A Canada Evidence Code Should Replace the Canada Evidence Act

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For decades experts in the law of evidence have called for comprehensive legislative reform of the law of evidence in Canada, but it hasn’t happened. The great success of the U.S. Federal Rules of Evidence (the FRE), operative from July 1, 1975 (but from Dec. 1, 2011, known as the Restyled Federal Rules of Evidence), makes Canada’s failure to enact a true code of evidence a considerable loss to its administration of justice. Almost all U.S. states have adopted the FRE as their state codes of evidence. It has given the American law of evidence a much greater accessibility and therefore flexibility of application. The effect, in terms of frequency of use, would have been comparable to that of the Canadian Charter of Rights and Freedoms upon the practice of criminal law.

In fact, there was a very diligent attempt by the federal Department of Justice to bring an Evidence Code into the federal and provincial laws of Canada, which began in April 1976. Consider how important is the loss represented by that failure, given that, that Evidence Code “lifted” about 80% of its provisions from the FRE—in effect, a Canadian version of the U.S. Federal Rules of Evidence. Had it been enacted, all of the U.S. caselaw interpreting and applying the FRE would now be available for Canadian courts and lawyers to pick the best of it, while not being bound to apply any of it—a magnificent wealth of free legal technology flowing across the border to be used as we might choose to use it.

The reaction of the legal profession killed the Evidence Code, as explained below. As a result, the serious defects it revealed in the law of evidence still exist today. Had it been “law for the layman,” or otherwise of public interest, it might constitute the nucleus and foundation of the law of evidence today.

To understand the nature of a true code, it is necessary to appreciate the extent of the loss in not adopting the Evidence Code. A true code is: (1) a legislated statement of the law; (2) comprehensive of its subject; (3) the exclusive source of the law within its field; and, (4) a statement of the law in principles rather than in rules. It’s position in law is comparable to that of the Canadian Charter of Rights and Freedoms in that all interpretation begins with the code. Previous caselaw and statutes may be consulted, but they are not binding upon a true code. Therefore, the Criminal Code is not a true code, first enacted in 1892, and: (1) interpreted as the product of, and therefore bound by the previous law; (2) not
Nor is “a comprehensive legislated statement of the law” a true code because it can be interpreted in whole or in part as bound by the previous law. A code is “a new beginning.” Sections 1 and 2 of the Evidence Code: (1) provide a standard against which the interpretation placed upon any of its sections can be measured; (2) establish the main rule of construction as being the purpose stated in s. 1. That prevents its provisions from being squeezed down to their narrowest meaning. Thus: (1) the Evidence Code is prevented from being merely an exception to the common law of evidence, otherwise the common law would continue to be the main source of the law of evidence; and, (2) is pre-emptive of other sources of law. The binding effect of the common law is broken and replaced by s. 3, which states: “Matters of evidence not provided for by this Code shall be determined in the light of reason and experience so as to secure the purpose of this Code.”


Because I had not been told what the consultation format was to be, I did it my way. I spoke at or organized and conducted more than 40 conferences and seminars across Canada. The seminars I conducted for senior judges and lawyers allowed the whole of the Evidence Code to be examined and reported on at each seminar. The sections of the Evidence Code were divided up among discussion groups, which were conducted between opening and closing plenary sessions. Resolutions were formulated and voted on in relation to the portions of the Evidence Code assigned to each discussion group. At the closing plenary session, each group reported the results of its discussions and presented its resolutions to the whole body present. In that way I secured well documented feedback, which I entered into my Resolutions Book, which grew larger as the consultation process matured. Prior to each seminar, each participant received a copy of the Report On Evidence and my 348-page book of consultation materials,
and a copy of the resolutions that had been passed at the preceding seminars. Thus, as the consultation process progressed, the seminars became more efficient because of the availability of already-formulated resolutions that could be debated, re-drafted, and voted on as each group saw fit.

My consultation materials were meant to provide first, a format for conducting a one or two-day seminar, complete with opening and closing plenary sessions, and discussion groups in between. Secondly, they provided materials on the law of evidence that could be used in the daily practice of law. I included the FRE and the U.S. *Uniform Rules of Evidence*--the 1953 version, but not the 1974 version because it had been amended to be the same as the FRE. There was a table of concordance between the Evidence Code and the FRE, and a “Summary of the Commentaries to the Evidence Code” from the *Report on Evidence*. There were articles on the experience with codification in the United States, and summarizing the arguments for and against similar codification of the law of evidence in Canada. I included a 1959 article from the Canadian Bar Review by Professor Graham Murray of the Faculty of Law at Dalhousie University, entitled, “Evidence: A Fresh Approach The American Uniform Rules Of Evidence” (1959), 37 Can. Bar Rev. 576. The article was based upon a paper presented to the New Brunswick Section of the Canadian Bar Association in 1957, which began:

I simply wish to remind my fellow Canadian lawyers and Canadian judges that the American legal profession has succeeded in codifying many of our difficult common-law rules of evidence, to argue that the *Uniform Rules* are worthy of our closest scrutiny and, finally, to advocate that the Canadian legal profession give consideration to the preparation of a similar code of evidence for use in this country.

He then discussed, “Why our rules of evidence are in urgent need of reformation,” and, “Why we Canadian lawyers should look to the American legal profession for assistance in reforming our own rules of evidence.” Immediately preceding, the consultation materials contained articles I had written entitled, (1) “A Note on Similarities Between the *Uniform Rules of Evidence* (1953) and the Evidence Code”; and, (2) “Some Noted Arguments Made by Professor Neil Brooks on the Law of Evidence and the Evidence Code.” Professor Brooks, of Osgoode Hall Law School in Toronto, is listed in the *Report on Evidence* as a “Special Consultant.” He had been one of the chief architects of the Evidence Code while at the LRCC.

However, codification of the law of evidence was attacked by the *Report on the Law Of Evidence* of the *Ontario Law Reform Commission* (the OLRC), published in June 1976. It took the much more conservative approach of an extensive amending and expanding of the Ontario *Evidence Act* in contrast to the more aggressive approach of the LRCC of true codification. My Osgoode Hall Law School dean (1961-64), H. Allan Leal, was by that time the Chair of the OLRC. Its *Report* states (p. ix) that: “Professor Alan W. Mewett of the Faculty of Law of the University of Toronto was engaged to direct and supervise a research team on the law of evidence.”
My consultation materials included the OLRC’s draft Evidence Act, the full report being too large (278 pages). I did include however, a table of concordance between the Evidence Code and the Act, the OLRC’s Report on the Law of Evidence’s Introduction to which states, in part (at p. xi): “We have thought it desirable to codify some of the common law, but we do not think it would be wise to attempt to prepare an exhaustive and comprehensive code of evidence.” In contrast, the Introduction to the LRCC’s Report on Evidence states that there is a need to have the, “basic rules of the common law … subjected to rational simplification, in clear, orderly and flexible rules.” Therefore there are a number of subjects dealt with by the LRCC’s Code that are not dealt with in the OLRC’s Act. On the other hand, there are some matters that the Act deals with in more specific detail, which the Code leaves to more general provisions, e.g., the swearing-in of children, medical reports, and proof of registered land instruments. And the treatment and organization of subjects is very different. For example, the Code provides its own definition of hearsay, wipes out all existing exceptions, but provides its own exceptions. In contrast, the Act provides some relaxation to the existing hearsay rule by further codified exceptions. The Code in dealing with documentary evidence separates the issues as to admissibility of originals, authentication and admissibility of copies, into three separate groups of sections. The Act uses the traditional approach of dealing with admissibility, authentication, and copies of a particular type of document, all within the same or an adjoining section.

The OLRC’s Report made gaining more support than criticism for the Code during the consultation process, much less likely. I laid out the arguments on both sides and stressed in my consultation materials and opening remarks at the seminars that the purpose of the consultation was to obtain advice as to revising the law of evidence, and not merely to conduct a popularity contest on the LRCC’s Evidence Code. Unfortunately, that is exactly what the consultation process became, and almost inevitably so because the OLRC’s Report expressly rejected codification, stating (p. xi):

We remain convinced that the common law approach to evidence is basically sound, and that it would be unwise to reform the law in radically new directions, alien to the tradition of the common law, for example by leaving the admissibility of evidence solely to the judgment of individuals presiding in particular cases. There must be guidelines which control the admissibility of evidence, but the guidelines must be such that they will not defeat the tribunal in its search for truth.

Although I knew that the attachment by Canada’s judges and lawyers to “the tradition of the common law” was strong, the consultation process was to teach me just how very strong that devotion was. It would be devotion to a fault today, given the need for consolidation and codification of laws in compensation for their quickly growing volume, complexity, and dependence upon technology.

In contrast to such devotion, the consultation materials set out the events leading to the FRE. They began in 1923 when the American Law Institute decided that a re-statement of the law of evidence
should be undertaken, the principle reason being that the rules of evidence were so defective, that instead of being a means of developing the truth, they tended to suppress it. By 1974, the FRE’s journey though the U.S. congressional review process had produced a “House Draft,” and a “Senate Draft.” The legislative drafts then went on to a conference committee, which produced the **Compromise Version of the Federal Rules of Evidence**. On December 16 and 18, 1974, the **Compromise Version** was enacted into law by the two houses of Congress. On January 2, 1975, President Ford signed it, and on July 1, 1975, the FRE became operative for U.S. federal court proceedings for cases commenced thereafter, and for proceedings after July 1st in cases pending on July 1st, unless the court found injustice or infeasibility would result (as stated in the Preamble). The FRE has been a very successful codification.

In regard to that very instructive history leading to the creation of the FRE, my consultation materials included the address by Professor Paul Rothstein of Georgetown University, an established expert on the U.S. law of evidence, entitled, “An Evidence Code: The American Experience,” opening the “Conference on Current Trends in Evidence,” at Dalhousie University in Halifax, on November 26, 1976. It stated:

Representatives of nearly every aspect of trial related law were on the Advisory Committee – academicians, judges, civil and criminal trial lawyers from both sides of the case, etc. Their drafts of the Federal Rules of Evidence owe an appreciable debt to the Uniform Rules and to the California Code. Indeed, some of the same drafters of the three earlier codes also sat on the Federal Rules of Evidence Advisory Committee.

In November, 1972, the drafts of the Federal Rules of Evidence seemed to be ready for finality, and so the Supreme Court of the United States approved the draft for use in all federal courts, to take effect automatically without further enactment on the following July 1st, which would be July 1, 1973.

But then the Rules hit a snag. Before their automatic effective date, Congress got into the act. Congress suspended the rules until Congress could take a closer look at them and examine each of them in detail. Congress’s dissatisfaction centered primarily on the privilege and hearsay provisions. Some Congressmen still didn’t like it that the hearsay rule was being restricted. The trial lawyers in Congress loved the old hearsay rule and didn’t want to see it restricted the way these rules did (and your Code does even more).

Let me examine the problem Congress had with privileges, which was probably the principal problem. The Supreme Court draft of the Federal Rules of Evidence prescribed an exclusive list of privileges much like the ones in your proposed Code. Congress felt that such an approach did not defer enough to the state law of privileges, which many Congressmen thought should apply not only in state courts but in federal courts as well. After all, they argued, states have reasons, policies for having privileges. For example, lawyer-client privilege. States want to encourage state lawyers and state clients to communicate. Or doctor-patient privilege. The states want to encourage state doctors and state patients to communicate fully, in the interests of better health care in the state. They won’t communicate fully if they know there’s no privilege should the matter get into a federal court. There’s a great likelihood matters do get into federal courts. So what good
does it do for the state to have a privilege if the federal court doesn’t respect it? That was the argument.

In addition, the list of privileges failed to contain some of the privileges that were favored by many Congressmen. A general physician-patient privilege was not there. A general privilege concerning interspousal communications in civil and criminal cases was not there. There was no journalist privilege.

Additionally, the draft contained a broad governmental executive information privilege (almost identical to the one in your proposed Code) and this really irritated the Congressmen, who were at that time chafing under President Nixon’s excessive claims of executive privilege. Some libertarian Congressmen felt this broad view of governmental privilege was especially bad because it went hand in hand with a restriction elsewhere in the draft, of the personal privileges like the husband-and-wife and doctor-and-patient privileges. The rules seemed to be broadening governmental privileges while narrowing personal privileges. You see, the draft did not provide for privileging confidential private citizen relationships except for a very narrow list of specifically enumerated ones. It was not like your Code, which does privilege confidential professional and family relationships quite generally. I might say that your draft would not have satisfied these Congressmen because, even though your draft does privilege family and professional relationships, it does so only in a half-way fashion. It grants a qualified privilege. The judge can balance various factors to see whether he wants to accord a privilege or not. I submit to you that this really does not effectively foster the policies behind the privileges. The purpose of these privileges is, I assume, largely to encourage full communications. Are people going to be encouraged to communicate when they know that they may or may not have a privilege, depending upon what a judge rules? I do not think so. I think if you really want to encourage them to communicate, you have got to tell them that they definitely have a privilege.

The height of the Watergate affair was a very bad time to put forth a draft with a broad executive privilege. Furthermore, it was probably a Watergate-engendered sensitivity that made Congress reluctant to cede any power to any other branch of government, whether it be to the executive or the judiciary. Thus Congress was not about to allow the judiciary to unilaterally adopt rules of evidence without Congress getting into the picture. Especially was this so since many of the matters in the Code, such as privileges and other provisions, especially provisions applying to criminal cases, were perceived to affect matters outside technical court room conduct, possibly reaching into fundamental liberties in the daily activities of citizens.

For these reasons Congress wanted to play a role. Overlaying it all was a feeling that perhaps codification was not needed, but this did not prevail. New areas of controversy surfaced once Congress opened the rules, but finally, after a House draft, a Senate draft, and a compromise draft, the Rules were enacted, and became effective July 1, 1975. In broad outline they were about 90 per cent what the Supreme Court draft had provided anyway. They are also very like your Code. About eighty per cent attempts to codify the common law. But you can’t codify the common law in the United States. It has many different strands, many conflicting views. In most cases our Code took the majority view; but in many it codifies a minority view. There is very little that is made up out of whole cloth and brand new. Privileges were, under the final enactment, left to the common law or to state law, depending on the kind of case; and a compromise was reached cutting back on liberalization of the hearsay rule.
By August 1978, my *Resolutions Book* was complete, being 258 pages of resolutions obtained from seminars completed. The incisive and probing questions and attacks on the Evidence Code that I had faced, raised my knowledge of the law evidence to a substantially greater level of expertise than I had obtained as a “trial Crown” in Toronto, during the ten years preceding the consultation process. The seminars held were of two types: (1) “judges’ seminars,” which were attended by senior judges and lawyers; and, (2) “lawyers’ seminars,” attended by litigation lawyers in each locality. In 1977, I conducted 25 seminars—five “judges’ seminars” and 20 “lawyers’ seminars.” In 1976, I spoke at ten conferences on the “Evidence Code.” And in 1978, I spoke at six conferences on topics within the law of evidence while still an employee of the federal Department of Justice. But at some of those 1978 conferences I spoke of the work of another body that resulted from the consultation process on the LRCC’s *Report on Evidence*—the *Federal/Provincial Task Force on Uniform Rules of Evidence* (the “Task Force”). By late Fall 1977, it was clear that the “Evidence Code” would at best, receive a “mixed” reception. It was most favourably received in Atlantic Canada and Quebec, and least favourably in British Columbia, with feedback from locations in between evenly progressing from one side of the spectrum to the other. Consider the following resolutions from the “judges’ seminars,” concerning the “codification issue,” which was dealt with at the closing plenary sessions, or within the preceding discussion groups, as those in attendance chose:

**Halifax Plenary**

Resolution I – This group is in favour of a comprehensive, legislated statement of the law of evidence.

Resolution II – This group is in favour of a Code of Evidence which contains its own statement of principle.

*Val Morin, Quebec Plenary*

Unanimously accepted the idea of an Evidence Code, the provisions of which would be brought into force all at the same time, but with a delay between enactment and coming into force.

**Toronto Group 1**

Resolution 1 – Be it resolved that we not adopt the Law Reform Commission’s view of a pre-emptive Code as desirable.

**Toronto Group 2**

Resolution 1 – True codification of the law of evidence in the form of the Law Reform Commission of Canada’s Evidence Code is inappropriate to the common law legal system and will not fulfill the purpose of section 1 of that document.

**Toronto Group 3**

Proposition I: Re Codification – It was generally agreed that a comprehensive Canadian Code of Evidence departing from our common law tradition is not desirable.

**Toronto Plenary**
Resolution (unanimously approved) – Statutory changes in the existing law of evidence should be made only in problem areas not susceptible to appropriate change by the ordinary processes of judicial law-making. Many of these problem areas have been revealed during the Consultation Process. When change is to be made, there should be a draft bill of provisions on the law of evidence dealing with specific particular problems as reflected by the Consultation Process and reflecting the solutions suggested by the Consultation Process, submitted to Parliament for consultation across the country and given First Reading.

Edmonton Plenary

Resolution I – Resolved that it has not been demonstrated that an exclusive Code of Evidence is desirable.

Vancouver Group 1

Resolution XX – Re Codification Resolved that a pre-emptive Canadian code of evidence departing from our common law traditions is neither desirable nor necessary.

Vancouver Group 2

Resolution II – codification This group is of the opinion that a comprehensive Canadian Code of Evidence departing from our common law traditions is not desirable.

Vancouver Plenary

Resolution I - A pre-emptive Canadian Code of Evidence, departing from our Common Law traditions, is neither desirable nor necessary.

Three points of note:
(1) Every group that rejected codification also adopted resolutions to the effect that (quoting from Resolution II of the Vancouver Plenary session), “statutory changes to the existing law of evidence should be made in problem areas not susceptible to appropriate change by the ordinary processes of judicial lawmaking.” And very similar wordings were used in the resolutions of the other groups and seminars that rejected codification.

(2) The resolutions from the lawyers’ seminars in each area reflected views very similar to those expressed in the above resolutions from each corresponding area. At the Regina lawyers’ seminar, Resolution I stated, “Resolved that it has not been demonstrated that an exclusive Code of Evidence is desirable.” Would a similar consultation process held today return similar views?

(3) Until a proposal for law reform becomes a Bill before a legislature or Parliament, it is often difficult to get lawyers to treat it seriously. Therefore some of the above resolutions recommended that proposals for law reform be given First Reading. But governments are reluctant to make substantial changes after First Reading, fearing the Bill and its sponsor will thereby suffer a critical loss of credibility; ergo, the “Catch-22” conflict of consultation on legislative reform.

Generally, the further west I went, the more vocal were lawyers against “a true code.” Typical was the comment of one senior Vancouver lawyer, who had come across the waters of the Strait of Georgia to attend the Victoria seminar at the famous Empress Hotel on June 15, 1977. He stated to the plenary assemblage that the Evidence Code, if enacted, represented his pension plan. In the year
following my years in Ottawa, we met before the British Columbia Court of Appeal, I representing the Crown in right of the Province of British Columbia in criminal appeals.

In the book of conference materials I included my article entitled, “The Meaning of Codification,” (previously published at, (1976), 35 C.R.N.S. 178). It was in response to that “meaning” that the “codification” resolutions were drafted and voted on. In my Introduction to the Resolutions Book, (dated August 1978), I provided this summary of the results obtained from the consultation process on this most important of all issues:

By far the most important issues were “codification” and “legislative approach.” The viewpoints expressed on these issues showed a very strong and consistent majority viewpoint. The main points which I found expressed in the Resolutions and in the comments I received while at these seminars were:

1. There should be no codification of the law of evidence at this time.
2. A comprehensive statement of the existing law of evidence should be developed immediately – opinion is split on whether it should be a legislated or non-legislated statement (which might be an authoritative analytical textbook or ‘Canadian Wigmore’).
3. Particular rules of evidence are in need of legislative amendment now.
4. Consultation in this form with judges and lawyers, on the law of evidence should continue. Reform of the law of evidence should be the product of continuing consultation with Bench and Bar.

A fifth important point which was strongly emphasized by comments at almost all of the seminars (although reflected in only a few of the Resolutions), was that an effort should be made by the federal and provincial governments to bring about uniformity in the federal and provincial rules of evidence.

The Consultation Process showed that there is work to be done by the Federal Department of Justice in the field of evidence. There is considerable support in developing a readily accessible statement of the rules of evidence and in amending rules which are out of date or obscure in their application, and also in bringing about greater uniformity between federal and provincial rules of evidence. Therefore, this Department is participating in a federal/provincial task force which is formulating recommendations to bring about uniformity in the rules of evidence. That body, the Federal/Provincial Task Force on Uniform Rules of Evidence, of which I am a member, will be presenting its first Annual Report to the Uniform Law Conference of Canada in August.

Part 2: The failure of the Federal/Provincial Task Force on Uniform Rules of Evidence to have its Uniform Evidence Act enacted, because the piecemeal amendment of the law of evidence is preferred
Late in 1977, because of the “mixed” reception that the Law Reform Commission of Canada’s proposal for an Evidence Code to replace the Canada Evidence Act had received nationally, the Federal/Provincial Task Force on Uniform Rules of Evidence had been formed under the sponsorship of the Uniform Law Conference of Canada (the ULCC), which body provides the mechanisms and procedures by which federal, provincial, and territorial government lawyers work together to maintain consistency and compatibility of federal and provincial laws. For example, the reason why the Evidence Acts in Canada look so very similar is due to adoption of the work of “Uniformity” (the ULCC’s term of endearment).

The Task Force was formed because the sharply contrasting positions of the LRCC (the Law Reform Commission of Canada) and the OLRC (Ontario Law Reform Commission) as to reform of the law of evidence, combined with the reception given the LRCC’s Evidence Code, threatened an imminent split in the law of evidence into two, criminal and civil laws of evidence, and therefore, separate federal and provincial laws of evidence. Up to that time “evidence” had always been a unified whole, with but a few rules having operation in only civil or criminal cases. Everyone thought it should remain that way. Therefore, through the instrumentality of the ULCC, the Task Force from late in 1977 until its final report in 1981, deliberated in fulfilling its mandate to formulate a uniformly accepted comprehensive statement of the rules of evidence. The resolutions obtained from the consultation process conducted in relation to the LRCC’s Report on Evidence, were often referred to in the deliberations of the Task Force.

The members of the Task Force wrote study papers on the various topics of the law of evidence, debated them at our monthly meetings, usually held in each member’s provincial capital city in rotation, and thus developed a draft Uniform Evidence Act (1982). Its final report was published as the, Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Toronto: Carswell; 1982). It was, in my opinion, the best textbook on the law of evidence in Canada until “constitutionalization” of various rules of evidence under the Canadian Charter of Rights and Freedoms gradually put it out of date. Professor Tony Sheppard of the Faculty of Law at the University of British Columbia, was “a member of the Task Force research team and principal writer of the Report.” The regular members of the Task Force came from the federal Department of Justice and the larger provinces, Ontario, Quebec, British Columbia, and Alberta, and sometimes a representative from Nova Scotia attended our monthly meetings. There were other members who attended on an intermittent basis, including Eugene Ewaschuk, Q.C., then Director, Criminal Law Amendments Section of the federal Department of Justice, and later Mr. Justice Ewaschuk of the Ontario Superior Court of Justice. Gilles Létourneau, then Acting Assistant Director General, Legislative Affairs, Quebec Department of Justice, who represented Quebec, later President of the LRCC, and a Justice of the Federal Court of Appeal. And the late Justice G.L. Murray of the Supreme Court of British Columbia was the B.C. representative. I was at first, a federal representative, and then a
“Member at Large” on moving to the Office of the Crown Counsel in Vancouver, and later to Legal Aid Ontario in Toronto as its first Director of Research at LAO LAW.

At a Special Plenary Session of the ULCC, held on August 27-28, 1981 in Whitehorse, Yukon, the new Uniform Evidence Act, being the end product of the Task Force’s work and Report, was adopted, appearing as Appendix 4 to the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence. Given the considerable time and talent devoted to the work of the Task Force, and the well acknowledged need for legislated reform, its Report should not have come to nothing.

On November 18, 1982, First Reading was given in the Senate to Bill S-33, (1st session (1980/04/14 - 1983/11/30) “An Act to give effect, for Canada, to the Uniform Evidence Act, adopted by the Uniform Law Conference of Canada.” Bill S-33 died and came to nothing. Finally, by means of a “Proposed Canada Evidence Act,” dated February 23, 1987, the federal Department of Justice circulated for consultation a draft Act, s. 1 of which stated, “This Act may be cited as the Canada Evidence Act, 1986.” It was mainly the Uniform Evidence Act with some re-organization and re-drafting. But it too came to nothing.

Those efforts failing, not until the electronic records provisions of the Canada Evidence Act, ss. 31.1 to 31.8, came into force on May 1, 2000, as Part 3 of the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 (PIPEDA), along with their 10 provincial and territorial counterparts, has there been significant revision and updating of the law of evidence by statute, or adequate provision for electronically-stored records as evidence. Now, only the Evidence Acts of British Columbia, the Northwest Territories, and Newfoundland and Labrador, still do not contain electronic records provisions. However, having been developed to fulfill an anticipated specific need arising from the fundamentally different nature of electronic records in comparison with traditional pre-electronic paper records, the electronic records provisions appear to signal an abandonment of a comprehensive approach to reform of the law of evidence in favour of a topic-by-topic or issue-by-issue approach, as problems are perceived to arise. That is far different and far more conservative than the bold view deemed necessary by the LRCC’s Report on Evidence and its contained Evidence Code published in December 1975.

At least one can hope that the outmoded, overly conservative view as to when legislative intervention is appropriate, which says, “if it ain’t broke, don’t fix it,” is gone. Law, like all other social sciences and the humanities is driven to change by changing technology—particularly procedural law, of which the law of evidence is a major subdivision. Waiting for emergencies to strike before laws are changed to cope with suddenly imposed new needs is too disruptive and costly. The necessary strategy is the anticipation of needed solutions before emergencies arise, not the rectification or “damage control” of emergencies. For example, the business record provisions of the Evidence Acts (e.g.: s. 30 of the Canada
Evidence Act; s. 35 of the Ontario Evidence Act; and, s. 42 of the B.C. Evidence Act) were legislated into hurried existence in the late 1960’s, in response to the decision in, Myers v. D.P.P. [1965] A.C. 1001, [1964] 2 All E.R. 881, 48 Cr. App. R. 348 (H.L.), wherein the House of Lords held that the available hearsay exception as to business records was not adequate to admit records concerning serial numbers of manufactured automobiles without the evidence of the person who was the maker of those records, and that any needed alteration of the law would require new legislation. The inadequacies of these legislated “quick fixes” was soon made apparent by the published textbook and journal commentary raising uncertainties as to their adequacy in dealing with the admissibility and “weight” issues generated by aducing electronically-produced records as evidence. See for example, “The Federal Business Record Provision: Section 30 of the Canada Evidence Act,” at p. 82, and generally, pp. 44-119 in, J. Douglas Ewart, Documentary Evidence In Canada (Toronto: Carswell; 1984; but no longer published); and see my article, “Electronic Records as Documentary Evidence” (2007), 6 Canadian Journal of Law & Technology 141, 147-151). Therefore every Evidence Act should contain electronic records provisions. In Canada, the Supreme Court of Canada instead followed the dissenting decision in Myers, thus allowing the Court to revise the hearsay rule exception for business records at common law: Ares v. Venner, [1970] SCR 608, 14 D.L.R. (3d) 4, 12 C.R.N.S. 349. As a result of this updating of the business records exception at common law, the Evidence Acts of Alberta and Newfoundland & Labrador still do not contain a business records exception to the hearsay rule. This very varied evidentiary legislation situation, will produce a very inconsistent caselaw, one jurisdiction to the next, once judges and lawyers realize the consequences in law required by the fundamental difference between an electronic record and a pre-electronic paper record—in particular, the “system integrity concept” that is expressly stated in the electronic records provisions; e.g.: s. 34.1(5),(5.1) of the Ontario Evidence Act; and, s. 31.2(1) of the Canada Evidence Act (see my Slaw blog article, “The Dependence of Electronic Discovery and Admissibility upon Electronic Records Management,” published Nov. 22, 2013). For example, the business record provisions were enacted before the present technology of electronic records existed, making necessary accompanying electronic record provisions, which three of Canada’s 14 jurisdictions still don’t have. The same weakness applies to the common law rules as to the admissibility of business records.

The consultation process in relation to the LRCC’s Evidence Code documented the very strong bias of the majority of lawyers and judges in Canada against codification of the law and in favour of judge-made law over statutory law. Has it altered much since then? In the United States, (and among lawyers in Quebec and possibly the Atlantic provinces), codification is much more readily accepted and used as proved by the success of the FRE. Most likely that was because American law school evidence courses had been based upon model codes, such as Uniform Rules of Evidence, for more than 25 years.
before the FRE became operative in 1975. Canadian law schools have not had a similarly national stepping stone up from “the traditions of the common law.”

Ironically and unfortunately, Canada has a greater need for codification than the U.S., having a population of slightly more than a tenth, and a caselaw production even smaller. In a small country, important issues of law do not get to the higher courts for decision fast and frequently enough to justify a continued dependence upon caselaw development as the predominant mechanism for maintaining the law’s currency, effectiveness, and necessary respect of the people it serves.

Many of our larger and more important pieces of legislation incur amendments every year and often more than once per year. But that is not codification. Just as a “comprehensive legislative statement of the rules of evidence” is not a codification of the law of evidence, and our Criminal Code is not a true code, but rather a legislated and unruly collection of amendments to the criminal law. Codification does not mean the abolition of caselaw or even a diminution of its importance or of the necessity of its continued existence. The bias against codification is not only unjustified, it hampers the proper development and utility of the law. The lawyer’s art is not diminished by it. Words are words, not mathematics—qualitative and not quantitative expressions of concepts and descriptions. Therefore they need interpretation and argument, whether in a code or as part of a collection of amendments, or court decisions. All three need lawyers and judges to interpret and apply their words effectively.

In a speech, “Codification and Judge-Made Law: A Problem of Co-Existence,” by the chair of the Law Commission of England, Mr. Justice Scarman, in 1966 at Birmingham University (reproduced at, (1967), 42 Indiana Law Journal 355 at 358), he defined a code as being:

A Code is a species of enacted law which purports so to formulate the law that it becomes within its field the authoritative, comprehensive and exclusive source of that law.”

A code must be enacted law in order to give it authority. Its “comprehensiveness” distinguishes a code from other types of legislative activity such as amendment, revision and consolidation. Codification will almost invariably include revision and consolidation, and to formulate all the law within its field. “Exclusiveness” means the code must be the exclusive source of the law within its field. The definition of a code as being, “nothing more than a restatement of the law enjoying the authority of a statute,” was rejected. His Lordship pointed out that there were already examples in English law where courts had accepted that they must give up the common law and the binding effect of precedents, adding: “The courts must start with the code and not attempt to go behind it.” Existing decisions are applied, not because they are binding, but only if they are persuasive. As an existing example of this approach, Mr. Justice Scarman quoted from Lord Herschell in setting down the proper approach to the Bills of Exchange Act of 1882 in, Vagliano v. Bank of England, [1891] A.C. 107, at 144-45:
The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law; and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

In contrast, Canada’s Criminal Code has been treated as being a restatement and consolidation of the pre-existing common law and statute law, coupled with an attempt to remove technicalities and clarify the law. Pre-existing rules have prevailed unless the provision of the Criminal Code in question has been held to contain sufficiently different language to support an interpretation that Parliament intended to displace it. This approach treats statute law as an exception to the common law rather than as the total source of the law. This is the way in which the rule of construction that states, “statutes, and particularly penal statutes, shall be strictly construed,” is justified.

In comparison, the LRCC’s Evidence Code, by means of its first three sections, establishes the exclusiveness and the comprehensiveness of its provisions. As stated by Mr. Justice Scarman, codification is thus the best means of ensuring that law reform does in fact take place. The need was well argued in the Introduction to the LRCC’s Report on Evidence (p. 4, and 34 C.R.N.S. 26 at 29):

… Present evidence law has rightly been categorized as a “proliferation of ostensible legal rules, refinements of rules, distinctions in the refinements, refinements and distinctions in the exceptions, and so forth ad infinitum.”

How then is a judge in the heat of a trial expected to cope when fine points regarding the admissibility of evidence may be raised at any time? And how can he be expected, often on the spur of the moment, to assess numerous conflicting or narrowly distinguishable precedents cited by opposing counsel? The simple fact is: he can’t. No one can fully master Wigmore’s or Phipson’s or the welter of judicial precedents that make up evidence law. The law of evidence functions because it is often ignored. Surely this is not good enough. For it means that the law is unevenly applied, a problem that is all the more serious where opposing parties are not equally matched. [emphasis added]

If such is the present state of the law, the exclusiveness and comprehensiveness that is the essence of codification is a necessary guarantee of the present law’s replacement. That is done by the fourth major distinguishing feature of a code—it states the law in principles, such as these first five sections of the LRCC’s Evidence Code:

**TITLE I GENERAL PRINCIPLES**

**Part I Purpose and Construction**

1. The purpose of this Code is to establish rules of evidence to help secure the just determination of proceedings, and to that end to assist in the ascertainment of the facts in issue, in the elimination of unjustifiable expense and delay, and in the protection of other important social interests.
2. This Code shall be liberally construed to secure its purpose and is not subject to the rule that statutes in derogation of the common law shall be strictly construed.

3. Matters of evidence not provided for by this Code shall be determined in the light of reason and experience so as to secure the purpose of this Code.

Part II  General Rules

4. (1) All relevant evidence is admissible except as provided in this Code or any other Act.

(2) “Relevant evidence” means evidence that has any tendency in reason to prove a fact in issue in a proceeding.

5. Evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusing the issues, misleading the jury, or undue consumption of time.

The Evidence Code contains 89 sections, including “Title VII Abrogation and Repeal” of the Canada Evidence Act and particular provisions of the Criminal Code. For a more complete definition and analysis of true codification, see my article, “The Meaning of Codification,” (1976), 35 C.R.N.S. 178, and the authorities cited.

An important advantage provided by codification over statutory amendments and court decisions is that it more effectively improves “access to justice.” The other two are more likely to diminish access to justice, for they spread and fragment the law among a greater number of sources necessary to be consulted in order to gather an adequate statement of the law. As a result, law is less readily understood, and therefore less respected by the people it is supposed to serve, especially so by the unconscionably high percentages of unrepresented litigants in our courts. Legal research takes longer and therefore costs more. “Access to justice” diminishes as the costs of legal research increase. It was exactly to cure that problem that the centralized legal research service, LAO LAW, at Legal Aid Ontario was created. (See my Slaw articles for August 9th and October 24, 2013).

The Introduction to the Evidence Code in the LRCC’s Report On Evidence ends with this paragraph (p. 11, and 34 C.R.N.S. 26 at 35):

Whatever lack of unanimity there may be about specifics, of one thing we are sure. All of us are in full agreement that the need to reform the law of evidence is long overdue. We are convinced that the only rational way of effecting this reform is by a set of rules such as those we now propose. These, no doubt, will require adjustment in the light of experience as times goes on, but this can readily be done if one starts with a coherent structure. We do not regard as particularly progressive any reform that tends to add still more patches to the outlandish patchwork quilt we call the law of evidence.

Consider the Commissioners of the LRCC who put their names to this statement and to the whole of its Report On Evidence: E. Patrick Hartt, Chairman; Antonio Lamer, Vice-Chairman; J.W. Mohr,
Commissioner; G.V. La Forest, Commissioner. Three of them were outstanding lawyers and later outstanding judges. Antonio Lamer was appointed to the Supreme Court of Canada on March 28, 1980, and became Chief Justice of Canada on July 1, 1990, retiring on January 6, 2000. G.V. La Forest was appointed to the Supreme Court of Canada on January 16, 1985, and retired on September 30, 1997. E. Patrick Hartt was a justice of the High Court of Ontario, now the Superior Court of Justice.

Therefore, if I were now the Minister of Justice and Attorney General of Canada, I would not be so “democratic” in my consultation on the need for law reform and codification of the law of evidence. Instead, if the Uniform Law Conference of Canada could not quickly respond, I would form a small committee of experts on the law of evidence, asking them to update the LRCC’s Evidence Code, particularly having regard to what the Canadian Charter of Rights and Freedoms and its caselaw have done to the law of evidence. A year later, I would have a Bill before the House of Commons in Ottawa containing a proposed Canada Evidence Code.