
**EVIDENCE
IN THE
LITIGATION
PROCESS**

Second Edition

SCHIFF

A CARSWELL STUDENT EDITION

EVIDENCE IN THE LITIGATION PROCESS

Second Edition

by

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Volume 1

**THE CARSWELL COMPANY LIMITED
TORONTO, CANADA
1983**

Canadian Cataloguing in Publication Data

Schiff, Stanley A., 1932-
Evidence in the litigation process

Includes bibliographical references and index.
ISBN 0-459-35640-2 (bound). — ISBN 0-459-35650-X (pbk.)

1. Evidence (Law) — Canada — Cases. I. Title.

KE8440.S35 1983 347.71'06 C83-098840-8

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PREFACE

This second edition comes at what may be a critical juncture in the development of Canadian evidence law. A new Canada Evidence Act, modelled closely on the Uniform Evidence Act, has been introduced into Parliament. If the statute is ultimately enacted, counterparts similar in content are likely to follow in at least some of the provinces. Where that occurs, the fabric of the common law regime explored in the following pages will disappear, replaced by what are, in all but name, codes of the law.

That, I am convinced, would not be desirable.

Evidence law should remain flexible, capable of ready and wise response to new problems of trial process as they arise. A comprehensive statutory statement cannot fit this bill. Legislation necessarily sets out doctrine as conceived at a given point of time, frozen into a particular set of authoritative words. Statutory policy and language repel judicial attempts to adjust as need dictates. Granted, inflexibility may be a small price to pay if the body of common law supplanted is defective beyond the power and will of judges to repair. Fortunately, that is not the case in this country. Most of the common law of evidence is tolerably adapted to the problems it must solve. Most of what is not can be corrected in the courts. That Canadian judges are increasingly willing to take on the job is shown by some of the more recent judicial efforts this book canvasses.

Even assuming that a comprehensive statutory statement of evidence law were desirable, its inflexibility dictates that policy and language must be wisely conceived in the first instance. Here the Uniform Evidence Act is deeply flawed. For the most part embodying recommendations of the Federal/Provincial Task Force on Uniform Rules of Evidence, its provisions carry the inadequacies of the Task Force's work. Shallow research and analysis, unwarranted assumptions about the wisdom of existing doctrine, mistakes in articulating doctrine: all have left their mark. In some instances, although the Task Force came to sensible conclusions, its parent body, the Uniform Law Conference, rejected resulting recommendations. Examples are discussed at relevant points in this book. In sum, even if evidence law in Canada should be translated into statutory form, we deserve better than the Uniform Evidence Act.

As in the first edition, I have omitted most supporting references a student in a first course in evidence law would not likely want to look up. Unless widespread enactment of the Uniform Evidence Act renders the research useful only to historians, I still contemplate publishing the references as footnotes in a future edition or in a supplementary volume. For this edition, the cases have been checked through law reports and unpublished judgments issued up to late February 1983. Statutes have been rendered current as of mid-April.

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Wales for 1961 and 1965); Sweet & Maxwell Ltd. (Williams, *Corroboration — Sexual Cases*, [1962] Criminal Law Review 662); Utah Law Review (Stewart, *Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 Utah Law Review 1); West Publishing Company (M. Belli, *Modern Trials*, 1st edition 1954; C. McCormick, *Handbook of the Law of Evidence*, 1st edition 1954, 2d edition 1972); The Yale Law Journal Company and Fred B. Rothman & Co. (Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale Law Journal 229, 229-34, 236-39; Note, *Interrogation in New Haven: The Impact of Miranda*, 76 Yale Law Journal 1519, 1613-14). The discussion of *res ipsa loquitur* in Chapter 16 previously appeared in somewhat different form as an article, *A Res Ipsa Loquitur Nutshell*, 46 University of Toronto Law Journal 451. I also express my appreciation to the Canada Council for the grant of a Killam Senior Research Scholarship to assist my research during a sabbatical leave in 1978-79.

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June 1983

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