admissible for the truth of their assertions. These include the following:

(1) Statements inconsistent with present testimony but which were given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. The proposal of the Federal Code does not require the safeguard of prior oath which usually will be accompanied by cross-examination, nor does the Ontario proposal but, like the American proposal, it is restricted basically to inconsistent statements but only of opposing witnesses.

(2) Statements consistent with present testimony offered to rebut an express or implied charge of recent fabrication or improper influence or motive. This rule is expanded beyond recent fabrication and has no stated limitation as to corroborative use as has section 28(2) of the Ontario proposal.

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[53] *Supra*, note 8, section 24(1).

[54] *Id.* section 24(3).

[55] *Id.* section 28(1).

[56] *Id.* section 28(2).

[57] *Id.* section 34(2).

(3) Statements of identification of a person made after perceiving him. The Ontario proposal has no similar section.

3. *Recorded Statements of Witnesses*

(a) Existing Law

The category of recorded statements of witnesses is divided into present memory refreshed and past memory recorded. Present memory refreshed substantially differs from past memory recorded in that in the former situation the memory is stimulated by the document or whatever form the memory aid takes. Consequently, the memory is revived and the witness is able to furnish the evidence; the aid itself is not admissible evidence.[58] At early common law,[59] there was no restriction upon the use of memoranda to refresh and the memoranda were not required to have been prepared or verified by the witness contemporaneous with the event as is the present Canadian law. Most American courts adhere to this approach[60] as do the courts in New Zealand.[61] However, English and Canadian courts have not been so liberal, apparently for the reason that to allow a party to stimulate his own witness by any aid whatsoever would lead to wholesale perjury by helpful witnesses. In *R.* v. *Woodcock*,[62] the Criminal Court of Appeal held that the trial judge had erred in permitting a witness to refresh his memory from a court deposition since it was not a contemporaneous note or record. However, although it seems some contemporaneity is required since the witness must have a memory to record, the note need not be made precisely at the time of the event; for example, the Supreme Court of Canada in *Reference Re Coffin*[63] was of the view that a witness might refresh her memory from a transcript taken at the preliminary inquiry. In Canada, a statement under oath seems to constitute an exception to the contemporaneity requirement since the witness, in any event, does not personally record or verify the contents of his testimony.

As for the verification precondition, in *R.* v. *Davey*,[64] an observer to a hit and run accident wrote down the licence number of the fleeing vehicle and reported the incident to a policeman. The observer heard the policeman broadcast the licence number over the police radio. The observer subsequently lost her record. At trial, the constable was not permitted to testify as to the license number as his note was deemed to be inadmissible hearsay. As well, the observer was not permitted to refresh her memory from the policeman's note since she had not observed him record the licence number. On appeal by stated case, it was decided that because the witness was in a position to verify the accuracy of the policeman's note since she overheard the broadcast when he related the licence number from his note, then this

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[58] *Young* v. *Denton*, [1927] 1 D.L.R. 426; [1927] 1 W.W.R. 75; 21 S.L.R. 319 (Sask. C.A.).

[59] *Henry* v. *Lee* (1810), 2 Chit. 124.

[60] *Supra*, note 6 at 15.

[61] *R.* v. *Naidanovici* [1962] N.Z.L.R. 334.

[62] *R.* v. *Woodcock*, [1963] Crim. L. Rev. 273.

[63] *Coffin, supra*, note 40.

[64] (1969), 6 C.R.N.S. 288; [1970] 2 C.C.C. 351; 68 W.W.R. 142 (B.C.C.A.).

constituted some evidence of verification and accordingly, she could refresh her memory from the note. It is questionable whether she was able to recall the licence number from the note or whether the note itself should have become evidence of past memory recorded.

It is clear that, in respect of past recollection recorded, the preconditions of contemporaneity and verification must be strictly complied with since the recording itself becomes evidence capable of proving its contents.[65] This assumes the availability of the witness who made or verified the record which otherwise would constitute inadmissible hearsay. If the witness is not available, the record may otherwise be admissible if the maker is deceased and was under a duty to make the record[66] or if it constitutes a business record[67] or meets the test in *Ares* v. *Venner*.[68] An unusual example of past memory recorded occurred in *R.* v. *Rouse & McInroy*.[69] In that case, the British Columbia Court of Appeal was of the opinion that where a Crown witness testifies upon cross-examination pursuant to section 9(2) of the *Canada Evidence Act* that she could not remember certain material facts, her written statement containing those facts was admissible hearsay as past memory recorded.

In *R.* v. *Alward*,[70] the New Brunswick Court of Appeal decided that a record of a serial number of a watch made when the memory of events was fresh is admissible as past recollection recorded and not merely to refresh memory notwithstanding that the witness cannot remember the particular serial number but can testify as to the usual accuracy of his recordings.

In a somewhat related situation, two employees of a store testified that one had read out serial numbers from coats and the other had written the numbers on an inventory sheet. The British Columbia Court of Appeal in *R.* v. *Penno*[71] held that the evidence of the witness, calling out the numbers, was not hearsay because it was not evidence of statements made to her by any other person. The evidence of the recorder was held as well not to be hearsay since it supposedly was not introduced for the purpose of proving the truth of what was said to her, but merely as evidence that she recorded accurately what was said to her. However, all that results is an inventory sheet, which is past memory recorded, that seems to lack verification by the maker of the statement unless both participants are considered as one, since their actions were interdependent. In any event, the only purpose of the

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[65] *Fleming* v. *Toronto R.W. Co.* (1911), 25 O.L.R. 317; 2 O.W.R. 827; 3 O.W.N. 457 (Ont. C.A.).

[66] *Palter Cap Co. Ltd.* v. *Great West Life Assurance Co.*, [1936] O.R. 341 (Ont. C.A.).

[67] *Supra*, note 43, section 30.

[68] (1971), 14 D.L.R. (3d) 4; [1970] S.C.R. 608; 12 C.R.N.S. 349; 73 W.W.R. 347 (S.C.C.) as applied in *R.* v. *Penno* (1977), 37 C.R.N.S. 391; [1977] 3 W.W.R. 361 (B.C.C.A.).

[69] (1977), 36 C.C.C. (2d) 257 (B.C.C.A.) leave to appeal granted to the Supreme Court of Canada.

[70] (1977), 32 C.C.C. (2d) 416; 73 D.L.R. (3d) 290 (N.B.C.A.), aff'd 16 N.R. 127 (S.C.C.).

[71] *Penno, supra*, note 68.

inventory sheet was to establish the truth of the particular recorded numbers. As well, the majority held that the inventory sheet was admissible on the basis of *Ares* v. *Venner*[72] and section 30 of the *Canada Evidence Act* as constituting a business record.

Another related matter is the use of notes by policemen which are used to refresh memory and rarely for the purpose of past memory recorded. Again, most courts will not allow an officer to refer to his notes unless he pledges that they were made fairly close to the time of the event.[73] If the officer has referred to his notes there is a right to inspect and cross-examine upon the notes.[74] However, where the officer has not referred to his notebook at trial, counsel cannot inspect it as of right[75] unless the officer has refreshed his memory so close to the time of the hearing that it may be considered the equivalent of use at the hearing.[76] As well, the distinction between production of notes used to refresh memory and the production of witnesses' statements must be remembered.

(b) The Evidence Codes

The proposal of the Federal Evidence Code as to past memory recorded is simple. By section 28, any statement previously made by the witness is admissible if it otherwise complies with the rules of evidence. Thus, there is no requirement of contemporaneity and verification. This is logical since the witness is available to be cross-examined as to the accuracy of the statement and the circumstances under which it was recorded. Contemporaneity and verification will go to weight and not admissibility, thus doing away with the subtle and often ludicrous distinctions that attend the present rule.

As for refreshing memory, any aid may be used.[77] The only limitation is that the aid must tend to refresh memory rather than lead to mistake or falsehood. Again, this is a rational approach especially in relation to items such as the use of a calendar or almanac. Rather than preclude the reception of otherwise useful evidence, the jury may be warned as to its limitations.

The Ontario proposal is more conservative than the Canada approach. As for present memory revived, the witness may only be shown a writing to assist his memory if he has made or verified the writing at the time of the event or within a reasonable time thereafter.[78] This proposal essentially represents the present law and is far too restrictive. Timid and non-professional witnesses who are sincere in testifying should be given all reasonable assistance.

As for past recollection recorded, the present law is maintained. The

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[72] *Venner, supra,* note 68.

[73] In British Columbia, it seems that the general practice requires the officer to totally exhaust his memory before he may refer to his notes.

[74] *Re Nichols* (1977), 34 C.C.C. (2d) 153 (Ont. H.C.); *R.* v. *Monfils* (1971), 4 C.C.C. (2d) 163; [1972] 1 O.R. 11 (Ont. C.A.).

[75] *R.* v. *Kerenko, Cohen and Stewart,* [1965] 3 C.C.C. 52; 49 D.L.R. (2d) 760; 45 C.R. 291 (Man. C.A.).

[76] *R.* v. *Lewis,* [1969] 3 C.C.C. 235; 67 W.W.R. 243 (B.C.S.C.).

[77] *Supra,* note 11, section 60.

[78] *Supra,* note 8, section 37.

record must be contemporaneous with the event and it must be checked for accuracy while the occurrence is still fresh in mind.[79] Again, this is timid. The witness is present for cross-examination and is able to account for the circumstances of the recording. A prohibition against conviction based in part on past recollection recorded after there is a motive to fabricate might be sufficient or, in the least, the courts should require corroboration if the record is made after the motive to fabricate exists.

The U.S. Federal Code allows any writing to be used by a witness to refresh his memory[80] and approximates the approach of the Law Reform Commission of Canada. As for recorded recollection, the record must have been made or adopted by the witness while the matter was fresh in his memory;[81] if so, the record is not excluded as hearsay. This rule is similar to the Ontario proposal and is not as broad as the Canada proposal.

4. *Unavailable Witnesses*

(a) *Res Gestae*

(i) *Existing Law*

The *res gestae* exception to the hearsay rule generally assumes the absence of the declarant as a witness and involves a statement, either accompanying and explaining a fact in issue, or relevant to a fact in issue and made substantially contemporaneous with that fact. The statement constitutes part of the story and must not be a mere narration of past facts.

Until recently, the courts took a strict approach as to when the event was continuing and when it had terminated. In the leading case of *R.* v. *Bedingfield,*[82] the accused was charged with murder; his defence was that the deceased had committed suicide by slitting her own throat. Shortly after the deceased emerged wounded from the room in which the accused had been, she stated: "Oh dear Aunt, see what Harry has done to me." She immediately died. This statement was excluded by Cockburn C.J. on the basis that it was after the fact, and, therefore, did not constitute part of the *res gestae.*

This approach was followed by the Supreme Court of Canada in *Gilbert* v. *The King,*[83] although in that case the statement was in fact admitted when made after the deceased had been shot but during his flight from further harm. In *R.* v. *Wilkinson,*[84] the Nova Scotia Court of Appeal decided that a statement implicating the accused in trying to kill the victim was admissible, as it was made moments before the victim was shot and was actuated by intense fear; accordingly it was held to be more than a narration of past facts, being a part of the transaction itself. In *R.* v. *Leland,*[85] the Ontario Court of

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[79] *Id.* section 38.

[80] *Supra,* note 13, Rule 612.

[81] *Id.* Rule 803(4).

[82] (1879), 14 Cox C.C. 341.

[83] (1907), 12 C.C.C. 127; 38 S.C.R. 284 (S.C.C.).

[84] (1934), 62 C.C.C. 63; [1934] 3 D.L.R. 50; 7 M.P.R. 562 (N.S.C.A.).

[85] (1950), 98 C.C.C. 337; [1951] O.R. 12; [1951] O.W.N. 30; 11 C.R. 152 (Ont. C.A.).

Appeal held that a statement: "Rose she stabbed me" made during a murderous assault was not part of the *res gestae*: certainly a very strict application of the doctrine.

The Privy Council has addressed itself as well to the question of *res gestae*. In *Teper* v. *The King*,[86] the accused had been convicted of arson. The questionable evidence was the statement, "Your place burning and you going away from the fire." This statement was held to be an assertion after the fact and not part of the *res gestae*. Finally, in *Ratten* v. *The Queen*,[87] the Judicial Committee altered the approach to *res gestae*, or as it is now termed "spontaneous exclamations," from the determination of whether the statement constituted part of the transaction or event to the question of the risk of concoction or fabrication of evidence by the declarant. The decision in *Bedingfield*[88] was questioned and the Wigmore approach[89] was adopted so that as regards

> statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adopt his account, he should exclude it.[90]

One of the difficulties in dealing with *res gestae*, assuming the evidence meets the preconditions permitting its admissibility, is what weight the trier of fact may give to the evidence. In other words, does it merely constitute original evidence or is it admissible hearsay going to truth? In *Christie*[91] and *Leland*,[92] the Courts were of the view that *res gestae* constitutes, at best, merely original evidence. This assumes jurors can validly understand the subtle distinction between truth and non-truth and, if they can, will adhere to the limiting direction. The evidence is obviously tendered to establish truth if the declarant is unavailable. By contrast, the Privy Council in the *Teper*[93] case considered *res gestae* to constitute a true exception to the hearsay rule going to the truth of its contents. Since no qualification as to the use of "spontaneous exclamations" was made by the Privy Council in *Ratten*,[94] it seems that this new type of exception to the hearsay rule permits this hearsay to be admissible to establish truth, not merely as original evidence.

In Canada, *Ratten* has been referred to with approval in two criminal cases. In *R. v. Mulligan*,[95] Mr. Justice O'Driscoll of the Ontario High Court admitted the statement, "Billy stabbed me," on the basis that it constituted a dying declaration as well as on the basis of *Ratten*. In *R.* v. *Garlow, and*

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[86] [1952] A.C. 480; [1952] 2 All E.R. 447.

[87] [1971] 3 All E.R. 801; [1972] A.C. 378.

[88] *Supra*, note 80.

[89] *Supra*, note 3, para. 1746 termed "spontaneous exclamations."

[90] *Supra*, note 87 at 389 (A.C.); 807 (All E.R.) per Lord Wilberforce.

[91] *Supra*, note 5.

[92] *Supra*, note 83.

[93] *Supra*, note 84.

[94] *Supra*, note 85.

[95] (1973), 23 C.R.N.S. 1 (Ont. H.C.), aff'd on other grounds (1974), 26 C.R.N.S. 179; 18 C.C.C. (2d) 270 (Ont. C.A.).

Garlow[96] Madame Justice Van Camp also of the Ontario High Court, admitted a statement made approximately five minutes after the attack on the accused. After referring to both *Leland* and *Ratten*, she applied the test of spontaneity from the latter case and admitted the statement on the basis that the risk of fabrication was absent and that a stamp of trustworthiness was present.

(ii) *The Evidence Codes*

The Federal Code is silent as to *res gestae,* spontaneous exclamations or contemporaneous statements.[97] Indeed, it would seem that these three categories, as well as all species of first-hand hearsay evidence, e.g., dying declarations, statements made by deceased in course of duty, statements by deceased against their proprietary interest, are admissible under the revolutionary inclusionary rule provided for by section 29; that is, a statement made by a person who is unavailable as a witness is admissible if the statement would be admissible if made by the person while testifying as a witness. As a result, all first-hand hearsay not excluded by some other exclusionary rule, e.g., opinion by a non-expert, becomes admissible evidence subject to the limitation that the proponent of the statement has not procured the absence of the witness[98] and that reasonable notice of the intention to tender the statement is given to the opposing party.[99] No distinction is made between use in civil and criminal proceedings and between oral and written evidence and there is no requirement that the statement be made *ante litem motam.* As well, hearsay statements of prospective Crown witnesses given after the fact, may be used substantively by the Crown to prove guilt if the witness should later become unavailable. Again, the absolute admissibility of first-hand hearsay evidence is truly revolutionary.

The Ontario proposal is somewhat narrower. As well, but only in relation to civil suits, first-hand hearsay would become admissible if the declarant is unavailable.[100] Notice is required[101] and the credibility of the declarant may be attacked.[102] The statement is not capable of being corroborative[103] and the common law rules of admissibility, (e.g., *res gestae,* statements of deceased), and inadmissibility, (e.g., on the ground of privilege), are preserved.[104]

A new category of hearsay is made admissible whether or not the declarant is called as a witness if the statement is made "in such conditions of

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[96] (1977), 31 C.C.C. (2d) 163 (Ont. H.C.).

[97] This category first espoused by Professor E. M. Morgan has been adopted by several states. The U.S. Federal Code deals with it as "present sense impression," "excited utterance" and "existing emotional and physical condition," *supra,* note 13, Rule 803.

[98] *Supra,* note 11, section 29(3).

[99] *Id.* section 29(4).

[100] *Supra,* note 8, section 22(2).

[101] *Id.* section 22(3).

[102] *Id.* section 22(4).

[103] *Id.* section 22(5).

[104] *Id.* section 22(6).

spontaneity or contemporaneity in relation to an event perceived by the witness (declarant) as to exclude the probability of concoction or distortion."[105] This new inclusionary rule is, of course, as it is founded on the decision of the Privy Council in *Ratten*.[106]

The U.S. Code does not specifically refer to *res gestae*. It contains no general rule on admissibility of first-hand hearsay of unavailable witnesses. However, Rule 804(5) does give the Court a residual discretion to admit such evidence if it does not come within a specific exception, if certain circumstantial guarantees of trustworthiness exist and "the Court determines that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence." These requirements go to admissibility and not merely to weight.

Rule 803, which declares the availability of the declarant to be immaterial, contains three provisions that are related to *res gestae*. By subsection 1, "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is admissible as a present sense impression. By subsection 2, "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible as an excited utterance. This seems to adopt both Wigmore's "spontaneous exclamation" and the general principles of *Ratten*. By subsection 3, "a statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the exclusion, revocation, identification, or terms of the declarant's will" is admissible as indicative of the then existing mental, emotional, or physical condition. Similar to the unavailability section, the Court is given a residual discretion to admit all hearsay statements even if the declarant is available if the evidence satisfies certain conditions of trustworthiness.[107]

Thus, in relation to *res gestae* and cognate issues, the U.S. Federal approach is, overall, closer to that of the more restrictive Ontario approach but not nearly as revolutionary as the general inclusionary approach of the Law Reform Commission of Canada.

(b) Testimony in Former Proceedings

(i) *Existing Law*

At common law, testimony given in a former judicial proceeding may be used in a subsequent proceeding provided: first, the witness cannot be called (e.g., deceased, has become insane, refuses to testify, is unable because of

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[105] *Id.* section 22.

[106] *Supra*, note 85.

[107] *Supra*, note 13, Rule 803(24).

illness to testify or is out of the jurisdiction[108]); second, the issues and parties are substantially similar; and third, the party or his representative against whom the testimony is offered had the opportunity to cross-examine at the former proceeding.[109]

This common law rule has been incorporated in the *Criminal Code* by section 643, commonly termed the perpetuating evidence section, in respect of testimony at a previous trial upon the same charge, at the investigative stage of the charge and during the preliminary inquiry. Similar to the common law rule, the evidence to be read in must have been taken in the presence of the accused and he must have been given the full opportunity to cross-examine.[110] The section applies in cases where the witness is dead, has since become or is insane, is so ill that he is unable to travel or testify, or is absent from Canada.[111] Although the section reads that the evidence "may be read as evidence," the Ontario Court of Appeal has ruled that the reading in of the previous testimony is mandatory if all the conditions are satisfied.[112]

(ii) *The Evidence Codes*

The Federal Code of Evidence is silent as to previous testimony.[113] No specific reference is made to previous testimony since all first-hand hearsay statements made by unavailable declarants, notwithstanding that the oath and the opportunity for cross-examination are absent, are admissible unless some other exclusionary rule might apply had the declarant been available as a witness.[114]

Likewise, the proposed Ontario Act makes no reference to former testimony. As with the Federal Code, the testimony would be admissible under the provision allowing first-hand hearsay to be received if the declarant is unavailable.[115] However, unlike the Federal definition, "unavailable"[116] does not include situations where attendance cannot be obtained, where the witness refuses to testify or cannot remember and where the witness may be obtained but the expense or inconvenience of procuring attendance is not justified.[117] In this respect, the Federal Code is more desirable since its expanded definition of "unavailable" allows more trustworthy evidence to be received. As well,

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108 Peter Y. Atkinson, *Evidence*, 11 C.E.D. (Ont. 3rd) para. 792.

109 *Walkerton* v. *Erdman* (1894), 23 S.C.R. 352.

110 In *R. Waucash* (1967), 1 C.R.N.S. 262 (Ont. H.C.) the previous testimony was refused on the basis that the accused had been mentally ill at the time of the preliminary inquiry and because of that fact did not have the full opportunity to cross-examine.

111 *Criminal Code*, R.S.C. 1970, c. C-35, s. 643.

112 *R.* v. *Tretter* (1975), 18 C.C.C. (2d) 82; (1974), 3 O.R. (2d) 708; 26 C.R.N.S. 153 (Ont. C.A.).

113 It should be noted that the accused's testimony at a prior proceeding is not read in by the Crown pursuant to the common law rule or by section 643, but because of the rule involving admission by parties, see *R.* v. *Brown (No. 2)*, [1963], 3 C.C.C. 326 (S.C.C.).

114 *Supra*, note 11, section 29.

115 *Supra*, note 8, section 22.

116 *Id.* section 22(2)(b).

117 *Supra*, note 11, section 29.

the Ontario Act does not permit former testimony to be used as corroborative evidence where corroboration is required.[118] This provision is not valid in relation to former testimony which should be exempt from this limitation.

The U.S. Code contains a specific rule permitting former testimony to be read in for substantive use if the party against whom the testimony is offered had an opportunity to develop the former testimony by direct, cross or redirect examination.[119]

(c) Dying Declarations

(i) *Existing Law*

The present rule is that a statement made in a "settled hopeless expectation of death" is admissible as an exception to the hearsay rule.[120] The rationale for admitting this type of evidence is that of necessity, since there may be no other witness to the event, and that of trustworthiness, since it is assumed that a person who knows he is about to die is unlikely to lie. Needless to say, the latter assumption is somewhat doubtful and is not capable of empirical verification. The charge must involve death and the rule has been extended to apply to criminal negligence causing death[121] as well as murder and manslaughter. It is for the trial judge to determine whether the conditions of admissibility are fulfilled[122] and it has been observed that "these dying declarations are to be received with scrupulous, I had almost said with superstitious, care. The declarant is subject to no cross-examination. No oath need be administered. There can be no prosecution for perjury. There is always danger of mistake which cannot be corrected."[123]

The subject of the dying declaration must be the circumstances of the fatal event and not extraneous matters such as a mere expression of opinion[124] or a prior similar act.[125] Dying declarations have been admitted where the deceased has survived a considerable time after the event, e.g., six and a half weeks[126] and three weeks,[127] as long as at the time of the declaration he had the required expectation of imminent death.

(ii) *The Evidence Codes*

The Federal Code contains no provision in respect of dying declarations.

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[118] *Supra*, note 8, section 22(4).

[119] *Supra*, note 13, Rule 804(b)(1).

[120] *R.* v. *Sunfield* (1907), 13 C.C.C. 1; 15 O.L.R. 252 (Ont. C.A.).

[121] *R.* v. *Jurtyn* (1958), 121 C.C.C. 403; [1958] O.W.N. 355; 28 C.R. 295 (Ont. C.A.).

[122] *Chapdelaine* v. *The King* (1934), 63 C.C.C. 5; [1935] 2 D.L.R. 132; [1935] S.C.R. 53 (S.C.C.).

[123] *Schwartzenhauer* v. *The King* (1935), 64 C.C.C. 1 at 1; [1935] 3 D.L.R. 711 at 711; [1935] S.C.R. 367 at 367 per Davis J.

[124] *Supra*, note 95.

[125] *R.* v. *Buck* (1940), 74 C.C.C. 314; [1941] 1 D.L.R. 302; [1940] O.W.N. 473; [1941] O.R. 444 (Ont. C.A.).

[126] *R.* v. *McIntosh* (1937), 69 C.C.C. 106; [1937] 4 D.L.R. 478; [1937] 2 W.W.R. 1 (B.C.C.A.).

[127] *R.* v. *Bernadotti* (1869), 11 Cox C.C. 316.

Again, section 29 would allow the reception of this type of evidence as a statement made by a person unavailable as a witness.

Likewise, the proposed Ontario Act contains no reference to dying declarations. Again, section 22 permits reception of this evidence on the basis that dying declarations are statements made to a witness called to give evidence and made by a declarant who is unavailable to testify.

The U.S. Code specifically admits a "statement under belief of impending death" in a prosecution for homicide or in a civil action if it was "made by a declarant while believing that his death was imminent, concerning the cause of circumstances of what he believed to be his impending death."[128] This rule is needed since there is no general provision permitting first-hand hearsay of unavailable witnesses.

(d) Statements Against Interest

(i) *Existing Law*

At common law, statements by a deceased person against his pecuniary or proprietary interest were admissible on the basis of trustworthiness, since as in the case of the dying declaration, it is most unlikely that someone will lie when he makes an admission to his detriment. Thus, in the leading case of *Higham* v. *Ridgway*,[129] a book entry by a deceased male midwife to the effect that he had delivered a woman of a child on a particular date and that he had been paid, was received as evidence of the date of the child's birth.

The House of Lords in the *Sussex Peerage Case*[130] had occasion to consider whether the rule should be extended to statements made against penal interest. The Law Lords held that a declaration by a deceased clergyman concerning a marriage at which he officiated was not admissible as evidence of the marriage, notwithstanding that his conduct exposed him to criminal prosecution.

The Supreme Court of Canada has recently considered the validity of the rule in the *Sussex Peerage Case*.[131] In *Demeter* v. *The Queen*,[132] the accused unsuccessfully attempted to tender evidence that an escaped convict who was serving life imprisonment at the time of his escape had confessed to a criminal associate that he had in fact killed the accused's wife and had done so without any involvement on the part of the accused. The majority of the Court was of the opinion that the statement was rightly rejected since the statement did not meet all of the following conditions:

(1) that the deceased should have made the declaration of some fact, the truth of which he had peculiar knowledge;

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[128] *Supra*, note 13, Rule 804(b)(2).

[129] (1808), 10 East. 109; 103 E.R. 717 (K.B.).

[130] (1844), 11 Cl. & Fin. 85, 764; 8 E.R. 1034, 1292.

[131] *Id.*

[132] (1977), 34 C.C.C. (2d) 137; 38 C.R.N.S. 317 (S.C.C.).

(2) that such fact was to his immediate prejudice at the time he stated it;

(3) that the deceased knew the fact to be against his interest when he made it; and

(4) that the interest to which the statement was adverse was a penal one.

The majority of the Court held that the third condition was not satisfied since there was nothing in the evidence to indicate that, when the deceased made the statement to his criminal associate, he apprehended or had any cause for apprehension that it was contrary to his penal interest. In addition, the majority adopted the opinion of the Ontario Court of Appeal, that the declaration must be considered in its totality and, if on balance it is in favour of the declarant, it is not against his interest.

Although the statement was rejected, the Supreme Court of Canada declined to follow the rule of absolute prohibition of statements of deceased persons against penal interest as enunciated in the *Sussex Peerage Case*.[133] However, by formulating strict conditions governing admissibility, it is implicit that the Court recognized the ease with which this type of evidence can be manufactured. In the subsequent case of *R.* v. *O'Brien*,[134] the tendered statement was again determined by the Supreme Court to be inadmissible and again it is implicit that the Court was suspicious of this type of evidence although it was not rejected out-of-hand. In that case, the accused and the deceased were jointly charged. The deceased fled the country but returned after the accused had been convicted and after the fugitive's charges had been stayed. Later, for the purposes of the accused's appeal, the deceased agreed to testify under the protection of the *Canada Evidence Act* to the effect that he alone had committed the offence but he refused to give an affidavit to that effect. Before the appeal, he died.

Although the Court reiterated that statements by deceased persons against penal interest may be admissible upon satisfying certain safeguards, the particular statement in question did not so qualify. The Court reasoned that the guarantee of trustworthiness of an out-of-court declaration flows from the fact that the statement is to the deceased's immediate prejudice, that is, he must have the realization that the statement may well be used against him. Since the entire circumstances negatived the conclusion that the deceased was exposing himself to prosecution, it was held to be not against his penal interest.

(ii) *The Evidence Codes*

The Federal Code makes no reference to statements of deceased persons against pecuniary, proprietary or penal interest. On the other hand, all three types of evidence are admissible as statements of unavailable witnesses.[135]

Likewise, the proposed Ontario Act is silent as to these statements; however, they are admissible as statements of witnesses who have died.[136]

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[133] *Supra*, note 130.

[134] (1977), 35 C.C.C. (2d) 209; 38 C.R.N.S. 325 (S.C.C.).

[135] *Supra*, note 11, section 28.

[136] *Supra*, note 8, section 22(2)(b).

By contrast, the U.S. Federal Code specifically provides that a statement against civil or criminal liability at the time it was made is admissible; however, a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless there are corroborating circumstances clearly indicating the trustworthiness of the statement.[137] Because of the easy fabrication of this type of evidence, this limitation is clearly required.

5. *Availability of Declarant Immaterial*

(a) Documentary Evidence

At common law, books of account,[138] banker's records[139] and government records[140] were generally admissible as exceptions to the hearsay rule. In *Myers* v. *D.P.P.*,[141] the House of Lords canvassed the issue of whether business records, which appeared to be patently trustworthy, were as such admissible as an exception to the hearsay rule. In that case, the Crown contended that the accused had disguised stolen cars by altering the log books of the cars which constituted their registration, and by substituting the log numbers from wrecked cars that he had purchased. The accused sold the stolen cars as renovated wrecks. At trial, the Crown called an officer in charge of the records of the manufacturers of the stolen cars to produce microfilms of cards filled in by various workmen indicating the cylinder block numbers on the stolen cars. These numbers coincided with the numbers on the cars sold by the accused. The accused was convicted. On final appeal to the House of Lords, the appeal was dismissed on the basis that even if the records had

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137 *Supra*, note 13, Rule 804(b)(3).

138 Books of account kept by a party were admitted as evidence and it was immaterial whether the entries were by the party or his clerk and whether the entrant was alive at the time of the action; see, *supra*, note 108, para. 505. This exception was based on necessity since the party was incompetent to testify. Gradually, the courts refused to recognize this exception, although in small claims courts this evidence is generally accepted without objection by the court or counsel.

139 In 1876, the *Banker's Books Evidence Act*, 42 Vict., c. 11 (U.K.), clarified by statute that copies of bank records were admissible as exceptions to the hearsay rule. Jurisdictions in Canada soon followed this example and provided similar legislation—now e.g., *Canada Evidence Act*, R.S.C. 1970, c. E-10, section 29 and *The Ontario Evidence Act*, R.S.O. 1970, c. 151, section 34.

140 The prerequisites for admissibility are that the records must be made by officials in the discharge of public duties and must be available to the public for inspection. See *Sturla* v. *Freccia* (1880), 5 A.C. 623 (H.L.): *Ioannou* v. *Demetriou*, [1952] A.C. 84 (P.C.): *R.* v. *Kaipiainen* (1953), 107 C.C.C. 377; [1954] O.R. 43; [1954] O.W.N. 15 (Ont. C.A.): *Finestone* v. *The Queen* (1953), 107 C.C.C. 93; [1953] 2 S.C.R. 107; 17 C.R. 211 (S.C.C.): and *R.* v. *Northern Electric Co. Ltd.* (1955), 111 C.C.C. 241; [1955] 3 D.L.R. 449; 21 C.R. 45 (Ont. H.C.). Although sections 24 and 25 of the *Canada Evidence Act* permit the reception of public documents, since "public" is not defined, it seems the prerequisites of the common law still apply. By contrast, section 26 of the *Canada Evidence Act* permits, *per se*, the admissibility of books and entries made in the usual and ordinary course of business of any office or department of the Government of Canada, or in any commission, board or other branch of the public service of Canada, subject to reasonable notice of intention to produce, which by section 28 of the Act is required with respect to most records.

141 (1964), 48 Cr. App. R. 348; [1965] A.C. 1001.

been wrongly admitted in evidence, there had been no substantial miscarriage of justice. However, the majority of the Law Lords were of the opinion that such records constituted hearsay evidence and were not admissible. The minority felt that since the records were obviously trustworthy, their admissibility necessarily followed and that the courts should be prepared to judicially change the law to accord with modern social practices. As a result of this case, the British Parliament, in 1965, passed legislation to allow the reception of trade and business records.[142]

As well, in 1969, the Canadian Parliament passed similar though somewhat more expansive legislation dealing with business records.[143] By section 30(1) of that legislation, a record made in the usual and ordinary course of business[144] is admissible where oral evidence in respect of a matter would otherwise be admissible.[145] "Business" is given a very wide definition to mean any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or out of Canada whether for profit or otherwise. In a criminal context, this definition has been interpreted to permit Federal Bureau of Investigation (U.S.A.) records of past convictions of accused to be received as proof of those convictions in criminal proceedings in Canada. As with most statutory provisions allowing documents or copies to be admitted, there is a requirement of reasonable notice, at least seven days before production, to be given to the other party. This section is most revolutionary in nature and permits the reception of trustworthy evidence which prior to the enactment of the section would, in criminal proceedings, have generally been excluded as inadmissible hearsay evidence.

In *Ares* v. *Venner*,[146] the Supreme Court of Canada had occasion to review the validity of the reasoning in the *Myers*[147] case in the context of contemporary Canadian society. In the *Ares* case, the plaintiff had his leg amputated as a result of the alleged negligence of the defendant doctor. The question in issue was the admissibility of nurses' notes who had attended the plaintiff while he was a patient.[148] These notes were received as part of the plaintiff's case but the nurses who made the notes were not called as witnesses. The Supreme Court of Canada held that the notes were rightly received. The Court rejected the opinion of the House of Lords that this type of evidence consti-

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[142] *Criminal Evidence Act, 1965*, c. 20 (U.K.).

[143] *Canada Evidence Act, supra*, note 139, section 30.

[144] Section 36 of *The Ontario Evidence Act, supra*, note 139, allows the tendering of a record being made in the usual and ordinary course of business; it must also be part of the usual and ordinary course of business to make such a record.

[145] Presumably, this restricts the evidence to first-hand hearsay and although it is questionable whether opinion evidence by non-experts should be excluded, it is most questionable whether the first-hand hearsay restriction is required in respect of generally trustworthy business records. See *Adderly* v. *Bremner* (1967), 67 D.L.R. (2d) 274; [1968] 1 O.R. 621 (Ont. C.A.) where, in a civil case, hospital records containing opinions were excluded.

[146] *Ares* v. *Venner, supra*, note 68.

[147] *Supra*, note 141.

[148] Some jurisdictions have legislated with respect to medical records, which include hospital records, e.g., *The Ontario Evidence Act, supra*, note 139, section 52.

tuted inadmissible hearsay and held that "hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated there in."[149] These prerequisites approximate those relating to statements by deceased persons made in the course of duty which also are admissible as an exception to the hearsay rule.[150] The decision in *Ares* v. *Venner* is most important since the courts have not restricted its application to hospital records but have applied it to all records that meet the prerequisites of contemporaneity, personal knowledge and the duty to record.[151] As a result, business records may be admissible under section 30 of the *Canada Evidence Act* or *Ares* v. *Venner*. This may prove important in a criminal prosecution where the Crown fails to give notice of production; the statute requires reasonable notice unless the court otherwise dispenses with such notice, whereas the case makes no mention of such condition precedent to admissibility.

Documents found in the possession of an accused constitute another exception to the hearsay rule.[152] In the leading case of *R.* v. *Horne Tooke*,[153] Lord Chief Justice Eyre stated, "But all papers found in the possession of a man are, *prima facie*, evidence against him, if the contents of them have application to the subject under consideration."[154] This principle was re-affirmed as applicable to all documents, even photographs, by the House of Lords in *Thompson* v. *The King*.[155]

In Canada, this principle has been accepted in various cases, among them *R.* v. *Smart and Young*[156] and *R.* v. *Hashem*.[157] Perhaps the clearest exposition of the rule has been that stated by Garrow J.[158] as follows:

> Undoubtedly documents found in the possession of A., an accused person, are admissible against him as original evidence to show his knowledge of their con-

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149 *Ares* v. *Venner*, *supra*, note 68 at 16 (D.L.R.); 626 (S.C.R.); 363 (C.R.N.S.); 362 (W.W.R.).

150 See the leading case of *Price* v. *Torrington* (1703), 2 Ld. Raym. 873; 92 E.R. 84: *Conley* v. *Conley*, [1968] 2 O.R. 677 (Ont. C.A.) and *Palter*, *supra*, note 66. It seems that the declarant must have been under a duty to have to make a record or entry, as well as under a duty to have done what he later recorded. As well, the entry must be entered *ante litem motam*; see, *The Henry Coxon* (1878), 3 P.D. 156 and is admissible only as direct evidence and not collaterally as are statements against interest by deceased. See *Chambers* v. *Bernasconi* (1834), 1 C.M. & R. 347; 149 E.R. 1114.

151 See, for example, *R.* v. *Penno*, *supra*, note 68, where the rule in *Ares* v. *Venner*, *supra*, note 68, was applied to allow the reception of inventory records.

152 This exception, strictly construed, relates to admissions against interest but is dealt with in this context because of its general importance.

153 (1794), 25 How. St. Tr. 1; 1 East P.C. 60; 2 Leach C.C. 823.

154 *Id.* at 120 (How. St. Tr.).

155 [1918] A.C. 221; 13 Cr. App. R. 61.

156 (1931), 55 C.C.C. 310; [1931] 2 D.L.R. 207; [1931] O.R. 176; 40 O.W.N. 44 (Ont. C.A.).

157 (1940), 73 C.C.C. 124; [1940] 1 D.L.R. 527; 15 M.P.R. 205 (N.S.C.A.).

158 *R.* v. *Famous Players* (1932), 58 C.C.C. 50; [1932] O.R. 307; 41 O.W.N. 87 (Ont. H.C.).

> tents or his connection with the transaction to which they relate. They will also be receivable against him as admissions to prove the truth of their contents if he has in any way recognized, adopted, or acted upon them.[159]

It must be noted that Powell in *Studies in Canadian Criminal Evidence* suggests that "mere possession constitutes knowledge of the contents of the documents and also prima facie evidence of the truth of the content of such documents."[160] In relation to a situation where a person is normally expected to deny an allegation, it is the failure to deny the allegation and not the allegation itself, which constitutes the evidence.[161] Although the adoptive admission is hearsay evidence, it is that of the accused and, therefore, is usually accorded more weight than hearsay further removed. In the context of possession of documents it would seem that the retention itself of the document constitutes a form of recognition or adoption of the contents of the documents subject to explanation to the contrary. It should also be noted that, where the documents are found by persons in authority, no explanation is required on the basis that to require an explanation may constitute a violation of the rule against self-incrimination.[162]

A basic evidentiary problem relating to prosecutions against corporate accused exists with respect to documents found in possession of the corporation. In *R.* v. *Ash-Temple Co.*[163] the trial judge had rejected certain documents found in the possession of various corporations. On appeal, Robertson C.J.O. stated in part:

> If the act relied on is that of an officer, servant or agent of the company, there must be evidence that he had authority from the company to perform the act. Mere possession of a document by a company, in the sense that the document was on its premises, and even in the company's files, may not, without more, afford ground for an inference that its contents had come to the knowledge of the Board of Directors, or of someone having authority from the company to deal with the matters to which the document relates.[164]

In other words, since a corporation is a legal fiction and does not exist apart from human actors, it is only when the directing minds or alter egos of the corporation have either personally participated in the matters being considered or have authorized participation that the matters are admissible against the corporation.

In response to the virtual impossibility of meeting this difficult test, Parliament passed what is now section 45 of the *Combines Investigation*

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[159] *Id.* at 94-95 (C.C.C.); 798 (D.L.R.); 348 (O.R.).

[160] Powell, "Documentary Evidence" in Salhany and Carter, eds. *Studies in Canadian Criminal Evidence* (Toronto: Butterworths, 1972) at 308.

[161] *Supra*, note 5.

[162] *R.* v. *Cripps*, [1968] 3 C.C.C. 323; 3 C.R.N.S. 367; 63 W.W.R. 532 (B.C.C.A.): *R.* v. *Eden*, [1970] 3 C.C.C. 280; [1970] 2 O.R. 161 (Ont. C.A.): *Hall* v. *The Queen* (1970), 55 Cr. App. R. 108 (P.C.).

[163] (1949), 93 C.C.C. 267; [1949] O.R. 315; [1949] O.W.N. 158; 8 C.R. 66 (Ont. C.A.).

[164] *Id.* at 280 (C.C.C.); 337 (O.R.); 78-79 (C.R.).

Act.[165] In effect, section 45 in respect of anti-combines proceedings drastically alters the common law rule, in that documents written or received or in the possession of a participant or agent, corporate or otherwise, are *prima facie* proof of knowledge of the document and its contents and that the contents were agreed to by the participant.[166] Notwithstanding the broadness of the section, some courts have held that multiple hearsay and opinion are not otherwise admissible pursuant to section 45[167] whereas other courts are of the opinion that these objections go to weight and not admissibility.[168]

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[165] R.S.C. 1970, c. C-23, as am. R.S.C. 1970, c. 10 (1st Supp.), s. 34; R.S.C. 1970, c. 10 (2nd Supp.), s. 65; 1974-75, c. 76; 1976-77, c. 28, s. 9. Section 45 provides:

(1) In this section

"agent of a participant" means a person who by a document admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant; "document" includes any document appearing to be carbon, photographic or other copy of a document;

"participant" means any person against whom proceedings have been instituted under this Act and in the case of a prosecution means any accused and any person whom although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged.

(2) In any proceedings before the Commission or in any prosecution or proceedings before a court under or pursuant to this Act,

(a) anything done, said or agreed upon by an agent of a participant shall *prima facie* be deemed to have been done, said or agreed upon, as the case may be, with the authority of that participant;

(b) a document written or received by an agent of a participant shall *prima facie* be deemed to have been written or received, as the case may be, with the authority of that participant; and

(c) a document proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is *prima facie* proof

(i) that the participant had knowledge of the document and its contents,

(ii) that anything recorded in or by the document as having been done, said or agreed upon by any participant or by an agent of a participant was done, said or agreed upon with authority of that participant,

(iii) that the document, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

[166] By the rule in *Koufis* v. *The King* (1941), 76 C.C.C. 161; [1941] 3 D.L.R. 657; [1941] S.C.R. 481, the document is admissible against all conspirators, although only a substantive charge is laid.

[167] *R.* v. *B.C. Sugar Refining Company Limited* (1960), 129 C.C.C. 7; 32 W.W.R. (N.S.) 577; (1962) 38 C.P.R. 177 (Man. Q.B.) and *R.* v. *Canadian General Electric Co. Ltd.* (1977), 34 C.C.C. (2d) 489 (Ont. H.C.).

[168] *R.* v. *St. Lawrence Corp. Ltd.* (1966), 51 C.P.R. 170; (Ont. H.C.); [1969] 2 O.R. 305; [1969] 3 C.C.C. 263; 5 D.L.R. (3d) 263 (Ont. C.A.), and *R.* v. *Anthes Business Forms Ltd.* (1975), 26 C.C.C. (2d) 349; 10 O.R. (2d) 153 (Ont. C.A.), aff'd (1977), 32 C.C.C. (2d) 207; 28 C.P.R. (2d) 33 (S.C.C.).

(b) The Evidence Codes

By section 31(a), the Federal Code permits reception of "a record of a fact or opinion if the record was made in the course of a regularly conducted activity at or near the time the fact occurred or existed or the opinion was formed or at a subsequent time if compiled from a record so made at or near such time." This provision is most admirable in its scope. Since the record must relate to a regularly conducted activity, this, in itself, is an assurance of trustworthiness as well as the fact that the original record must be made close to the time of the event. The rule allows both fact and opinion and the latter is desirable in relation to many matters, e.g., hospital records, since they are made by persons usually having the necessary expertise. In any event, this consideration should go to weight rather than admissibility. Furthermore, since subsequent records are permitted if made from the original record this will then allow the reception of computer records, a needed feature in the computer age.

By section 31(b), all public records and reports made pursuant to a duty imposed by law are admissible irrespective of the right of the public to inspect them. Again, this safeguard is imaginary at best. Strangely enough, this provision also permits reception, "in civil cases and against the prosecution in criminal cases, of factual findings resulting from an investigation made pursuant to authority granted by law." Even in civil cases, it would seem very difficult to rebut factual findings in a paper document without being able to cross-examine the particular declarants, although in many cases the defendant will have been afforded this right at some prior inquiry. In criminal cases, police reports often contain "will-say" statements rather than signed statements, the former being replete with error. It is not desirable that these constitute substantive evidence. What this aspect of the provision is designed to do is to compel full discovery of the Crown's case. This provision, with necessary limitations, is required in the *Criminal Code* and should not be hidden in some seemingly inconsequential provision in the Evidence Code.

By section 39, the proposed Ontario Act permits the reception of business records. The provision is much more specific than that of the Federal Code and suffers because of its specificity. It is seemingly limited to first-hand hearsay since these records are only admissible "where oral evidence in respect of a matter would be admissible in a proceeding." In any event, if multiple hearsay is admissible, clearly opinion evidence by non-experts would be excluded and in the context of business records there are few dangers in this regard. A further limitation exists since not only must the record be made in the usual and ordinary course of business but it must also be in the usual and ordinary course of business to make such a record. Notice of intention to produce is required and "computer out-put" is expressly provided for. As well, the section is deemed to be in addition to any other legislative or judicial rule permitting admissibility of the particular record.

By section 40, photographic records of destroyed records are permitted if made within six years after the original record was made, although the court has a discretion to otherwise permit such evidence.

By section 41, copies of government documents are permitted without

notice and no proof of the signature or the official character of the person who certifies the document is required.

The U.S. Federal Code, in respect of documentary evidence and, in particular, business and governmental records, is more specific than either the Federal Code or the proposed Ontario Act. By Rule 803(4), statements made for purposes of medical diagnosis or treatment are admitted. By Rule 803(6), records of regularly conducted activity including opinions and diagnoses are admissible if it was the regular practice of that business, which is defined widely, to make the memoranda. By Rule 803(8), public records and reports made pursuant to a duty, excluding however, in criminal proceedings, matters observed by police officers and other law enforcement personnel, are admitted. In all, there are twenty-three specific exceptions to the hearsay rule where the availability of the declarant is immaterial together with a final subsection giving the court a general power to admit other forms of hearsay evidence if the judge is satisfied equivalent circumstantial guarantees of trustworthiness exist.

6. *Previous Convictions*

(a) Existing Law

The issue that arises with respect to previous convictions is the propriety of their use in subsequent civil proceedings since their use in subsequent criminal proceedings is limited to specific legislative exceptions.[169] In the case of *Hollington* v. *Hewthorn*,[170] the rule was propounded that evidence of a criminal conviction is inadmissible in subsequent civil proceedings to prove the facts of the offence upon which the conviction was based. The Court reasoned that the reception of the previous conviction, in that case, careless driving, would infringe the opinion rule as well as the hearsay rule since it would constitute an assertion of negligence, which was in issue in the subsequent civil case, by a non-witness and would merely be the opinion of another tribunal.

As absurd and illogical as this rule[171] may be, in the sense that greater proof on the common issue is required in the criminal proceeding, i.e., proof beyond a reasonable doubt as opposed to mere preponderance, the Supreme Court of Canada in *English* v. *Richmond and Pulver*[172] approved

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[169] E.g., by section 180(1)(d) of the *Criminal Code*, evidence that a person was convicted of keeping a disorderly house is proof, in the absence of evidence to the contrary, in respect of inmates and found-ins. And by section 318, previous convictions for theft or possession of property obtained by an indictable offence are admissible to establish knowledge in respect of subsequent charges, within five years of possession of stolen property and mail.

[170] [1943] 2 All E.R. 35; [1943] K.B. 587 (Eng. C.A.).

[171] Another technical objection to the rule is that since the Crown and not the plaintiff was a party to the criminal proceedings, subsequent use of the conviction violates the rule against "res inter alios acta" (no one shall be prejudiced by a transaction between strangers). But this is nonsense, since the party against whom it is being used was a party to the previous proceeding, i.e., the accused and defendant are one and the same party.

[172] (1956), 3 D.L.R. (2d) 385; [1956] S.C.R. 383. In that case, the court, however, held that a plea of guilty in the former proceeding was admissible as an admission against interest.

of the rule in *Hollington* v. *Hewthorn*[173] which constitutes the present Canadian law on this matter.

(b) The Evidence Codes

The Federal Code, by section 31(h), would allow "evidence of a final judgment adjudging a person guilty of a crime, to prove any fact essential to sustain the judgment except when tendered by the prosecution in a criminal proceeding against anyone other than the person adjudged guilty." This provision is clearly needed. However, it is doubtful whether it will have its desired impact since the Supreme Court of Canada, in the case of *McNamara Construction (Western) Co.* v. *The Queen*,[174] has severely curtailed the jurisdiction of the Federal Court, to which this provision would apply, in subsequent civil cases. The provision may not apply to divorce actions, where rape, bigamy, incest and carnal knowledge convictions would be pertinent, since the federal legislation[175] incorporates by reference the laws of evidence of the province in which proceedings are taken. The *Divorce Act* should be specifically amended to make section 31(h) applicable.

As for the right of the Crown to tender facts determined in prior prosecutions involving the previous conviction, this is most logical. However, where the conviction is based on a plea of guilty made in dubious circumstances, the question arises, one that is not considered by the provision, of what weight the previous conviction should be given. In cases actually litigated, as opposed to guilty pleas, they should constitute conclusive proof, otherwise, inconsistent verdicts may arise which might bring the administration of justice into disrepute.

The Ontario Act takes a timid aproach to the use of previous convictions or civil findings in subsequent civil proceedings and strangely restricts this type of evidence to five specific situations. By section 30, proof of a conviction is conclusive in actions for libel or slander. By section 31(1), proof of a previous finding of adultery against a co-respondent is proof, in the absence of evidence to the contrary, in a subsequent proceeding. By section 31(2), a conviction for bigamy constitutes proof, although it is not stated whether it is conclusive, in a subsequent proceeding for divorce. By section 31(3), proof that an accused has been convicted of sodomy, bestiality or rape constitutes proof in a subsequent proceeding for divorce. As well, by section 31(4), proof of a conviction for bigamy is evidence of adultery for maintenance purposes.

Section 29 appears to be the most illogical of the Ontario proposals and is designed to overrule the holding in *English* v. *Richmond*[176] that a plea of guilty is admissible as an admission against interest. The Ontario proposal would render pleas of guilty inadmissible: a most absurd result. Surely, the right to explain away the plea, as is presently permitted by case law, is a sufficient safeguard against ill-advised pleas of guilty.

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[173] It should be noted that this rule has been legislatively reversed in England by the *Civil Evidence Act, 1968*, c. 64, ss. 11-13.

[174] (1977), 75 D.L.R. (3d) 273; [1977] 2 S.C.R. 654 (S.C.C.).

[175] *Divorce Act*, R.S.C. 1970, c. D-8, section 20.

[176] *Supra*, note 172.

By Rule 803(22), the U.S. Federal Code permits:

> Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere) adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused; the pendency of an appeal may be shown but does not affect admissibility.

The weight of the previous conviction is apparently left to the discretion of the trier or triers of fact.

C. HEARSAY: NON-HEARSAY

The fundamental decision that must be determined in any situation where the court is called upon to rule whether an item of evidence is hearsay, and therefore inadmissible,[177] or whether it is non-hearsay, and therefore admissible, is for what purpose the evidence is being tendered. Often, this purpose is most difficult to ascertain and, as is often the case in legal matters, the rule is easier to state than to apply. The rule was clearly stated in *R.* v. *Christie*:

> By the law of England evidence is not admissible through the mouth of one witness to shew what a third person said for the purpose of proving the truth of what that third person said, (a) because to admit such evidence would be to accept the statement of a person not on oath, and (b) because that person could not be cross-examined on his statement. But the evidence may be admitted upon some other principle. The maxim "Hearsay is no evidence" should be "Hearsay is no evidence of the truth of the thing heard."[178]

An example of the difficulty of determining whether the statement is in fact being tendered for the purpose of proving the truth of the assertion, explicit or implicit, which it contains, or whether the statement is tendered only to establish that it was made and to prove whatever logically follows from its making, occurred in the early House of Lords case of *Wright* v. *Tatham*.[179] In that case the testator's insanity was in issue and letters received by the testator were unsuccessfully tendered to indicate that the senders of the letters considered the testator sane at the time the letters were written, as demonstrated by the general tenor of the letters. The Law Lords were of the opinion that to allow the letters to be tendered for such a purpose would be contrary to the hearsay rule since the purpose would be to establish the implied assertion that the testator was sane and the letter writers should so testify under oath and subject to cross-examination. Some Law Lords felt that the letters also constituted hearsay by conduct which was also prohibited. This judgment has justifiably been criticized on the basis that the letters were tendered to prove that they were written and not to prove their contents; none referred to the sanity of the testator. What the trier or triers of fact may infer from the writing is within the permissible scope of their function and the fact that the letters may contain implied assertions goes to weight and should not preclude admissibility. This decision seems overly formalistic.

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[177] Unless it comes within a recognized exception to the rule.

[178] *Supra*, note 5 at 548, per the Attorney General.

[179] (1838), 5 Cl. & Fin. 670; 7 E.R. 559.

The following are some recent cases where courts, after applying the "for what purpose—truth or fact made?" test, have held that the evidence in issue was non-hearsay.

In *R.* v. *Baltzer*,[180] the accused raised the defence of insanity to a charge of murder and sought to admit statements made by the accused to third persons containing comments of a weird nature. The Nova Scotia Court of Appeal held that these comments were relevant to show the accused's state of mind and were admissible not for the truth of what was said but to establish that the accused said peculiar things.

In *R.* v. *Bencardine and De Carlo*,[181] a Crown witness had given inculpatory evidence against the accused but when subsequently called for the defence he recanted from his former testimony. Upon being cross-examined by the Crown, he denied any threats which might have caused him to change his testimony. In reply, the Crown called the witness' former solicitor to testify that the witness had informed him that he had been threatened. The trial judge ruled that this was hearsay evidence. On appeal, the Ontario Court of Appeal held that the evidence was not hearsay since the evidence was not received to prove the fact of intimidation but rather to prove the witness' state of mind. Furthermore, there was no solicitor-client privilege since the communication was not made in the course of seeking legal advice nor was it made with the intention of confidentiality.

In *R.* v. *Dunn*,[182] a telephone interception was made by the police with the consent of the intended recipient of the telephone call. By section 178.11 (2) of the *Criminal Code*, an interception is lawful if the consent to intercept is given by a party to the private communication. By the time of trial, the consenting party had died and the Crown led evidence of a peace officer establishing the consent. The trial judge ruled that the evidence of consent did not violate the hearsay rule since the evidence was admitted to prove the fact of consent and not the truth of the accompanying statement.

In *R.* v. *Cresmascoli and Goldman*,[183] the fact situation was similar to *Dunn* except the consenting party to the communication had later mysteriously disappeared. One of the accused was a noted Toronto criminal lawyer. Following the reasoning of *Dunn*, the Ontario Court of Appeal held that the evidence of the fact of consent did not constitute hearsay evidence.

In *Green* v. *Charterhouse Group Canada Ltd.*,[184] evidence was led of a document which recorded that a certain matter had been transmitted by telex. The Ontario Court of Appeal was of the opinion that the document was admissible to prove the fact of transmission but not to prove the truth of its contents.

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[180] (1975), 27 C.C.C. (2d) 118; (1974), 10 N.S.R. (2d) 561 (N.S.C.A.).

[181] (1974), 15 C.C.C. (2d) 342; 2 O.R. (2d) 351; 24 C.R.N.S. 173 (Ont. C.A.).

[182] (1976), 28 C.C.C. (2d) 538; 33 C.R.N.S. 299; 16 N.S.R. (2d) 527 (N.S. Co. Ct.).

[183] (1978, unreported, Ont. C.A.).

[184] (1976), 68 D.L.R. (3d) 592; 12 O.R. (2d) 280 (Ont. C.A.).

Finally, in *R.* v. *Kores*,[185] an accused who spoke no English was interviewed by police through an interpreter while a stenographer recorded the English portions of the interview. At trial, the transcript was rejected as being hearsay since what the accused said was being related second-hand by the interpreter. The British Columbia Court of Appeal held that the trial judge had erred since hearsay was not involved as it was the transaction itself that was being proved. Once the interpreter had sworn that he had faithfully translated the questions and answers notwithstanding that he could not recall them, the recorded transcript of the interview became admissible evidence as admissions against interest: a specific exception to the hearsay rule.

What was said by the interpreter as to what the accused said in response to the questions of the police did not in itself constitute hearsay since it was offered to prove that the answers were in fact made. In other words, the interpreter was a mere conduit and his translation was not to be included as adding a layer of hearsay to the otherwise hearsay admissions.

The following are some recent cases where courts, after applying the "for what purpose—truth or fact made?" test, have held that the evidence in issue was inadmissible hearsay.

In *R.* v. *Cosgrove and Dubois*,[186] the Crown, in order to prove the ownership of an allegedly stolen television set found in the accused's possession, attempted to introduce through the alleged owner a document which she had received at the time of purchasing the set and on which was recorded, by the manufacturer, a serial number corresponding to the serial number of the allegedly stolen set. The alleged owner had never compared the document with the number on the set. The trial judge rejected the owner's document on the basis that it was hearsay evidence and that a proper foundation had not been laid and requisite notice had not been given pursuant to section 30 of the *Canada Evidence Act*. This ruling may shock the sensibilities of a lay person as excluding valid evidence; however, the preparation of the Crown in this case should, as well, be questioned.

In *R.* v. *Douglas*,[187] the Crown led evidence that the accused associated with drug addicts and users. The Ontario Court of Appeal was of the opinion that this evidence was relevant to the particular drug charge but that a witness might testify only of personal knowledge and not of reputation to establish such association. Hearsay reputation, although admissible as to the character of disorderly houses as an exception to the rule,[188] is not admissible in respect of drug charges.

In *R.* v. *King*,[189] the accused was charged with speeding. The accused's speed was calculated on the basis of the time it took to go past markings on

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185 [1970] 5 C.C.C. 55; 73 W.W.R. 97; 11 C.R.N.S. 58 (B.C. Co. Ct.), new trial ordered 15 C.R.N.S. 107; 75 W.W.R. 93; 12 Crim. L.Q. 320 (B.C.C.A.).

186 (1975), 22 C.C.C. (2d) 399 (Ont. Co. Ct.).

187 (1977), 33 C.C.C. (2d) 395 (Ont. C.A.).

188 *Theirlynck* v. *The King*, [1931] S.C.R. 478; 56 C.C.C. 156; [1931] 4 D.L.R. 591 (S.C.C.).

189 (1977), 35 C.C.C. (2d) 424 (Ont. Div. Ct.).

the highway which the police officer testified he had measured with a chain; the chain had a marking on it placed there by the manufacturer indicating it was two hundred feet in length. On appeal from conviction, the Court held that the marking on the chain constituted inadmissible hearsay evidence and accordingly quashed the conviction. The reasonable man may well question the formalism of this reasoning since any means available to a peace officer to have checked the length of the chain would have, itself, involved hearsay to an infinite regression. What measurement is not, in itself, hearsay?

In *Reference Re Regina* v. *Latta*,[190] the evidence in issue was threats on the deceased's life by persons other than the accused and, although the witness had witnessed a quarrel between the deceased and another, in the main, the threats were related to the witness by the deceased. The Alberta Court of Appeal was of the opinion that such evidence was inadmissible hearsay offered for the truth of their contents. This holding is somewhat questionable since the accused contended that the evidence was offered to establish that the threats were made. However, the Court further held that since there was no other evidence implicating anyone else in the murder, the evidence was so tenuous as to be of no probative value and accordingly was inadmissible. This seems to be the more valid ground of rejection of the evidence and accords with Thayer's view that, "[t]he law of evidence undoubtedly requires that evidence to a jury shall be clearly relevant, and not merely slightly so; it must not barely afford a basis for conjecture, but for real belief; it must not merely be remotely relevant, but proximately so."[191]

In *R.* v. *Lessard*,[192] the trial judge relied on a psychiatric report whose admission into evidence had not been agreed to by both counsel, without the psychiatrist testifying as to its contents. On appeal, the Ontario Court of Appeal was of the view that the report constituted inadmissible hearsay but that its reception had caused no substantial wrong in the circumstances.

In *Phillion* v. *The Queen*,[193] the trial judge had refused to admit the evidence of a polygraph operator that, based on a polygraph test he had performed on the accused, the accused's denial to him of committing the murder was true. This evidence was offered to show that the accused had lied to the police when he had confessed to them. On final appeal, the Supreme Court of Canada held that the evidence of the polygraph operator consisting of answers given by the accused to certain questions and his opinion that such answers were true is hearsay and inadmissible as self-serving evidence.

In turn, this again raises the question left unanswered by the case of *R.* v. *Rosik*,[194] whether an expert witness who relies on second-hand hearsay[195]

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[190] (1977), 30 C.C.C. 208 (Alta. C.A.).

[191] *Supra*, note 2 at 516.

[192] (1976), 30 C.C.C. (2d) 70; 33 C.R.N.S. 16 (Ont. C.A.).

[193] (1977), 33 C.C.C. (2d) 535; 37 C.R.N.S. 361; 74 D.L.R. (3d) 136 (S.C.C.).

[194] (1971), 2 C.C.C. (2d) 351; [1971] 2 O.R. 47; 13 C.R.N.S. 129 (Ont. C.A.), aff'd 2 C.C.C. (2d) 393n; [1971] S.C.R. vi; 14 C.R.N.S. 400 (S.C.C.).

[195] As permitted by *Wilband* v. *The Queen*, [1967] 2 C.C.C. 6; 2 C.R.N.S. 29; [1967] S.C.R. 14 and *R.* v. *Lupien*, [1970] 2 C.C.C. 193; 9 D.L.R. (3d) 1; [1970] S.C.R. 263.

as part of the premise of his opinion or conclusion may relate to the trier or triers of fact what the accused said to him about the charge and what his opinion is of the truth of what the accused told him.

Finally, in *R.* v. *Rowbotham*,[196] the Crown sought to prove that the accused had a certain telephone number and had made certain long-distance calls from that telephone. To establish this, the Crown attempted to introduce, through a telephone employee, telephone bills printed by a computer. The employee had no knowledge of how the bills were prepared or how the computer worked. The trial judge ruled that the telephone bills were inadmissible since they were hearsay and since the business records provision[197] of the *Canada Evidence Act* had not been complied with.

Again, this ruling may surprise most members of the public who believe in the general reliability and accuracy of computer records. In any event, it seems clear that the Federal Code,[198] the proposed Ontario Act[199] and the U.S. Federal Rules[200] have considered the problem of computer records, whether made at the time of the event or made subsequently from records made at or near the time of the event, and have enacted provisions to ensure the reception of this reliable and modern form of hearsay evidence.

D. CONCLUSION

Most lawyers will concede that the hearsay rule, which was formulated as late as the seventeenth and eighteenth centuries and which now admits of so many exceptions that most commentators cannot agree as to their exact number, now requires a basic restructuring to meet present social needs. That there is much trustworthy, reliable and necessary evidence excluded by a strict application of the hearsay rule was recognized as early as 1898, when Massachusetts enacted a provision that all first-hand hearsay declarations of a deceased made in good faith before the commencement of an action were admissible.[201]

In 1938, England passed legislation to admit, in civil cases, all first-hand documentary hearsay made before a motive to fabricate existed.[202] And in 1968, this legislative rule was extended to apply to oral hearsay[203] in civil cases.

In the United States, the American Law Institute formulated its pioneering, though controversial, Model Code of Evidence in 1942. Its proposals as to hearsay were considered so broad as to make hearsay generally admissible

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[196] (1977), 33 C.C.C. (2d) 411 (Ont. Co. Ct.).

[197] *Canada Evidence Act, supra,* note 139, section 30.

[198] *Supra,* note 11, section 31, re subsequent records.

[199] *Supra,* note 8, section 39(13), re computer out-put.

[200] *Supra,* note 13, Rule 803(6).

[201] Mass. Acts, 1898 c. 535 enacted at the urging of Professor Thayer; Mass. Stat. Ann., s. 233-65 (West, 1959).

[202] 1938, 182 Geo. VI, c. 28.

[203] *Civil Evidence Act,* 1968, *supra,* note 173.

by virtue of the wide range of exceptions.[204] In 1953, the Commissioners on Uniform State Laws published their Uniform Rules of Evidence which treated hearsay in a more traditional fashion.

In England, the Lord Chancellor and Home Secretary referred a comprehensive review of the law of evidence in civil and criminal cases to the Law Reform Committee and the Criminal Law Revision Committee respectively. In response to the hearsay problem, the English Law Reform Committee, and later the English Criminal Law Revision Committee,[205] stated that:

> The rule against hearsay has five disadvantages. First it results in injustice where a witness who could prove a fact in issue is dead or unavailable to be called; secondly, it adds to the cost of proving facts in issue which are not really in dispute; thirdly, it adds greatly to the technicality of the law of evidence because of its numerous exceptions; fourthly, it deprives the court of material which would be of value in ascertaining the truth; and fifthly, it often confuses witnesses and prevents them from telling their story in the witness-box in the natural way. These disadvantages have long been recognized. It is high time that they were tackled boldly.

Armed with this admonishment to tackle the hearsay problem boldly, the Law Reform Commission of Canada did so. Its provision[206] that previous statements by a witness are, *per se*, admissible is truly revolutionary. It abolishes the self-serving rule and leaves the control of abuse to the discretion of the trial judge.[207] This approach is reflective of the civilian approach to admit all evidence and to leave its weight to the trier of fact. Although it is admirable in its flexibility, it is this over-flexibility and general uncertainty whether a particular item will be admissible or inadmissible that has led to a wave of criticism by the legal profession against the Federal Code.

Also, armed with the benefit of much previous work in the area of evidence, the Federal Code has borrowed generously from other works, especially American ones. Generally, that has proved beneficial. In respect of statements by unavailable persons[208] the wisdom of allowing these statements in criminal cases may be questioned.[209] It may be that these provisions must be treated differently in respect of civil and criminal law and desirable as common principles may be, they may not be valid when applied in drastically different contexts. In any event, the business records provision[210] is a splendid solution to current social needs.

The Ontario Law Reform Commission's draft Evidence Act is a piece-

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[204] J. M. Maguire, *Evidence: Common Sense and Common Law* (Chicago: Foundation Press, 1947) at 153.

[205] Law Reform Committee, *Hearsay in Civil Proceedings*, (Cmnd. 2964; 1966) at 18, repeated by the Criminal Law Revision Committee, *Eleventh Report: Evidence (General)*, (Cmnd. 4991; 1972).

[206] *Supra*, note 11, section 28.

[207] *Id.* section 5.

[208] *Id.* section 29.

[209] The question should be posed whether this provision admits of infinite regress, e.g., deceased declarant A told deceased declarant B that A actually killed the murder victim and not the accused.

[210] *Id.* section 31(a).

meal reaction to individual nettling problems. It has no grand scope, as it does not purport to be definitive as to the rules of evidence and instead strikes one as a fine-tuning and tinkering with certain individual areas. In relation to hearsay, the reaction is traditional and most conservative. Certain liberalization is tolerated but in a restrained and almost begrudging fashion. Its solution to the rule in *Hollington* v. *Hewthorn*[211] is sophomoric and its rejection of evidence of pleas of guilty is clearly based on erroneous reasoning.[212] However, its presentation is much more scholarly than that of the Federal Code.

The U.S. Federal Rules of Evidence are a result of a growing conservative reaction to the 1942 Model Code of Evidence and the 1953 Uniform Rules of Evidence. The Federal Rules fall somewhere between the traditional outlook of the proposed Ontario Act and the novel approach of the Canada Code. Many of its provisions in respect of hearsay seem more valid than the extremes of the Canadian works.

The absurd technicalities surrounding the hearsay rule have developed because the judiciary have ignored the admonishment contained in the thesis of that great genius of evidence, Professor Thayer, that all exclusionary exceptions are really declarations of the fundamental proposition that all that is logically probative is admissible and hence are to be liberally construed.[213] In relation to hearsay evidence he wrote:

> It seems a sound general principle to say that in all cases a main rule is to have extensions rather than exceptions to the rule; that exceptions should be applied only within strict bounds and that the main rule (that all relevant evidence is admissible) should apply in cases—not clearly within the exception. . . . A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible.[214]

Hopefully, the Federal-Provincial Task Force on Evidence which is presently reshaping the federal and provincial laws of evidence will heed this admonishment and its wisdom when the Task Force tackles the hearsay rule to determine how it should be formulated to better serve modern society.

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[211] *Supra*, note 170.

[212] *Supra*, note 11, section 29.

[213] *Supra*, note 108, para. 442.

[214] *Supra*, note 2 at 521.