Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

questioning suspects

Working Paper 32

Canada

QUESTIONING SUSPECTS

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1984

Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Table of Contents

The objective of a criminal trial is justice. Is the quest of justice synonymous with the search for truth? In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony. Such a result may follow from law's deliberate policy. The law says, for example, that a wife's evidence shall not be used against her husband. If truth and nothing more were the goal, there would be no place for such a rule. For in many cases the wife's testimony would add to the quota of truth. But the law has regard to other values also. The sanctity of the marriage relationship counts for something. It is shocking to our moral sense that a wife be required to testify against her husband. So, rather than this should happen, the law makes its choice between competing values and declares that it is better to close the case without all the available evidence being put on the record. We place a ceiling price on truth. It is glorious to possess, but not at an unlimited cost. "Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much."

It is justice then that we seek, and within its broad framework we may find the true reasons for the rule excluding induced confessions. Undoubtedly, as already stated, the main reason for excluding them is the danger that they may be untrue. But there are other reasons, stoutly disclaimed by some judges, openly professed by others, and silently acknowledged by still others — the last perhaps being an instance of an "inarticulate major premise" playing its role in decision-making. These reasons, all of them, are rooted in history. They are touched with memories of torture and the rack, they are bound up with the cause of individual freedom, and they reflect a deep concern for the integrity of the judicial process.

The Honourable Samuel Freedman,
formerly Chief Justice of the Court of Appeal
for the Province of Manitoba,
"Admissions and Confessions" in Salhany and Carter,
Studies in Canadian Criminal Evidence (1972), 99
(footnote omitted).

Introduction

An effective police officer must be able to ask questions of persons that he believes can assist in the resolution of a criminal investigation. There is a moral obligation upon such persons to offer any relevant information they may have, but their assistance cannot be compelled.[1] Save in circumstances specifically sanctioned by statute, police officers have no power to demand answers to their questions.[2] Nor can their powers of arrest be exercised solely to detain a person for questioning.[3]

While the obligation of assistance extends to all citizens, the law has long recognized that it would be repugnant in principle to empower agents of the state with authority to compel statements or answers from persons suspected or accused of crime. Such authority would grant nothing less than a power to compel incriminating admissions or confessions of guilt. The absence of any obligation to answer questions is described positively as the right to remain silent. In this sense, the prerogative to pose questions is matched by the freedom to keep silence.[4] The police and the prosecution cannot expect a suspect or an accused to assist in the preparation and proof of their case against him. In an adversarial system of law this principle is as fundamental as the presumption of innocence.[5]

A police officer's right to put questions and a suspect's right to remain silent signify different interests in the administration of criminal justice. The former is essential to the investigation of crime and, accordingly, to public security. The latter vouchsafes the right of the citizen not to incriminate himself.[6] To balance the interests that inhere in these two rights, the common-law courts developed rules of evidence to govern the admissibility of extra-judicial statements. The fulcrum of that balance is the concept of voluntariness.

From its infancy in the eighteenth century to its maturity in the twentieth, the principle of voluntariness has been applied as a rule of evidence and a rule of policy.[7] The chief elements of the positive rule are now well defined in Canada and can be surveyed with relative dispatch, although the volume of jurisprudence provides an abiding reminder that the application of the rule is not free from difficulty or ambiguity. By contrast, the policy of the law is shot through with controversy.

This Working Paper is predicated on the belief that it is fair and just for statements made to police officers by persons suspected or accused of crime to be admitted in evidence if those statements were made with an enlightened understanding of the consequences that may flow from making them. While we would not inhibit the acquisition of statements from such persons in the investigation of crime, we would deny that they are voluntary unless it is demonstrated that at the time of their making the accused had been apprised of his legal jeopardy. The Commission does not accept the view that the voluntariness of a statement made by a suspect or an accused can be adequately assessed by a retrospective examination of the circumstances of its making unless prescribed rules for the questioning of suspects have been followed.

Voluntariness is not solely an evidentiary concern. There is a procedural dimension to it that comprehends the manner in which statements were obtained, received and recorded. While we endorse voluntariness as the test of admissibility, we propose to give form to this procedural dimension. Our recommendations would, of course, have significant ramifications with respect to the administration of the voluntariness rule, but the purpose of this paper is not to resolve long-standing evidentiary disputes in Anglo-Canadian law on confessions. With equal respect for the interests of effective law enforcement and the interests of persons who are suspected of crime, we seek to regularize procedures for taking statements. In our proposals we strive for standards that will facilitate a determination of the voluntariness, and admissibility, of statements given by suspects to police officers.

The Government proposes to renew the voluntariness rule by translating it and ancillary rules into legislative form. Clauses 63 to 72 of Bill S-33 are thus very important to this paper.[8] As expressions of the Government's policy, they give some indication of the scope for reform in the law of confessions, and indeed there

can be no greater bar to radical reform than pending or recently-enacted legislation. In its preparation of this paper the Commission has assumed that the admissibility of extra-judicial statements made by an accused to a person in authority will be governed in the future either by the current common-law rules or by statutory rules similar in principle to those set out in Bill S-33. Although the provisions of that measure would introduce some changes in the law, they are remarkable chiefly for their fidelity to precedent, and thus they provide a convenient vehicle by which to review the salient characteristics of current Canadian law on the admissibility of confessions. To the extent that they demarcate the natural limits to reform, these provisions also obviate the necessity for extensive historical review of the evolution of the confessions rule at common law. In this paper extensive reference is made to the relevant provisions of Bill S-33 and to the report of its immediate progenitor, the Federal-Provincial Task Force on Uniform Rules of Evidence.[9]

Reported cases and doctrinal writings provide a library of literature on the law and policy governing the admissibility of extra-judicial statements. This jurisprudence demonstrates that the law of confessions raises questions of policy upon which unanimity is impossible and broad consensus extremely difficult. This Working Paper is not a text on the law of confessions or an academic exercise in comparative law.[10] In it the Commission takes a position on what it perceives as important issues in the interrogation of suspects. Our objective is a programme of practical and workable rules for the conduct of such questioning. In these pages the Commission begins with a précis of the voluntariness rule and a summary of divergent views on its function in Canadian criminal law, as expressed in recent opinions delivered by judges of the Supreme Court of Canada. Part One, therefore, is expository. In Part Two the Commission presents its recommendations for reform.

Neither exegesis of the law nor posturing on hard questions of policy can prove, and therefore vindicate, the correctness of any particular initiative in reform of the law. As with other contentious topics, different constituencies in the legal community have profoundly different opinions with respect to the law on the questioning of suspects, and we do not expect that all of them will be satisfied by the programme set out in this paper. As machinery for the administration of criminal justice, the rules that we propose

must stand on their own merits. We believe that they are consistent with the Constitution and that, if enacted, they would materially improve the law on police interrogation. We also believe that the rules proposed in this Working Paper strike a fair balance between the rights of the suspect and the interests of the community in the administration of criminal justice.

PART ONE

The law

I. The voluntariness rule

Interrogation is one of several means by which the police collect information and evidence. Its importance is manifest in the number of cases where a statement made in response to questioning by the police provides either the only positive evidence available to the Crown or evidence that will establish an otherwise weak case beyond reasonable doubt. Questioning can also dispel suspicions held against innocent persons. Interrogation, in short, is essential to effective law enforcement.

Unlike other means of collecting information, such as electronic surveillance or search and seizure, police interrogation in Canada has never been regulated by legislation. One reason for this distinction is that search and wire-tapping are plainly investigative powers for obtaining evidence, or intelligence, and accordingly they are generally subject to a requirement of reasonable and probable cause. Another is that the execution of these investigative techniques implies an invasion of the citizen's private interests. Questioning by the police does not necessarily presuppose complicity in crime on the part of the person questioned, and it involves no obvious invasion in the sense suggested by a comparison with powers of search or electronic surveillance. A police officer who poses questions does so with no other authority than the freedom and discretion that any citizen has to address himself to another, though it is plain that he does so as an agent of the state in the fulfilment of specified duties.

Some indirect regulation of police interrogation has been provided by the rules of evidence, and in particular by the

exclusionary rule descending from *Ibrahim* v. *The King*.[11] In Canada, as in most jurisdictions that administer the common law of evidence, or some statutory derivative thereof, the rule governing the admission of extra-judicial statements as evidence in a criminal proceeding derives from the opinion given for the Privy Council in that case by Lord Sumner. It derives from a single sentence:

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority.[12]

This statement was adopted as a "positive rule" of Canadian law in 1922, when the Supreme Court of Canada decided *Prosko* v. *The King*,[13] and either the *dictum* or the principle it avers has been repeatedly affirmed in subsequent cases.[14] Perhaps *because* of its elegance and economy, Lord Sumner's statement of the rule has attracted the kind of respect that a statutory provision commands. The controversy that surrounds the interpretation of the confession rule and its function in the administration of criminal justice is partly due to Lord Sumner himself: the celebrity of that single sentence has made the rule into something of legal rune on which proponents of different policies have fought, with varying results, over and over again.

Evidence of extra-judicial statements made by an accused to a person in authority is by definition a species of hearsay when tendered by the prosecution. Accordingly, the provisions of Bill S-33 that would govern the admissibility of such statements are found among exceptions to the general ban on hearsay evidence. Even as such, however, extra-judicial statements are presumed inadmissible until the prosecution establishes that the statement satisfies the special criterion of voluntariness. If such proof is made, the statement is admissible, although the Bill, like the common law before it, recognizes in the trial judge a discretion to exclude a statement of tenuous admissibility if its probative value is outweighed by its prejudicial effect.[15]

Clauses 63 and 64 state the essential elements of the law:

> **63.** In this section and sections 64 to 70, "person in authority" means

> a person having authority over the accused in relation to a criminal proceeding or a person who the accused could reasonably have believed had that authority;
>
> "voluntary", in relation to a statement, means that the statement was not obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority.
>
> **64.** A statement, other than one to which paragraph 62(1)(*f*), (*g*), (*h*) or (*i*) applies that is made by an accused to a person in authority is not admissible at the instance of the prosecution at a trial or preliminary inquiry unless the prosecution, in a *voir dire*, satisfies the court on a balance of probabilities that the statement was voluntary.

Save for the reduction of the burden of proof, new and old law would coincide in these provisions. As does the common-law rule, the statutory rule of voluntariness would apply only when the statement in issue was made to a person in authority. The forum for determining voluntariness would remain the *voir dire*, a trial upon the issue of admissibility conducted solely by the trier of law.[16] Thus, an extra-judicial statement cannot be put to the trier of fact or, in the case of a preliminary inquiry[17] or trial by judge alone,[18] weighed by the trier of fact until it has been admitted upon proof of voluntariness.[19]

The principal aspects of the rule as they affect the questioning of suspects can be reviewed under four heads: scope, person in authority, voluntariness, and burden of proof.

A. *Scope*

No distinction is made in the application of the voluntariness rule between inculpatory and exculpatory statements, nor is there any distinction between a confession and an admission of any fact that is material to a determination of guilt or innocence.[20] There are, however, three clear exemptions from the voluntariness rule and the *voir dire* as applied to extra-judicial statements.[21]

First, after some hesitation,[22] the Supreme Court of Canada ruled in *Park* v. *The Queen* that an accused could make an enlightened and express waiver of the *voir dire*,[23] and this decision is codified in clause 68 of Bill S-33. As such a waiver constitutes an admission of voluntariness, the statements can be received without further inquiry. No such provision is made in the Bill, but the Court in *Park* stipulated that the presiding judge retains a discretion to conduct a *voir dire*, despite the waiver, in order to ascertain whether the accused understands the nature and effect of the waiver given.[24]

The second exemption from the requirement of a *voir dire* covers statements that of themselves constitute an offence.[25] This is as much a point of logic as of law, and nothing is said of it in Bill S-33. Statements are acts and thus subject to proof as facts. Where such facts constitute the gravamen of an offence, a requirement for proof of voluntariness would be tantamount to a requirement for proof that the offence was voluntarily committed. Indeed, if carried to its extreme, it would create a bar to the description of the offence. As a confession is tendered as proof of an offence, and not alleged as the offence itself, any suggestion that a statement forming part or all of the offence itself should be proved voluntary is absurd, though the existence of promises or threats in such circumstances might conceivably be relevant to allegations of a substantive defence of entrapment, provocation or self-defence.

Third, clause 64 of Bill S-33 declares, by reference to subclause 62(1), that the voluntariness rule does not apply to certain types of statements.

> **62.** (1) The following statements are admissible to prove the truth of the matter asserted:
>
> ...
>
> (*f*) a statement as to the physical condition of the declarant at the time the statement was made, including a statement as to the duration but not as to the cause of that condition;

> (*g*) a statement, made prior to the occurrence of a fact in issue, as to the state of mind or emotion of the declarant at the time the statement was made;
>
> (*h*) a spontaneous statement made in direct reaction to a startling event perceived or apprehended by the declarant;
>
> (*i*) a statement describing or explaining an event observed or an act performed by the declarant, made spontaneously at the time the event or act occurred.

This miscellany combines certain recognized exceptions to the hearsay rule and statements that might have been admissible at common law under the doctrine of *res gestae*.[26] By allowing the reception of these statements as proof of their contents, these provisions would eradicate the euphemistic jargon of *res gestae* from Canadian law and resolve the uncertainty with regard to the foundation upon which spontaneous declarations are admissible.[27] They would also eliminate further debate on a question that has never been resolved by the Supreme Court of Canada: is a statement that forms part of the *res gestae* inadmissible until proved voluntary at a *voir dire*, or, conversely, does an inadmissible confession become admissible if it can be brought within the concept of *res gestae*? In the Supreme Court the clearest *dicta* on the issue are those of Mr. Justice Dickson in *Erven* v. *The Queen*, where he said that although confessions and statements forming part of the *res gestae* were admissible upon wholly distinct rationales, it did not follow that the rules affecting the reception of each are mutually exclusive.

> Statements should not slip in without a *voir dire* under the pretext that they form part of the *res gestae*.... The rules regarding *res gestae* are substantive rules regarding hearsay and the admissibility of evidence. They do not affect the procedure by which decisions are to be made regarding admissibility of statements made to persons in authority. Statements constituting part of the *res gestae* are admissible as exceptions to the general rule excluding hearsay. As with all statements by an accused, they are subject to the general

> requirement of voluntariness. In order to determine whether they are voluntary, as well as whether they are, in fact, part of the *res gestae* and otherwise admissible, such statements must be considered by the judge on a *voir dire* in the absence of the jury.[28]

By this view an inadmissible confession could never be received through the doctrine of *res gestae* because both types of statement, if made to a person in authority, must be proved voluntary at a *voir dire*. Although it is unclear whether the position taken by Dickson J. represents the law at the moment,[29] it is clear that the Government rejected this position in the formulation of Bill S-33. By distinguishing between the two types of statements, and thus giving formal recognition to distinct criteria for their admission, the provisions of Bill S-33 would bring a measure of intellectual rigour, if not clarity of principle, to the application of rules in a confused area of the law. Thus, if it were enacted, clause 64 would require an exercise in classification, and, in order to protect the accused against gross prejudice, a *voir dire* would have to be held in order to determine whether the statement in issue falls within the rule or one of the enumerated exceptions. If it lies within the former, the *voir dire* must proceed to a determination of voluntariness; if it lies within an exception, it would be admissible.[30]

Apart from the three exceptions considered above, the admissibility of other extra-judicial statements is dependent upon the prosecution's proof of voluntariness at a *voir dire*.[31] The concept of "statement" generally poses no particular difficulty, although it should be noted that a statement can also take the form of assertive conduct.[32] This qualification is captured in the definition set out in clause 2 of Bill S-33:

> "statement" means an oral or a recorded assertion and includes conduct that could reasonably be taken to be intended as an assertion.

Accordingly, if an investigating officer holds up an item of contraband and asks the accused if that contraband is his, a nod of the head will suffice as an admission of possession. For present purposes, the effect of the definition of "statement" is to assimilate assertive acts to testimonial evidence, as opposed to original evidence, and thus, when read together with this definition, clause 64 would appear to require that assertive conduct in the presence of a person in authority be proved voluntary at a *voir dire* before being admitted in evidence at the instance of the Crown.[33]

B. *Person in authority*

As noted above, it is an essential condition for the application of the voluntariness rule that the statement in issue have been given to a person who is recognized at law as a person in authority. This was the case at common law, and would remain so under Bill S-33. Extra-judicial statements made by the accused to other persons are admissible, without proof of voluntariness, as statements against interest by a party-litigant. Of course, it is in the nature of criminal investigation and prosecution that extra-judicial statements made to persons in authority are most often made to police officers, but the category of persons in authority is not limited.[34] In a practical sense, therefore, the breadth of this category measures the scope of the rule. In the absence of a definition, the courts have considered as persons in authority anyone whom the accused might reasonably believe to be in a position materially to affect the course of a prosecution against him.[35] These criteria clearly admit of both broad and narrow interpretations. The paradigm is the person who is directly involved in the apprehension of a suspected offender or in the investigation or prosecution of an offence.[36] The narrowest view would restrict this notion even further so as to exclude anyone whose authority does not apparently derive from the state.[37] The courts, however, have not always taken the narrow view and thus it has been held that employers,[38] medical personnel,[39] private detectives,[40] and victims[41] might qualify as persons in authority. Once again, the issue depends entirely upon the circumstances of each case.

It is important to note that "authority" in this context has nothing to do with promises or threats allegedly made by the person to whom a statement was given, nor with that person's ability to make good upon any threat or promise; the existence and effect of inducements are only elements in the assessment of voluntariness, and not conditions for the application of the rule.[42] The central factor in identifying a person in authority is the degree of power or control that the accused might reasonably perceive in the person to whom he makes the statement, although the existence of any inducement will obviously colour his perception in the circumstances.[43] While the reasonableness of the accused's belief implies an objective criterion in identifying a person in authority, a majority of the Supreme Court of Canada ruled in *Rothman* v. *The Queen* that the test of a person in authority was essentially

subjective,[44] and this rule of interpretation is set out in clause 70 of Bill S-33.

> Where an accused in making a statement was unaware that he was dealing with a person in authority, the statement shall be treated as having been made to a person other than a person in authority.

Thus, if the accused does not believe that his interlocutor is a person in authority, or if he can be duped into believing him not to be such a person, the voluntariness rule does not apply.[45] This characterization of the requirement for a person in authority affords considerable latitude for subterfuge and deception by persons who seek to elicit statements by concealing their identity; it also removes the bar against procuring statements by inducements where identity is concealed.

C. *Voluntariness*

(1) The traditional view

Proof of voluntariness is, of course, the substantive test of admissibility for an extra-judicial statement made by the accused to a person in authority and tendered in evidence by the prosecution. Otherwise the manner in which a statement was obtained can only influence the weight that can be ascribed to it by the trier of fact.[46] As it was at common law, the concept of voluntariness is defined in Bill S-33 as the absence of promises or threats held out through word or deed by a person in authority.[47] A voluntary statement, therefore, is one that was intentionally made without the inducement of a promise or a threat. It is not necessarily one that was made with an enlightened understanding of the legal ramifications that may flow from doing so.[48]

The type of inducement that will vitiate the admissibility of a statement is as impervious to positive definition as the concept of voluntariness itself. In this regard Bill S-33 does not deviate from precedent, and thus it must be assumed that common-law principles of interpretation will remain in effect to the extent that the Bill does not declare explicit rules with respect to the determination of admissibility. On the *voir dire* the judge is faced primarily with a question of fact,[49] in which the telling element will be the existence

of a causal link between the conduct of a person in authority and the making of the statement. The assessment of voluntariness requires that the presiding judge examine all the circumstances surrounding the making of the statement, and it is for this reason that the kind of conduct that will render a statement inadmissible cannot be defined systematically. The importance of the facts in each case was discussed by Mr. Justice Rand in *R.* v. *Fitton*:

> The cases of torture, actual or threatened, or of unabashed promises are clear; perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.[50]

Rejection of the evidence must follow if it is apparent upon an examination of the circumstances that the words or acts of a person in authority might reasonably be believed to have induced the accused to make a statement under the apprehension of harm or advantage. A causal relationship, however, is necessary: were the words or actions of a person in authority the causes that induced the accused to make a statement under a fear of prejudice or hope of advantage?[51] The inducement need not relate to the future course of a prosecution,[52] and there is no requirement that the conduct of the person in authority be either wilful or intentional.[53] However, if the effect of an inducement that would offend the rule is in any way dissipated, a subsequent statement will not necessarily be rendered inadmissible.[54]

Fear or hope aroused in the accused will not necessarily be grounds for exclusion because these states of mind may be self-induced or induced by conduct that does not otherwise offend the rule.[55] Spiritual inducements, trickery or oppressive circumstances will not of themselves render a statement involuntary, and therefore inadmissible, unless the evidence discloses conduct that is tantamount to a promise or threat.[56] Improper or illegal conduct by persons in authority, including the denial of counsel by police officers, will also not bar the admission of statements unless it falls within the prohibited classes of inducement.[57] In assessing the circumstances in which a statement was made, the judge may consider, for example, whether a warning was given,[58] whether trickery was employed,[59] whether the suspect was of sufficient

age[60] and intellectual capacity[61] to understand what he was doing, and whether the interrogation was of undue duration.[62] According to traditional jurisprudence, therefore, exclusion for lack of voluntariness is dependent upon evidence of a promise, a threat or some equivalent form of inducement.

A causal link between the conduct of a person in authority and a statement does not imply that the prospect of harm or advantage must necessarily be held out to the accused himself, or indeed that it had been communicated to him by the person in authority;[63] a statement will be excluded if the material consequences of a promise or threat will fall upon some person other than the accused.[64] Certainly promises of interim release, pardon or reduced sentence, even if given only in the form of assent to a suggestion made by the accused himself, can lead to exclusion.[65] Instances of the type of conduct that will constitute an inducement that is obnoxious to the rule are innumerable but it is important to retain that any inducement conveying an element of prejudice or advantage can deny the admissibility of the statement if it caused the accused to speak. Conversely, of course, the necessity of a causal link implies that if the inducement has abated the statement may be admitted. The dissipation of its effect may result either from the lapse of time or from other intervening factors, such as the issuance of a warning. Once again, the duration or effect of an inducement, like its existence, is a question of fact for the judge.

It should be noted that in clause 66 of Bill S-33 the Government has also codified the common-law rule[66] that statutory compulsion does not of itself violate the concept of voluntariness:

> The fact that a statement was required to be made under compulsion of statute shall not be considered in the determination of whether the statement was voluntary.

Despite this rule, however, a *voir dire* must still be conducted to determine that other circumstances surrounding the making of the statement did not contaminate its voluntariness.[67]

(2) Recent developments

As interpreted by the courts at common law, especially in appellate jurisprudence, the concept of voluntariness in Canada is quite restrictive, and it would remain so if Bill S-33 were enacted.[68]

In recent years, however, the courts have expanded the scope of the confessions rule, and this expansion can be discussed under two heads.

a. *Capacity*

The Supreme Court of Canada has recently acknowledged that a free and voluntary statement may still be excluded if the declarant was in such a condition that his statements could not be considered "the utterances of an operating mind".[69] To some extent, of course, capacity would be evaluated as one of the attending circumstances, and thus imbecility, insanity, extreme drunkenness and the like might affect the admissibility of a statement.[70] Accordingly, it could be argued that exclusion for lack of capacity is not a new and separate ground for the rejection of a statement, but an exception to the strict definition of voluntariness that can be justified by reference to the burden of proof and questions of fact to be decided by the judge at first instance.[71] Alternatively, it might be argued that capacity is now an essential element of the substantive confessions rule, and one that must be demonstrated by the prosecution in establishing voluntariness. Whatever distinctions in form there may be between these two formulations, there is little or no difference in substance. It seems plain, however, that the requirement of capacity could not be used at common law to recast the negative formulation of the voluntariness rule into a positive requirement of enlightened consent. The Supreme Court appears to have limited the question of capacity to a determination of whether the statement in issue was the utterance of an operating mind, and this suggests that only some form of clinical incapacity will necessitate exclusion of the statement. Otherwise the accused's state of mind will be considered only as a matter of weight.[72]

Clause 69 of Bill S-33 maintains the criterion of capacity and justifies it upon an analogy with *non est factum*.[73]

> **69.** (1) A statement otherwise admissible under section 64 shall not be received in evidence where the physical or mental condition of the accused when he made the statement was such that it should not be considered to be his statement.

The criterion of capacity as construed by the Bill is, however, markedly different from the concept at common law in one respect. According to the decisions of the Supreme Court, it would appear that at common law a finding of incapacity was open to the judge upon assessment of all the circumstances in which the statement was made, and thus this decision would follow from a question of fact and as a function of the prosecution's burden of proof.[74] Subclause 69(2) of the Bill, however, states that an extra-judicial statement made to a person in authority cannot be excluded by reason of the accused's incapacity unless the accused himself discharges the evidential burden to put his capacity in issue.[75] While it is not denied that such a burden lies with the accused, the novelty in the Bill is the elevation of a principle of common sense to a rule of law.

b. *Oppression*

Although oppression has never been expressly sanctioned by the Supreme Court of Canada as a separate ground for the exclusion of extra-judicial statements, the issue remains open at common law.[76] Even in the absence of express authority, however, oppression has been tacitly recognized at common law in Canada as a basis for the exclusion of extra-judicial statements. As the prosecution must prove voluntariness to the satisfaction of the judge, and as the judge will deliver his ruling after an assessment of all the relevant circumstances, he may exclude a statement if the prosecution fails to discharge its burden. Exclusion on this basis can be tantamount to a discretionary exclusion for oppression. It can, of course, be argued that a statement not barred by the voluntariness rule is admissible and that, accordingly, other considerations can go only to weight as assessed by the trier of fact. This view may be theoretically sound, but there are many instances in which a trial judge has excluded an extra-judicial statement solely on the basis that he retained a doubt with respect to its voluntariness in the circumstances of the case.[77] Lengthy interrogations and questioning incommunicado,[78] for example, are factors that might contribute to such a result. Therefore, as a function of the burden of proof, rather than as part of the positive rule itself, an atmosphere of oppression or compulsion could suffice to justify the exclusion of extra-judicial statements. This discretion, if that is what it can be called, would be eliminated by Bill S-33

because the reduced burden of proof under the Bill, together with the narrow definition of voluntariness, would deny the judge's ability to exclude simply on the ground that he retains some doubt as to the voluntariness of a statement.[79]

D. *Burden of proof*

It has long been settled law that the onus to demonstrate the admissibility of a statement lies with the prosecution.[80] It is also clear that in establishing the circumstances in which a statement was made the prosecution must call all persons in authority who were present at the time and be able to account for all events surrounding the interrogation.[81] There is no rule of automatic exclusion for failure to produce all witnesses to the statement, and thus the judge may proceed to an assessment of voluntariness having received a satisfactory explanation for the absence of any witnesses.[82] If the prosecution does not call all witnesses to the statement, however, it does so at its peril, as the absence of any person who may have been in contact with the accused at a material time will augment the quantum of doubt against the admissibility of the statement.[83] Accordingly, barring evidence of illegal inducements, and quite apart from the contents of any testimony, the prosecution's case for admissibility will be strongest if all witnesses are called. It will be progressively weaker if the absent witness is a person in authority, or someone in the presence of a person in authority, and is in a position to induce the statement by means of a promise or threat.[84]

As for the quantum of proof required of the prosecution on the *voir dire*, the courts at common law and the Government in Bill S-33 have taken rather different positions. The Bill fixes the quantum of proof upon a balance of probabilities. There is perhaps some ambiguity as to the exact quantum of proof required at common law, but one thing is clear: it was never proof upon a balance of probabilities.[85] There are *dicta* in many cases that the quantum is proof beyond reasonable doubt,[86] while in some other cases it is said that the prosecution must prove affirmatively, or to the satisfaction of the judge, that the statement was voluntary.[87] Whatever difference of degree there may be between these two standards, there is plainly a difference in kind between them and proof upon a balance of probabilities.[88]

II. The rationale for the rule

A. *Introduction*

Controversy has always surrounded the interpretation of the voluntariness rule because there has never been agreement with regard to its function in the administration of criminal justice. Some regard the rule solely as a device for purging hearsay statements of the risks of unreliability before they are put to the trier of fact, while others describe it as an instrument for the control of investigative practices. Yet others assert that it serves these functions and more. Undoubtedly, there is merit in all of these positions, and supporting opinions might be found in jurisprudence of very high authority. But the proponents of any particular opinion cannot claim to such certitude and authority in their views that would deny the validity of other opinions. The development of the confessions rule in the twentieth century demonstrates, if nothing else, that the application of the rule can vary markedly in the circumstances of a particular case. Historical analysis will not disclose a single rationale by which to characterize the rule, either as a rule of evidence or procedure.

In Canadian courts there is ambiguity and disagreement with respect to the rationale that supports the voluntariness rule. That the application of the rule fluctuates as a function of policy is amply demonstrated in recent jurisprudence of the Supreme Court of Canada. Although this pattern of fluctuation is evident throughout the evolution of the confessions rule, there is no utility in undertaking here a history of the rule in Anglo-Canadian law, partly because there is already a vast body of literature on the subject and partly because the immediate purpose of this Working Paper is to propose a course of action for reform of the present law. It is nevertheless important to canvass the range of policies that have been advanced in favour of the rule. For this purpose recent jurisprudence of the Supreme Court of Canada provides ample demonstration of the chief lines of argument with regard to the functions of the courts in the administration of rules of evidence. Indeed, a survey of the opinions expressed in *R.* v. *Wray*[89] and *Rothman* v. *The Queen*[90] will suffice for exposition of the differing views advanced by members of the Court with regard for the rationale for the confessions rule in the law of evidence. In the following pages the opinions delivered in

those cases are considered at some length, and with extensive quotation. But the objective of this review is not mere exposition. For reform of the law relating to questioning of suspects, the contrasting positions taken in the Supreme Court raise a fundamental question of policy: should the courts supervise the manner in which evidence of extra-judicial statements is obtained from a suspect during the investigation of a criminal offence?

With respect to the law on confessions, the orthodox opinion in Canadian jurisprudence is that the courts should concern themselves solely with determining whether a statement is objectively trustworthy and entitled to credit in the sense that it was not induced through fear or hope excited in the accused by a person in authority. The exclusion of involuntary statements is a refusal to receive hearsay evidence that might be unreliable, and it is not directly a sanction against the manner in which that evidence was obtained. Reliability in this connection is commonly associated with probable truthfulness, although the courts more often speak of the unreliability inhering in the danger that the statements may be untrue. Proof of voluntariness is presumed to eliminate risk in relying upon extra-judicial statements in the determination of guilt or innocence.

As the concern for the forensic reliability of statements is only indirectly related to the manner in which the statements are obtained, other rationales for the voluntariness rule have been advanced to account for this aspect of the issue. The thrust of these is that the power to exclude evidence should be used in such a way as to discipline the conduct of police questioning and to advance or protect both the substance and appearance of fairness in the administration of criminal justice. From this point of view rules governing the admissibility of extra-judicial statements are construed not only as tests of reliable evidence but as norms by which to regulate relations between investigating authorities and the public. The disciplinary rationale is specifically based upon the premise that the voluntariness rule should be exercised as an instrument to supervise the activities of those who are responsible for the investigation of crime, and thus to preserve the rectitude of the judicial system by disallowing proof of an illegal act through evidence obtained by means of illegal or improper acts.

While there may be no doubt that voluntariness is the crux of the confessions rule, it cannot be said that one rationale justifies

this legal criterion of admissibility. It may be true that the rule emerged in the eighteenth century from a desire to ensure that evidence presented to the trier of fact would be reliable and not tainted by a substantial risk of falsehood. It is certainly true that the reliability rationale has remained very much a central part of the rule throughout its evolution in the courts. But, since evidentiary reliability in this sense only defines the voluntariness rule as a mechanism that facilitates a decision by the trier of fact on the truth of the allegations against the accused, it fails to monitor the conduct of police officers. The reliability rationale and the disciplinary rationale are not incompatible, however, although they epitomize radically different views of police powers, the interests of the individual citizen, and the proper functions of the courts. Both rationales force hard choices in the formulation of a policy to govern the admissibility of confessions, and in some instances there will be an irreconcilable polarity between the public's need to detect and ascertain guilt, and the suspect's right to remain silent. The voluntariness rule represents the attempts of the common law to mediate these interests.

B. R. *v.* Wray

The history of the confessions rule begins in 1783 with the decision in *R.* v. *Warickshall*.[91] The accused was charged as an accessory after the fact in a case of grand larceny. She had received stolen property with the knowledge that it had been stolen, but the goods were discovered as a result of a confession that had been "obtained by promises of favour".[92] The Court ruled that the inducement rendered the confession inadmissible as evidence at the trial:

> Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.[93]

Thus the doctrine of voluntariness was fixed as a rule governing the admissibility of evidence.

On the ground that evidence discovered by means of an inadmissible confession was itself inadmissible, counsel for Jane Warickshall then moved that the Court should also refuse any proof of the fact that stolen property was found among the accused's possessions, "for otherwise... the prisoner [would be] made the deluded instrument of her own conviction". This motion was refused:

> This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived; and the impossibility of admitting any part of the confession as a proof of the fact, clearly shews that the fact may be admitted on other evidence; for as no part of an improper confession can be heard, it can never be legally known whether the fact was derived through the means of such confession or not; and the consequences to public justice would be dangerous indeed; for if men were enabled to regain stolen property, and the evidence of attendant facts were to be suppressed, because they had regained it by means of an improper confession, it would be holding out an opportunity to compound felonies. The rules of evidence which respect the admission of facts, and those which prevail with respect to the rejection of parol declarations or confessions, are distinct and independent of each other.[94]

Here and in the passage quoted above it is clear that the rationale for the confessions rule, and indeed for rules on the admissibility of evidence in general, is forensic reliability.

The long arm of precedent at common law proved its reach in 1970, when the reasons advanced by the Court in *Warickshall's Case* were restated in the judgment delivered by Mr. Justice Martland for a majority of the Supreme Court of Canada in *R.* v. *Wray*.[95]

Mr. Wray was charged with murder. The case against him was largely circumstantial, save for a signed statement and a rifle that was discovered as a result of information divulged in the confession. After signing the statement the accused was taken by the police to a swamp near the scene of the crime and, on the basis

of what he told them there, the police found the rifle on the following day. The statement was excluded from the trial on the basis that it was involuntary and therefore inadmissible. The trial judge also purported to exercise a discretion to exclude evidence of the accused's participation in the discovery of the weapon. The Ontario Court of Appeal affirmed that the trial judge had such a discretion. This ruling was the sole ground of the Crown's appeal to the Supreme Court of Canada. The appellant argued that proof of the discovery was admissible. Moreover, the Crown argued that it could lead evidence of the accused's involvement in locating the rifle and of the portion of the confession that was confirmed by this discovery. In support of this argument it relied chiefly upon the rule stated by Chief Justice McRuer of the Ontario High Court of Justice in *R.* v. *St. Lawrence*.[96] The appeal was allowed by a majority of the Supreme Court, with three judges dissenting.

Wray is of immense importance in Canadian criminal jurisprudence. The question upon which leave to appeal was granted forced the Court to tackle fundamental issues of policy with respect to the law governing the admission and exclusion of evidence in criminal proceedings. Moreover, the ruling delivered by the Court has governed the issue in Canada ever since. The gist of the reasons given for the majority by Mr. Justice Martland can be summarized as follows: as a matter of law, the trial judge has no discretion to exclude technically admissible evidence of substantial weight and probative value on the basis that its admission would operate unfairly against the accused or would bring the administration of justice into disrepute. There is, however, a narrow discretion to exclude on the ground of unfairness: the judge may exclude evidence of tenuous admissibility if its probative value is surpassed by its prejudicial effect.

The reasons upon which Martland J. reached his conclusion are clear. He said that in all questions affecting the admissibility of evidence the governing premise is the general principle of relevance, and on this point he quoted from the speech given by Lord Goddard in *Kuruma* v. *The Queen*:

> In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.[97]

Mr. Justice Martland took the view that a derogation from this general principle could be justified solely by some positive rule of exclusion, such as the voluntariness rule, or by the discretion to exclude evidence in order to ensure a fair trial. Following a lengthy examination of jurisprudence in the House of Lords, and particularly the decision of the Privy Council in *Noor Mohamed*,[98] he concluded that there was no authority to support a broad discretion that would allow the exclusion of admissible evidence solely on the basis that its reception would be prejudicial to the accused because of the manner in which it was obtained, or that its reception would bring the administration of justice into disrepute. So far as Mr. Justice Martland was concerned, fairness has a restricted meaning in the law governing the admissibility of evidence in criminal cases:

> I think confusion has arisen between "unfairness" in the method of obtaining evidence, and "unfairness" in the actual trial of the accused by reason of its admission. The result of those two cases was, in effect, to render inadmissible evidence which the *ratio decidendi* of the *Kuruma* case had held to be admissible. The view which they express would replace the *Noor Mohamed* test, based on the duty of a trial judge to ensure that the minds of the jury be not prejudiced by evidence of little probative value, but of great prejudicial effect, by the test as to whether evidence, the probative value of which is unimpeachable, was obtained by methods which the trial judge, in his own discretion, considers to be unfair. Exclusion of evidence on this ground has nothing whatever to do with the duty of a trial judge to secure a fair trial for the accused.[99]

The conclusion, therefore, is plain:

> [I]n my opinion, under our law, the function of the court is to determine the issue before it, on the evidence admissible in law, and it does not extend to the exclusion of admissible evidence for any other reason.[100]

The rationale advanced by Martland J. is closely tied to a perception of the trial process as a mechanism for determining the truth of allegations made against the accused. So far as the duties of the trial judge are concerned, this view expressly eschews any direct or supervisory control over the manner in which criminal investigations are conducted.

The dissenting judges took quite a different view of the issues in *Wray*. The thrust of their objections to the majority's conclusion

is contained in the opinion delivered by Cartwright C.J.C. At the outset, quoting from *R.* v. *St. Lawrence*, he endorsed Chief Justice McRuer's statement of the rule governing the admissibility of confessions that are confirmed by subsequent facts:

> Where the discovery of the fact confirms the confession — that is, where the confession must be taken to be true by reason of the discovery of the fact — then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible.[101]

Cartwright C.J.C. then discussed anomalies that arise when truthfulness is imported into the evaluation of extra-judicial statements. He noted that in *DeClercq*[102] a majority of the Supreme Court agreed that the truth or falsity of an extra-judicial statement may be relevant to its admissibility even though the test of admissibility is voluntariness. Moreover, he says, "[t]he great weight of authority indicates that the underlying reason for the rule that an involuntary confession shall not be admitted is the supposed danger that it may be untrue".[103] The obvious question, therefore, is whether reliable evidence of truthfulness would justify the admission of any statement. The problem posed by *DeClercq* is whether an involuntary statement ought to be admitted upon proof that it is true. If truthfulness were the ultimate criterion, there would be no doubt that it should. Cartwright C.J.C. took up this issue in the following passage which begins with a quotation from the judgment of the Ontario Court of Appeal in *R.* v. *Mazerall*:

> It would be a strange application of a rule designed to exclude confessions the truth of which is doubtful, to use it to exclude statements that the accused, giving evidence upon this trial, has sworn to be true.
>
> While in my view this observation was *obiter*, it is difficult to reject its reasoning if the only ground for excluding an involuntary confession is the danger of its being untrue. If, on the other hand, the exclusion of an involuntary confession is based also on the maxim *nemo tenetur seipsum accusare* the truth or falsity of the confession does become logically irrelevant. It would indeed be a strange result if, it being the law that no accused is bound to incriminate himself and that he is to be protected from having to testify at an inquest, a preliminary hearing or a trial, he could none the less be forced by the police or others in authority to make a statement which could then be given in evidence against him. The result which would seem to follow if the exclusion is based on the maxim would be that the involuntary

> confession even if verified by subsequently discovered evidence could not be referred to in any way.[104]

Chief Justice Cartwright, like Mr. Justice Martland for the majority, refused to overrule *R.* v. *St. Lawrence*, but, unlike the majority, he affirmed the trial judge's discretion to exclude legally admissible evidence in instances where its reception would be unfair to the accused or would bring the administration of justice into disrepute. He acknowledged that the basis for the discretion would vary with the facts of any particular case and that the scope of the discretion could thus not be defined with precision. On the facts before him, however, the Chief Justice ruled that the discretion was properly exercised on the basis that the police had procured the accused's confession by trickery, duress and improper inducements, and had wilfully denied counsel access to the accused while the interrogation was taking place.

Though there were other opinions delivered in *R.* v. *Wray*, the salient difference between the majority and the dissentients emerges from a comparison of the reasons given by Martland J. and Cartwright C.J.C. The crux of the matter is the divergence of views with respect to the scope of the trial judge's duty to ensure that the accused has a fair trial. The difference is this: the majority took the view that this duty only extends to the court process and the minority took the view that it included supervision of investigative procedures as well.

C. Rothman *v.* The Queen

In *Rothman* v. *The Queen* the accused was charged with possession of cannabis resin for the purpose of trafficking. The evidence disclosed sufficient grounds for conviction on a charge of simple possession, but proof of the higher charge depended upon the admission of an extra-judicial statement that was made by the accused to a police officer acting under cover. Following his arrest the accused was given a warning. Constable Gervais, the investigating officer, asked if he would give a statement. Rothman refused and was placed in a cell. At about one o'clock in the morning, the investigating officer put Constable McKnight in the accused's cell with instructions to obtain information from the accused. He was casually dressed and had a four- or five-day growth of beard. The accused told Constable McKnight that he looked "like a nark".

The constable later won the accused's confidence by telling him that he was a truck driver from Pembroke and that he was in jail for traffic violations. What happened next is summarized in the following statement of facts:

> Constable McKnight asked the Respondent why he was in jail and the Respondent stated that it was for possession of hashish. While in the cell, Constable McKnight sat beside the Respondent on the only bench. The Respondent then told Constable McKnight that he sold hashish for $25.00 for 3 grams, that the hash that he had been caught with had been "fronted" to him and that he would have to pay the people back $1,000 because he had been "busted". The Respondent stated that he would have made $1,800 on the drugs that he had. Constable McKnight asked if there were many drugs in the City and the Respondent replied that there were approximately 40 pounds. The Respondent also stated that he was arrested at his apartment along with his buddy who was in the next cell. During the conversation, Constable McKnight informed the Respondent that he was a truck driver from the Pembroke area and had been fishing so the Respondent would have the impression that he was not a nark and that he did not know much about drugs. Constable McKnight indicated that people in the Pembroke area were interested in drugs and that he would be interested in getting drugs; however, no deal was set up. The Respondent asked Constable McKnight when he would be getting out and he replied that a buddy would be coming down to pay the fine. The Respondent stated that he had to go to court the next morning because he was on parole respecting other charges. Constable McKnight was released from the cell at 1:07 a.m. and made his notes concerning the conversation shortly thereafter.[105]

The trial judge, having determined that Constable McKnight was a person in authority, excluded the statement on the ground that the "continuation of the intent to obtain a statement by this disguise"[106] cast doubt upon the manner in which the statement was elicited. This ruling was reversed by a majority in the Ontario Court of Appeal, Dubin J.A. dissenting. In the Supreme Court the accused's appeal was dismissed. Martland J. gave judgment for a majority of six, and Lamer J. delivered reasons concurring in the result; Estey J. dissented, Laskin C.J.C. concurring therein.

The basis of the accused's appeal lies in the dissenting opinion of Dubin J.A. in the Court of Appeal. In his view the rationale for the confessions rule included the reliability of an extra-judicial statement but also embraced other factors, especially protection of a suspect's right to remain silent:

> The rules respecting confessions and privilege against self-incrimination are related. I use that term in the sense of the right of a person under arrest to remain silent when questioned by law enforcement officers.[107]

Mr. Justice Dubin concluded that a trial judge has a discretion to exclude confessional statements because of the manner in which they were obtained.

To reach this conclusion in *Rothman*, Dubin J.A. undertook a rigorous re-examination of the rule in the *Ibrahim's Case*. He argued that Lord Sumner's celebrated statement of the rule was not exhaustive,[108] and found support for this view elsewhere in Lord Sumner's reasons:

> The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred. If, then, a learned judge, after anxious consideration of the authorities, decides in accordance with what is at any rate a "probable opinion" of the present law, if it is not actually the better opinion, it appears to their Lordships that his conduct is the very reverse of that "violation of the principles of natural justice" which has been said to be the ground for advising His Majesty's interference in a criminal matter. If, as appears on the line of authorities which the trial judge did not follow, the matter is one for the Judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shewn to have been exercised improperly.[109]

Moreover, Dubin J.A. demonstrates by quotation that Lord Sumner himself did not regard the voluntariness rule as an immutable or exhaustive rule of law:

> The appellant's objection was rested on the two bare facts that the statement was preceded by and made in answer to a question, and that the question was put by a person in authority and the

> answer given by a man in his custody. This ground, in so far as it is a ground at all, is a modern one. With the growth of a police force of the modern type, the point has frequently arisen, whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him apart altogether from fear of prejudice or hope of advantage inspired by a person in authority.
>
> It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. In an action of tort evidence of this kind could not be excluded when tendered against a tortfeasor, though a jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy.[110]

On the basis of this passage and that quoted immediately above, Dubin J.A. concluded that in Lord Sumner's view "the admissibility of a confession made to a person in authority was a matter of judicial discretion and that the rule adopted by him was a rule of policy."[111]

Having characterized the voluntariness principle as a rule of policy, Mr. Justice Dubin said that the policy itself was not fixed:

> If the sole basis of the exclusion were the danger that the confession may be untrue, then it would follow that once the truth of the statement had been established its admissibility would be automatic. However, in my respectful opinion, even where the truth of the confession is established, it will nevertheless be excluded if it were shown to have been obtained by force. The reason for excluding such a statement therefore cannot be assigned to the danger that it may be untrue. It will be excluded only by reason of policy.[112]

Among other factors to be weighed, Mr. Justice Dubin placed great emphasis upon the privilege against self-incrimination, as that concept may be equated with the suspect's right to remain silent. He stated that this right is "a fundamental principle in the administration of justice",[113] and he adopted the view that confessional evidence may be excluded in the exercise of a residual discretion "to consider the broad question of public policy in the administration of criminal justice".[114] In sum, therefore, the learned

justice decided that the admissibility of confessions is governed by an inexhaustive rule of policy, which itself is reinforced by a broad supervisory discretion in the trial judge to ensure the fair administration of justice.

Mr. Justice Dubin's opinion in *Rothman* must be seen not only as a dissent from the views of the majority in that case, but as a dissent from the interpretation of the confessions rule that has been set and followed by successive majorities in the Supreme Court of Canada. Mr. Justice Martland's opinion in *Rothman* epitomizes the orthodox view in that court. As we have seen, this interpretation construes Lord Sumner's statement of the rule as a positive rule that is not qualified by such broad considerations of policy as might be suggested by a liberal reading of the entire speech in *Ibrahim*. The narrowness of this view allows a relatively simple application of the rule.

First, it is necessary to ascertain that the suspect made a statement to a person in authority. If he did not, the statement may be admitted without proof of voluntariness. A person in authority is one whom the accused, at the time he made the statement, could reasonably believe to be in a position to affect the course of a prosecution against him. Accordingly, Martland J. agreed with the majority in the Ontario Court of Appeal that the disguised officer in *Rothman* was not a person in authority and that the statement was admissible. He stated quite specifically that the privilege against self-incrimination was a testimonial privilege and quite irrelevant to the issue in the case at hand. Thus it could be argued that the *ratio* of the majority's decision is limited to the test that should be applied in identifying a person in authority: the rest is *obiter*. However, as the majority in the Court of Appeal had done so, Mr. Justice Martland also examined the admissibility of the statement on the assumption that McKnight was a person in authority. These *dicta* provide a succinct catechism on the traditional view of voluntariness and *Ibrahim* in the Supreme Court.

If a statement has been given to a person in authority, the only remaining requirement for admissibility is proof of voluntariness at a *voir dire*. The trial judge found, as facts, that Constable McKnight made no inducement to the accused and that the statement made to him was given without fear of prejudice or hope of advantage. In Mr. Justice Martland's view these findings were sufficient to settle the issue of admissibility. As proof of

voluntariness is made by the absence of promises, threats or other inducements that might raise an apprehension of fear or hope in the accused, the findings of the trial judge demonstrated that the Crown "had satisfied the requirements for the admission of the confession as stated in the *Ibrahim* case".[115] Admissibility could not be affected by factors outside this restrictive concept of voluntariness. Thus Mr. Justice Martland ruled that the trial Judge erred in excluding the confession on the basis that the ruse to obtain a statement by an officer in disguise cast doubt upon the manner in which the statement was elicited:

> It was not, in my opinion, a sufficient basis for the refusal of the trial judge to receive the confession in evidence solely because he disapproved of the method by which it was obtained. The issue in the case was as to whether the confession was voluntary.[116]

In support of this conclusion Martland J. noted the frequency with which Lord Sumner's statement of the rule in *Ibrahim* had been cited by judges of the Supreme Court as the governing authority.[117] While acknowledging that difficulties of application may arise in the circumstances of any particular case, he held that Canadian law has remained faithful to a strict construction of Lord Sumner's formulation of the positive rule.

Mr. Justice Martland nevertheless acknowledged that a number of judgments had been delivered towards the end of the last decade in which the Supreme Court apparently created an exception to the orthodox interpretation of voluntariness, an exception that would allow a finding of involuntariness, and inadmissibility, in certain circumstances where there was no inducement by a person in authority. These are circumstances in which the statement cannot be said to be the utterance of an operating mind.

In *Horvath* v. *The Queen*[118] the accused made three so-called "soliloquies" that were recorded on tape. These statements were made when the interrogating officers were not in the room. In the second and third statements the accused made incriminating admissions, and following the third he signed a written confession. The trial Judge accepted the opinion given by a psychiatrist that the accused was in a light hypnotic state throughout the second soliloquy. He excluded evidence of this statement and of the third statement because it too was tainted by the hypnosis that vitiated the second.

Horvath's appeal to the Supreme Court of Canada was successful, though the division of opinions makes it rather difficult to discern the *ratio* upon which the result of the majority was reached. The bench consisted of seven judges. The minority of three, for whom Martland J. was the spokesman, agreed with the British Columbia Court of Appeal that the state of hypnosis had dissipated before the written confession was given. Moreover, the minority was of the opinion that the confession was admissible because there was no evidence that it had been obtained by fear of prejudice or hope of advantage induced by a person in authority: it was, therefore, legally voluntary.

For the majority, Spence and Estey JJ. delivered one opinion, Beetz and Pratte JJ. another. For the former, Spence J. wrote that the trial judge was correct to exclude the statements on the basis that he retained a substantial doubt as to their voluntariness after an examination of all the circumstances. He emphasized that the interrogating officer was highly skilled and that the accused had been brought to a state of "complete emotional disintegration"[119] during the course of the interview. Spence J. was clearly prepared to revise and expand the Court's traditional interpretation of the voluntariness rule. With reference to *R.* v. *Fitton*, he stated that

> the judgment of this Court in *Fitton* must be limited so as not to rule admissible statements made by the accused when not induced by hope of advantage or fear of prejudice but which are certainly not voluntary in the ordinary English sense of the word because they were induced by other circumstances such as existed in the present case.[120]

On this point, Beetz J., writing for himself and Pratte J., concurred. They were of the view that the rule in *Ibrahim* was judge-made and therefore, by definition, not exhaustive. They argued that the criterion of admissibility is the positive principle of voluntariness, and thus a finding of inadmissibility could be based on grounds other than evidence of promises or threats, hope or fear: the rule could be extended to cover any form of coercion in the circumstances of the case.

Following his review of *Horvath*, Mr. Justice Martland turned to *Ward* v. *The Queen*,[121] in which the Supreme Court was asked to rule on the admissibility of a confession given following a car accident. The accused was charged with criminal negligence in the operation of a motor vehicle. Only one car was involved in the

accident. The accused and his companion were discovered on the ground beside the wrecked vehicle. The accused told the person who came to his aid that he had been the driver of the car. When questioned by police officers some thirty minutes after the accident, and again at the hospital several hours later, he denied that he was the driver. He testified at the *voir dire* that he had no recollection of the events in question. The physician who attended him at the hospital stated that the accused was unable to explain what happened.

In delivering the unanimous judgment of the Supreme Court, Spence J. interpreted the voluntariness test as follows:

> In my view, there is a further investigation of whether the statements were freely and voluntarily made even if no hope of advantage or fear of prejudice could be found in consideration of the mental condition of the accused at the time he made the statements to determine whether or not the statements represented the operating mind of the accused.[122]

Accordingly, Mr. Justice Spence ruled that the exclusion of the statements given by Ward to the police was justified by a reasonable doubt that they were not the "utterances of an operating mind."[123]

Mr. Justice Martland concluded his review of *Horvath* and *Ward* thus:

> I have reviewed the authorities in this Court with a view to showing that, in determining the admissibility of a confession to a person in authority, the Court is not immediately concerned with the truth or reliability of the statement made by the accused, but with the question as to whether the statement he has made was free and voluntary, within the stated rules and whether the confession was the utterance of an operating mind.[124]

This conclusion summarizes the position of the majority in the Supreme Court in *Rothman*. In this position, however, there apparently remains some ambiguity as to the effect of *Horvath* and *Ward*. It is not clear whether the issue of capacity is construed by Mr. Justice Martland as a caveat to the traditional interpretation of voluntariness or whether it is a factor that affects the burden of proof.[125]

Mr. Justice Martland's opinion in *Rothman* concludes with a discussion of the Supreme Court's decision in *Alward & Mooney*,[126] and in it he seeks to rebut the proposition that the Court adopted a new rule on confessions in that case. The statement at issue there was given after one police officer falsely said to another, in the presence of the accused, that the victim of the attack with which they were charged, had regained consciousness and would be able to identify his attackers. The Supreme Court affirmed the admissibility of the statement, and in no way suggested that it could have been excluded solely because it was procured by a deception. In reaching its result, the Court adopted a statement made by Limerick J.A. in the court below, and therein lies the ambiguity of the judgment:

> The true test, therefore, is did the evidence adduced by the Crown establish that nothing, said or done by any person in authority, could have induced the accused to make a statement which was or might be untrue because thereof. The Crown met that test.[127]

It has indeed been argued that this statement substitutes the reliability rationale for voluntariness as the rule governing the admissibility of confessions. Martland J. denied that any such revision of the traditional rule could have been accomplished by an incidental quotation from the judgment of the lower Court. In this he is undoubtedly correct. He argued that the judgment in *Alward & Mooney* is perfectly consistent with the traditional interpretation of the *Ibrahim* rule as established by the Supreme Court in *Boudreau*,[128] *Fitton*[129] and other cases. According to this view, therefore, what is significant about *Alward & Mooney* is not only that it condones trickery and deception, but that it reflects in plain language the close association between the reliability rationale and the strict interpretation of *Ibrahim*. Admittedly, that association is made indirectly, but to date it remains the only rationale positively adopted by a majority of the Supreme Court. Paradoxically, the opinion of the Court in *Alward & Mooney* was written by Spence J., who evidently held rather different views when writing in *Horvath* and *Ward*.

With the exceptions of *Horvath* and *Ward*, the majority jurisprudence on confessions in the Supreme Court is generally consistent, but it is far from unanimous. Indeed, as Mr. Justice Martland's opinion in *Rothman* epitomizes the traditional view, the dissenting opinion delivered by Estey J. reveals a deep division in

the Supreme Court with respect to the fundamental purposes of the exclusionary rule in the admissibility of confessional evidence. Prompted perhaps by the rigour of Dubin J.A.'s dissent in the Court below, that opinion also represents the strongest plea to date for a reconsideration of the confessions rule according to first principles. It is the culmination of such initiatives undertaken through the last decade by various members of the Court, beginning with the dissents in *R.* v. *Wray*, and it too deserves extensive review.

It should be noted at the beginning that Mr. Justice Estey confined his reasons to the facts in *Rothman*. He states explicitly that his opinion does not apply to cases in which evidence is obtained by means other than questioning, and that it only covers instances in which an accused has told a person in authority that he does not wish to make a statement. In these circumstances, "voluntariness" must be given a more expansive interpretation than it would receive under the majority's analysis of Lord Sumner's statement of the rule in *Ibrahim*:

> To be voluntary a statement must be volunteered by the speaker in the sense that the statement must be the product of a conscious *volens* on the part of the speaker. The *volens* must relate not only to the mechanics of speaking, that is the articulation of the ideas of the speaker. Where the speaker has, as here, already refused to give a statement to the authorities, the test of voluntariness must include an appreciation of the circumstances in which the statement is made, including an awareness that his statement is being 'volunteered' to a person in authority. To apply the rule otherwise in the circumstances we have here would not merely permit but would encourage the deliberate circumvention by the authority of the accused's announced exercise of his right not to give a statement to the authorities.[130]

Two questions arise immediately from a reading of this passage. What Canadian authorities support this view of voluntariness? What rationale supports Mr. Justice Estey's view of the rule?

With respect to the first question, Estey J. states that the two majority opinions in *Horvath* and the Court's decision in *Ward* conclusively establish one proposition: Lord Sumner's statement of the rule is not limitative. Looking even further back in the jurisprudence of the Supreme Court, he cites the language of Rand J. in *R.* v. *Fitton* to the effect that "voluntariness" must be understood broadly as a capacity for intelligent volition:

> Even the word "voluntary" is open to question; in what case can it be said that the statement is not voluntary in the sense that is the expression of a choice, that it is willed to be made? But it is the character of the influence of idea or feeling behind that act of willing and its source which the rule seizes upon.[131]

Mr. Justice Estey states that this more general interpretation of voluntariness was expressly adopted by the Supreme Court in *Ward* in the following language:

> [T]here is a further investigation of whether the statements were freely and voluntarily made even if no hope of advantage or fear of prejudice could be found in consideration of the mental condition of the accused at the time he made the statements to determine whether or not the statements represented the operating mind of the accused.[132]

According to this analysis, wilful deception and the subversion by persons in authority of an accused's declared choice to remain silent will vitiate the voluntariness of any statement procured as a result. Thus it might be argued that the sole point of division between the majority and the minority in *Rothman* is that the latter would adopt an objective test of "a person in authority" in instances where the accused had refused to make a statement.

But, just as his interpretation of voluntariness is broader than that of the majority, Mr. Justice Estey's view of the rationale for the rule extends beyond evidentiary reliability:

> The rules of evidence in criminal law, and indeed in civil law, are all concerned with relevancy, reliability and fairness as well as other considerations such as the reasonable economy and efficiency of trial. The rules with reference to confessions have an additional element, namely the concern of the public for the integrity of the system of the administration of justice. If the reliability of an accused's statements were the only consideration in determining their admissibility the courts would not have adopted distinctive principles applicable only to statements to persons in authority and not to statements against interest generally. Reliability cannot be the ticket for admission because statements may have enough of the appearance of reliability to ensure reference to the trier of fact but still have been excluded by the confession standard.[133]

Chief among other reasons that may militate in favour of exclusion, Mr. Justice Estey suggests the possibility that the manner in which

a statement was obtained offends the right to remain silent and thus the integrity of the judicial system. The association of these two principles is developed clearly in the following passage, which begins with a quotation from the opinion delivered by Beetz J. in *Horvath*:

> Apart from the untrustworthiness of confessions extorted by threats or promises, other policy reasons have also been advanced to explain the rejection of confessions improperly obtained. But the basic reason is the accused's absolute right to remain silent either completely or partially and not to incriminate himself unless he wants to. This is why it is important that the accused understand what is at stake in the procedure.
>
> This additional consideration connotes a recognition by the courts since the earliest times of the desirability and indeed the necessity of adopting a system of principles in the administration of justice which will be accepted by and command the support of the community. Thus it can be said that confessions are not admissible where to admit them would bring the administration of justice into disrepute, or, to put it another way, would prejudice the public interest in the integrity of the judicial process.[134]

By this view, the exclusionary rule is a specific manifestation of what might be called the supervisory functions of a Court. Mr. Justice Estey finds this self-evident in the very terms of the rule:

> The [voluntariness rule] itself, of course, requires (and this is an absolute requisite) that the statement in fact be made to a person in authority; and if this qualification is not met, then it matters not whether the person is known to the accused to be one in authority. This is because the principle adopted for the protection of the integrity of the administration of justice is founded upon the realization that persons in authority, instrumentalities of the State, must observe certain basic rules. This is so for the practical reason that their very authority might, by promise or threat, express or implied, produce a statement whether or not the accused was truly willing to speak, and on occasion might bring about statements which are in whole or in part untrue. It is also necessary to adopt these basic rules for the higher reason that ethical precepts are a vital ingredient in a system of justice if it is to command the respect and support of the community it serves, particularly in a judicial structure which embraces the concept of the jury.[135]

As for the provenance of the voluntariness rule, Mr. Justice Estey considers that the issue is largely moot if the rule emanates "from

a desire on the part of the courts and the community to adopt policies which will ensure a fair, impartial and reputable administration of justice".[136] Testimonial reliability, truthfulness and concern for the right to remain silent are therefore ancillary or corollary considerations subsumed within this overriding rationale.

Due to the particular circumstances of the *Rothman* case, Estey J. nevertheless undertook an examination of the right to remain silent and its relation to the privilege against self-incrimination. The privilege, when invoked by an accused, signifies the right not to testify and thus to remain silent at trial.

> The right in the accused, in my view, to elect not to testify in the trial of a charge laid against him is one of the fundamental elements of our criminal jurisprudence ranking with the presumption of innocence and the onus on the Crown to establish guilt beyond a reasonable doubt according to law. His right to silence arises not because he is a witness but because he is an accused.[137]

Between this testimonial privilege and the accused's right to remain silent Mr. Justice Estey found a margin of overlap:

> It surely follows that if our law continues to recognize the right of an accused not to enter the witness box under compulsion, his indirect testimony in the form of out-of-court statements to a person in authority should not be admissible on a basis which, following his invocation of the right to silence, undermines or defeats the right not to testify.[138]

On this basis Mr. Justice Estey concludes that protection for the due administration of justice is the one rationale that will justify the exclusion of confessional statements in any circumstance. This discretion, however, is qualified by requirements that a causal relation be found between the impugned conduct and the statement at issue, and that the conduct be so shocking that exclusion is absolutely required to protect the integrity of the system of criminal justice. Considerations that bear upon the truthfulness of a statement or on the accused's right to remain silent are but factors to be assessed by the trial Judge in ensuring that the accused has a fair trial.

As noted above, Mr. Justice Lamer delivered a third opinion in *Rothman*. He concurred in the result reached by the majority, but it appears that he could not find support for his reasons among

other members of the Court. In a long and difficult opinion he attempted to reconcile the views espoused by the majority and the dissentients. In the process he proposed a fundamental reformulation of the confessions rule in these terms:

> 1. A statement made by the accused to a person in authority is inadmissible if tendered by the prosecution in a criminal proceeding unless the judge is satisfied beyond a reasonable doubt that nothing said or done by any person in authority could have induced the accused to make a statement which was or might be untrue.
>
> 2. A statement made by the accused to a person in authority and tendered by the prosecution in a criminal proceeding against him, though elicited under circumstances which would not render it inadmissible, shall nevertheless be excluded if its use in the proceedings would, as a result of what was said or done by any person in authority in eliciting the statement, bring the administration of justice into disrepute.[139]

The first of these propositions is grounded upon the view that in *Alward & Mooney* the Supreme Court replaced the traditional voluntariness rule with a test of reliability. The second plainly embraces the notion that a trial judge should have a residual discretion to exclude extra-judicial statements on the basis that the manner in which they were obtained requires their exclusion on grounds of public policy. This discretion, however, is qualified by requirement that a causal relation be found between the impugned conduct and the statement at issue, and that the conduct be so shocking that exclusion is necessary to protect the integrity of the system of criminal justice. This combination of propositions bears substantial similarity to recommendations made by the Law Reform Commission of Canada in its Report on Evidence.[140]

With reliance upon the reasons given for the Court by Dickson J. in *Marcoux & Solomon*,[141] Mr. Justice Lamer appears to disagree with the opinion, advanced in the Court below by Dubin J.A., that the right to remain silent and the privilege against self-incrimination are linked. As the privilege is perceived as a testimonial prerogative of a witness or an accused, it does not apply to non-testimonial statements. Quite certainly, the privilege did not signify, in Mr. Justice Lamer's view, an automatic rule of exclusion that serves to discipline the conduct of public authority. On the particular facts of *Rothman*, however, in which the accused expressly refused to make any statement, Mr. Justice Lamer was seemingly prepared to

acknowledge that the confessions rule in general was broad enough to accommodate aspects of a non-testimonial privilege:

> But I should like to add here, that I agree with Dubin J.A. that the rule is related to the privilege against self-incrimination for it is, in my opinion, predicated in part on the right an accused person enjoys not to be compelled to testify; but in part only, for the rule is also the result of a desire on the part of the judges to protect the system's respectability and, as a result, its very acceptance by its constituency.[142]

In this last, of course, Lamer J. discloses an affinity with the dissenting reasons of Estey J.

Mr. Justice Lamer's opinion is noteworthy for its attempt to reconcile two opposing views of the policy that supports the confessions rule. Moreover, he attempts to do so by the articulation of specific criteria. The first aspect of the rule proposed by him, which he says would be conclusive of most arguments on admissibility, shares the view that the confessions rule is a device by which to purge proffered evidence of risks that may compromise its suitability for adjudication by the trier of fact. Accordingly, the ambit of the rule would remain rather narrow. By contrast, of course, the second aspect of the rule would affirm a residual discretion to investigate the manner in which a confession was obtained and, where warranted, to discipline official misconduct by the exclusion of its fruits from the trial. In Mr. Justice Lamer's view this two-step test would provide a means to ensure that a criminal trial is a forum for the delivery of justice and not just a search for the truth.

III. Conclusion

Though *Rothman* is but one among scores of cases on the admissibility of confessional statements, it illustrates well the range of views on the topic in the Supreme Court of Canada. Even within the three opinions delivered in this case it is plain that some judges hold radically different interpretations of previous decisions

delivered by the Court, most notably in *Horvath* and *Ward*. The appearance of inconsistency in the Court's jurisprudence may to some extent be explained by a strict view of *stare decisis*. In many instances members of the Court have stated explicitly that their opinions must be restricted to the particular facts before them. However, a student of the Court's rulings can find in this only a rationalization, rather than an explanation; the doctrine of precedent cannot explain the wide divergence of opinions as to the scope and function of the confessions rule.

Indeed, one who studies the case-law of the Supreme Court since 1971 is obliged to conclude that the rule in *Ibrahim* has become more a riddle of words than a rule of principle. The differences between the majority and the dissentients in *Rothman*, though they may lie chiefly in *obiter dicta*, are not radically unlike those in *R.* v. *Wray*. In both cases the majority ruled that the admissibility of confessional statements is governed by technically-defined criteria; if those criteria are met, and the statement is relevant, the statement is admissible, subject only to the assessment of weight by the trier of fact. The issue of fairness arises only to the extent that statements prejudicial to the accused may be excluded from the trier of fact if their probative value is trifling. The minority in both cases adopted the view that the confessions rule is primarily a rule of policy and that its application must be circumscribed by principles of fairness that protect the integrity of the trial process and ensure the probity of the investigative conduct of persons in authority.

The divergence of philosophical opinion that is evident in *Wray* and *Rothman* forces difficult choices in policy with respect to the administration of criminal justice in Canada. When such choices have been made in the past the results have not always been consistent. For example, with the introduction of Bill S-33 the Government has proposed a codification of the general principles of admissibility set forth by Martland J. in *Wray*. By contrast, subsection 24(2) of the Charter allows for the vindication of constitutional rights by the exclusion of evidence obtained in violation thereof, and this in large measure is predicated upon the perception of the exclusionary power as a mechanism for controlling official misconduct. Other instances where the power to exclude evidence is available to supervise police activity can be found in the provisions of the *Criminal Code* that govern the admissibility of wiretap evidence[143] and in the provisions of the

Young Offenders Act on the admissibility of evidence obtained in violation of the procedural rules set down in that Act.[144] Nevertheless, it remains true that the exclusionary rules provided in the Constitution and in miscellaneous statutes are exceptions to the general rule in Canadian law that illegally or improperly obtained evidence is admissible.

PART TWO

Recommendations for reform

I. Introductory recommendation

RECOMMENDATION

1. As proposed in Recommendations 2 through 14 inclusive, the Commission advocates the enactment of statutory rules to govern the questioning of suspects.

This recommendation enunciates the Commission's policy with respect to the law on the interrogation of suspects, and all subsequent recommendations flow from it.

The Commission takes the view that the law on extra-judicial statements consists of a procedural and an evidentiary dimension. The former comprises the manner in which statements are obtained and the latter describes the use to which statements may be put in a judicial proceeding. The two intersect on the issue of admissibility. The voluntariness rule descending from *Ibrahim* v. *The King*,[145] being a rule of evidence for the admissibility of a species of hearsay, seeks only to distinguish what is acceptable or unacceptable as proof in the determination of guilt or innocence. As interpreted by the Supreme Court of Canada, it affords no general mandate for judicial supervision of the manner in which law-enforcement agencies obtain extra-judicial statements, except to the extent that the rule demands proof that the statement was not procured through hope of advantage or fear of prejudice induced by a person in authority. The Commission, however, believes that prescribed rules are required for supervision of the procedure for taking statements.

As for the form of such regulation, the Commission believes that rules for the questioning of suspects must have the force of law, and accordingly it recommends that such rules be statutory. Statutory authority can, of course, derive either from ordinary legislation or from subordinate legislation. As yet the Commission has no strong view as to the particular legislative text in which procedural rules ought to be included, but it is convinced that only ordinary legislation can satisfy the public interest in having clear and stable standards for the interrogation of suspects.[146] Neither administrative guidelines nor internal police manuals have the force of law and they can vary from jurisdiction to jurisdiction. Subordinate legislation, though it carries the weight of statutory authority, is practically an instrument of executive power, and thus lacks the prominence or the fixity of ordinary legislation. The Commission believes that striking a balance between the interest of the state in the protection of individual freedoms and in the conviction of criminal offenders is a sufficiently delicate and controversial business that primary responsibility for any rules governing the interrogation of suspects should lie with the highest rule-making body in our system of government. The construction of such rules and their modification should be open to the fullest public and political debate.

The police often do not know whether a statement they gather will be used as evidence in a prosecution, but the probability that it will rises in proportion to the grounds for belief that the statement's maker has committed a criminal offence. When a person is under arrest or detention, or when process has been commenced against him, there is obviously a substantial basis for suspecting him of that offence. This person is already an "accused" at law.[147] Accordingly, the peace officer who questions him is not seeking mere information. He seeks information related to his suspicion that the accused has committed an offence. He seeks evidence, and for practical purposes he is taking "indirect testimony".[148] As evidence for the persuasion of the trier of fact, this "testimony" may have a determining effect on the result of a contested prosecution. It may also determine the issue before any appearance in court if on the basis of his statement the accused elects to plead guilty.

At present, the law accords to the suspect none of the protection granted to the accused in court. An interrogation is not a public proceeding, especially when conducted in the absence of

counsel, and the record of such questioning would not bear comparison with a transcript. Moreover, there is no presumption of innocence at the interrogation of a suspect: there are at least reasonable grounds for believing that he is guilty of an offence. In fact, then, if not in law, an interrogation is an inquisition in which agents of the state seek the disclosure of evidence. Such a procedure is not inherently objectionable. If a suspect wants to give a statement or to answer questions, and knows the consequences that may flow from doing so, interrogation can only assist the administration of criminal justice.

In a courtroom the law places a premium upon the enlightened choice of the accused to make a statement. This is evident in section 469 of the *Criminal Code*[149] and in the various protections available at trial, including the absolute right to remain silent. No less than the accused in court, however, the suspect, the person detained in custody, or the person against whom process has issued, deserves the protection of the law. For these people, the legislative imposition of rules and procedures will afford the protection of publicity because Parliament will have declared standards expected of the police when questioning suspects. It will provide accountability because the state will risk the loss of its evidence if it fails to meet the standards prescribed. Moreover, the protections accruing from legislative intervention will avail both to suspects and to the Crown because compliance with fixed procedures will assure the courts and the public that the investigation and prosecution of crime are being conducted according to generally acceptable standards.

The foregoing reasons for legislative regulation of police interrogation are largely analytical rather than empirical. The Commission has not undertaken field-work to determine variations in investigative practices among different police forces, but it assumes that individual police officers will treat suspects with the appropriate measure of respect. Even without extensive empirical research, however, the Commission believes that there is more than enough justification for the view that the evidentiary standard of admissibility fails to provide the kind of guidance needed in the conduct of questioning by police officers.[150] This proposition is not, ultimately, capable of proof; nor, of course, is the converse. Indeed, the necessity for control of police-interrogation practices has always divided the legal community and public opinion at large, and it would be sheer fancy to think that general agreement

could be reached on the issue. For its part, however, the Commission has no hesitation in tendering recommendations for legislative regulation of police interrogation. In its opinion, voluminous case-law, the Ouimet Report[151], the Morand Report[152] and the McDonald Report,[153] to say nothing of the report and studies prepared for the Royal Commission on Criminal Procedure in the United Kingdom,[154] demonstrate the need for procedural control of police questioning.

Clauses 63 through 72 of Bill S-33, however, can be fairly described as a consolidation, if not a codification, of common-law rules that govern the admission of extra-judicial confessions tendered by the prosecution in penal cases. Among these provisions are specific initiatives that deviate from established precedent, including a shift in the Crown's burden from proof beyond reasonable doubt to satisfaction of the court on the balance of probabilities, the reversal of *DeClercq* v. *The Queen*,[155] and some modification of the rule in *R.* v. *St. Lawrence*.[156] The Commission, while it is in general agreement with the Bill's provisions on confessions, advocates some emendation of them; these proposals are set out below in Recommendations 13 and 14.

In wrestling with the rationale of the rule, a matter on which reams have been written, the Task Force on Uniform Rules of Evidence had this to say:

> There is ... the clear common law principle that the Crown must establish its case without the assistance of the accused, and the Task Force is of the opinion that it is this principle that is the primary rationale of the Confessions Rule today.[157]

The Commission accepts this statement. The rationale, of course, is the idea to which the rule gives shape and force.

The prosecution cannot compel the assistance of the accused in proving its case; nor, of course, can the police compel the assistance of a suspect or an accused in their investigations, except upon positive authority. If a suspect wishes to provide such assistance, he is free to do so, just as the authorities are free to ask for it. The Commission believes that no suspect should be asked to make discovery against himself without being warned of the consequences that may follow. That this should be so is, in our opinion, imperative, if not self-evident, where a suspect in custody

makes a statement to a police officer. There must be reasonable and probable grounds for a police officer to take a person into custody, and a person in custody is an accused, even if only in the constructive sense intended by section 448 of the *Criminal Code*.[158] In principle, however, there is no real distinction between the predicament of a suspect who is an accused at law and one who is not, as there will often be reasonable grounds for suspicion without a corresponding arrest or the issuance of process.

A police officer is the agent of the state and of the community who bears primary responsibility for investigating offences, apprehending suspects and seeing to the prosecution of persons accused of crime. As noted by the Task Force, the police officer is also an agent of the Crown. When he seeks to question a suspect, an adversarial process has commenced. Giving answers is making discovery. In the Commission's view the procedure for police questioning should be formally regulated by rules to ensure, first, that the accused gave his answers freely with an enlightened understanding of the consequences that might follow and, second, that an accurate record of the discovery is made.

There have, of course, been previous calls for rules to govern police-interrogation practices. In its review of the recommendations proposed by the Task Force on Uniform Rules of Evidence, the Uniform Law Conference called for a study of this question:

> Approved. Motion. Resolved that a study be made of legal rules to govern the conduct of the police in the taking of statements, with the intention that such rules would be appended to the Uniform Evidence Act [now Bill S-33].[159]

It should be obvious that the Commission agrees in principle with this resolution. Whether such rules should be appended to the Bill S-33 is not an issue on which we have a settled opinion, but we hope that the rules proposed in this Working Paper will provide a sound basis on which to develop legal rules such as those contemplated in the resolution approved by the Uniform Law Conference.

As envisaged by the Commission, the law on extra-judicial confessions would consist of general rules governing statements made to persons in authority and specific rules governing the interrogation of suspects by police officers. The former would

subsume the latter. Police officers are, of course, persons in authority; thus, where the specific rules are not applicable, statements made to these persons would remain subject to the general rules, as in instances of non-custodial questioning of a person who is not a suspect. The Commission proposes that the provisions on confessions in Bill S-33 provide the general regime, and that the specific regime consist of the rules made in the recommendations below. The former would be primarily a mechanism for testing evidentiary reliability, while the latter would be a procedural code regulating the questioning of suspects; they would meet on the question of admissibility.

II. Rules governing the questioning of suspects

Division I — Preliminary provisions

A. *Application*

RECOMMENDATION

2.(1) A police officer who has reasonable grounds to believe that a person is implicated in the commission of a criminal offence shall not question that person with respect to that offence or any other offence except in conformity with these rules.

(2) Notwithstanding the generality of the foregoing paragraph, these rules shall apply with respect to questioning of any person under arrest or detention; they shall also apply with respect to any person who is an accused within the meaning of section 448 of the *Criminal Code*, or against whom an information has been laid or an indictment preferred.

The general principle set out in paragraph 1 of this recommendation is that the scheme of rules proposed by the Commission should operate whenever a police officer seeks to question a person whom he has reasonable grounds to believe is implicated in the commission of a criminal offence. The touchstone of the scheme, therefore, is the quantum of suspicion. Paragraph 2 enumerates instances in which the requisite quantum can be assessed by objective standards.

The concept of "reasonable grounds" is well known in Anglo-Canadian law. As a criterion for the exercise of official authority in instances where prior authorization is not required, as in an arrest without warrant, its chief disadvantage is that it forces the judiciary to a retrospective assessment of a judgment made by a peace officer in infinitely varying circumstances. Though it lacks this element of prescriptive certainty, a criterion of reasonable grounds for the invocation of the scheme proposed by the Commission is markedly more exact, and therefore conducive to consistent observation by the police and interpretation by the courts, than the retrospective assessment of voluntariness that takes place upon a *voir dire* at common law.

The Commission has adopted a test of reasonable grounds on the premise that, if it be accepted that the Crown cannot compel the assistance of the accused in the preparation of its case and must be able to prove guilt beyond reasonable doubt without that assistance, a suspect should be informed of the legal jeopardy in which he finds himself, and of his right to remain silent, as soon as the investigating officer has a substantial basis for suspecting him of involvement in the commission of an offence. Where such grounds exist, questions put to a suspect in the furtherance of an investigation anticipate answers that may prove crucial to the resolution of a subsequent prosecution. It would be anomalous indeed if the scheme proposed here were to operate only where a suspect had been arrested or detained, or had been named in an information sworn against him or an indictment preferred against him. If, for convenience alone, we refer compendiously to the states described in paragraph 2 as "custody", it should be obvious that these states reflect only some formal action taken upon reasonable grounds for belief. It certainly does not follow that reasonable grounds cannot exist independently of such formal action as is reflected in arrest, detention or the issuance of process. The suspect's right to remain silent acquires its significance wherever there is a substantial quantum of suspicion against him, and for this reason the Commission proposed that the present scheme should operate whenever that quantum exists.

The second paragraph of this recommendation is predicated upon the language of section 10 of the *Canadian Charter of Rights and Freedoms* and it denotes compulsory restraint of the citizen. The latter part of this paragraph creates a category of constructive custody to include persons who may not be under physical arrest

or detention at the time of questioning and, indeed, persons who may not have been arrested or detained at some previous time. By definition, both actual and constructive custody are predicated upon the existence of reasonable grounds, and thus to the commencement of adversarial or accusatorial procedures.

As defined in Recommendation 2(2), custody lends itself readily to objective identification, and, as should be apparent from the language of the proposal, the recommendation is consistent with section 10 of the *Canadian Charter of Rights and Freedoms*. The definition of constructive custody simply deems accused persons to be beneficiaries of these rules.

The Commission is quite aware that "arrest and detention" is an ambiguous phrase in Canadian jurisprudence, especially the concept of detention. For the moment, however, and without prejudice to our work on arrest, we take the view that the wisest policy in describing physical custody is to adopt the language of the Charter and await elucidation of its terms in the courts. The chief question, of course, is whether there is some form of detention short of arrest that would give rise to the obligation imposed by section 10.

According to the Supreme Court of Canada in *R.* v. *Whitfield*,[160] arrest denotes a deprivation of the citizen's liberty, but it does not necessarily involve actual physical restraint. In *Chromiak* v. *The Queen*,[161] the Court decided that detention signifies compulsory restraint, and generally physical restraint, but that it does not necessarily include arrest. If these propositions are correct, it would seem that detention can only denote compulsory restraint after arrest. Detention short of arrest is therefore a juridical non-entity. Moreover, if the foregoing represents a true syllogism, it follows as a corollary that custody[162] and detention are identical. But is it a true syllogism?

At least one thing is clear from *Whitfield* and *Chromiak*: arrest is the larger and inclusive category because detention does not necessarily embrace arrest. Indeed these cases explicitly hold that it cannot. One might infer that a deprivation of liberty is the same as compulsory restraint and that, therefore, arrest subsumes detention. On the main issue, however, one is left with the conclusion that, barring statutory exceptions, arrest precedes detention or that detention commences with arrest. In the result, the law does not enforce the rights of a suspect before his arrest.

This analysis poses problems, not the least of which are that it defies common sense, practical experience and the plain meaning of words. Police officers routinely stop citizens for investigative purposes without giving them a warning of their rights. This is commonly the case where citizens are stopped for questioning or for roadside checks of one sort or another.[163] In many instances the police do not have reasonable and probable grounds to suspect such persons of a criminal offence. To say that these persons have not been detained is simply a fiction.[164] Even in the absence of positive authority, it may be said that the law recognizes a power of detention before arrest if only because it provides no censure against the practice. The question of policy that arises here is whether the law's definition of detention should embrace all instances of detention in fact. This issue is obviously of immense practical importance to the police.

If detention is construed so as to include any kind of stop short of arrest, the obligations of the police under section 10 of the Charter and under the rules proposed here would arise early in any encounter with a citizen. This would be especially the case if the courts determine that a peace officer can lawfully detain a citizen without reasonable and probable grounds. Yet the imposition of a constitutional or statutory duty to warn in those circumstances would result in a legal and social absurdity: it would transform virtually every encounter between the citizen and the police into an adversarial or hostile relationship. This is undesirable in law and mistaken in fact. Such requirements upon the police would lead to subversion of relations between them and the public by providing for procedural protections that in many instances would be grossly disproportionate to the nature and cause of the detention.

At least with respect to custody as defined in Recommendation 2(2), the Commission supports an interpretation of detention that, barring statutory exceptions that sanction a power to stop, would view it as a state of compulsory restraint following arrest. We believe the case-law supports this interpretation. We wish only to allude to the definitional problem concerning detention because we feel that a Working Paper on the questioning of suspects is not the appropriate place in which to make substantive recommendations with respect to this matter. These terms will be analyzed in the courts, and further analysis will be undertaken by those in the Commission who are studying the law of arrest. In some respects, however, these remarks on arrest and detention mark a digression

because the central proposition advanced by the Commission in Recommendation 2 is clear: our scheme of rules would come into effect whenever a police officer has reasonable grounds to believe that a person is implicated in the commission of a criminal offence.

RECOMMENDATION

3. Except where there is any inconsistency between these rules and the provisions of the *Young Offenders Act*, these rules shall also apply to questioning by a peace officer of a suspect who is a young person.

Section 56 of the *Young Offenders Act*,[165] which has not yet been proclaimed in force, enacts rules to govern the admissibility of extra-judicial statements by young persons accused of crime. Subsection 56(1) provides:

> Subject to this section, the law relating to the admissibility of statements, made by persons accused of committing offences applies in respect of young persons.

Accordingly, if the rules proposed in this Working Paper should form the basis of legislative action for the regulation of the interrogation of suspects, and if Bill S-33 should become law, both would be incorporated by reference into the *Young Offenders Act*, and both would govern the admission of confessions by young persons. There is, in the Commission's view, no incompatibility between the rules proposed here and the provisions of section 56 in the *Young Offenders Act*. That section does, however, impose additional obligations upon the authorities who seek to question young persons. We believe that the greatest impact of our rules on these practices would concern the procedures set out in Recommendations 8 through 12.[166]

RECOMMENDATION

4. These rules shall not apply to statements that of themselves constitute the gravamen of an offence.

Although the issue has not been decided by the Supreme Court of Canada, lower courts have taken the position that a *voir dire* is not necessary where the statement in issue constitutes the gravamen of the offence charged. As expressed by Mr. Justice Martin of the Ontario Court of Appeal in *Stapleton* v. *The Queen*,

the rationale for this exception is that the voluntariness rule seeks only to regulate the admissibility of extra-judicial confessions that were made by the accused after the commission of an offence and tendered by the prosecution in proof of the charge.[167] The Commission agrees with this position.

B. *Interpretation*

RECOMMENDATION

5. The following definitions shall apply in the interpretation of these rules:

"suspect"	**means a person in respect of whom these rules apply according to Recommendations 2 and 3;**
"questioning"	**includes any utterance or gesture that is calculated to elicit, or is reasonably likely to elicit, a statement from a person with respect to the investigation of a criminal offence;**
"police officer"	**includes constables, persons appointed as peace officers under the *Customs Act*, the *Excise Act*, the *Fisheries Act* and the *National Defence Act*, or any agent thereof.**

"suspect"

See commentary under Recommendation 2.

"questioning"

This definition is restricted to utterances and gestures that are substantively linked to the investigation of any criminal offence.

Statements lie somewhere on a continuum between those that are unsought, truly spontaneous utterances and those that provide specific answers to questions posed. But what of the statement that is given by an accused when he is handed a transcript of things said by a witness or an accomplice, or the statement of an alleged robber when presented with photographs taken in the bank, or the statement given when the accused is confronted with his alleged

victim? Instances of express questioning by peace officers for the purpose of eliciting information or evidence about an offence are clear and present no definitional difficulty. Less clear, and indeed quite problematic, is the extent to which a definition of questioning should embrace "functional equivalents" to direct interrogation. This issue has arisen in the United States with respect to the application of the warnings required by the decision of the Supreme Court in *Miranda* v. *Arizona*.[168] The leading authority on this question is *Rhode Island* v. *Innis*, in which the Court adopted an expansive definition of interrogation:

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.[169]

The Commission agrees with this view of questioning. We have no hestitation in extending the definition of "questioning" to embrace gestures that are reasonably likely to provoke a statement from a suspect. In theory this extension is nothing but an adaptation of the concept of "assertive conduct" that figures in the so-called rule of adoptive admissions. Actions unaccompanied by words can provide a powerful constraint upon the *volens* of a suspect, especially a suspect in custody. Indeed, gestures that will induce confessional statements are commonplace, even if they fall short of physical abuse. While we agree with the Supreme Court of the United States that "the police surely cannot be held accountable for the unforseeable results of their words", we think that the

definition should be sufficiently flexible to capture both direct and indirect means of procuring statements.

We should point out that nothing in our recommendations would restrict the object of questioning to incriminating statements made by a suspect, and in this connection we maintain consistency with the decision of the Supreme Court of Canada in *Piché* v. *The Queen*.[170]

"police officer"

The Commission has restricted the application of this scheme of rules to "police officers". Though the definition is not exhaustive, our intention is to encompass peace officers whose principal responsibilities include enforcement of the criminal law. Further expansion of the scheme's application would impose a procedural burden of responsibility upon persons or agencies that is grossly disproportionate to their responsibility for the investigation and prosecution of crime.

Some compensation for the restrictive scope of the scheme can be found in the notion of agency set out in the latter part of the Commission's definition of "police officer". In common usage, agency denotes a relationship in which one actor performs the will of another. At common law, the rules of evidence governing the admissibility of extra-judicial statements already admit of this concept in circumstances where someone other than a person in authority is assimilated to a person in authority for purposes of administering the voluntariness rule. With respect to the definition of "police officers" proposed by the Commission, we would extend the responsibility for compliance to any person who, in the circumstances of the case, might be reasonably considered as acting on behalf or with the acquiescence of a police officer.

Division II — General rules

Division II of the Commission's recommendations sets forth substantive rules on the questioning of suspects by police officers. The general principle, contained in Recommendation 6, is that no suspect shall be questioned without a warning of his right to remain silent. To this requirement one specific refinement is added. Recommendation 7 stipulates that a warning in the form prescribed

by Recommendation 6 be given at the first reasonable opportunity to a suspect who makes a spontaneous statement, and that this statement be reduced to writing as soon as possible.

RECOMMENDATION

6. (1) A police officer who has reasonable grounds to believe that a person is implicated in the commission of a criminal offence shall not question that person with respect to that offence or any other offence under investigation, unless he has given that person a warning in the following terms:

> **You have a right to remain silent. Anything you say may be introduced as evidence in court. If you agree to make a statement or answer questions, you are free to exercise your right to remain silent at any time. Before you make a statement or answer any questions you may contact a lawyer.**

This warning shall be given orally and may also be given in writing.

(2) A warning need not be repeated if a warning has recently been given or in other circumstances where repetition would be self-evidently unnecessary.

At least until the proclamation of the *Canadian Charter of Rights and Freedoms*, the police were not obliged to issue a warning of any kind to persons whom they wished to question, although most police forces have done so as a matter of practice for many years. There was some uncertainty in the law on this question after the decision of the Supreme Court of Canada in *Gach* v. *The King*.[171] Mr. Justice Taschereau (as he then was) suggested in this case that a caution was a necessary condition for the admission of a confession, but in *Boudreau*[172] the Court later distinguished these remarks as *obiter dicta*, and ever since it has been settled law that the issuance of a warning of the right to remain silent is only one among the circumstances that a judge will assess in determining the voluntariness of a statement.

Sections 10 and 11 of the Charter require the police to inform persons who are arrested or detained, or charged with an offence, of certain constitutional rights, but no provision of the Charter obliges the police to issue a warning of the right to remain silent. It is, nevertheless, trite law that every citizen has an absolute right not to answer questions or make a statement unless some specific statutory authority allows the police to compel the disclosure of

information. Recommendation 6 would impose upon police officers a statutory duty to give a warning of the right to remain silent whenever they wish to question a suspect. As there is in fact no presumption of innocence where there is a suspicion of guilt, it seems a self-evident proposition of fairness that a suspect should be apprised of a right that has long been recognized at law. The Commission takes the view that the right to silence of a person suspected or accused of crime is as great, if not greater, than the right to contact a lawyer.

The purpose of Recommendation 6(2) is to avoid needless repetition of the warning required in the first paragraph. As understood by the Commission, repetition would be unnecessary where the required warning is fresh in the mind of the suspect, and the second paragraph of the recommendation attempts to reflect this view.

With respect to persons caught within the terms of Recommendation 2(2), the last sentence of the warning will for practical purposes be a reiteration of the warning required by subsection 10(b) of the Charter. For suspects to whom the scheme would apply solely by virtue of Recommendation 2(1), it may be argued that the Commission is advocating some expansion of the right to counsel as it presently exists in Canadian law. This is indeed the position taken here. It cannot, of course, be argued that a suspect does not have a right to contact a lawyer unless or until a statutory authority expressly vests him with it. Any citizen has the right to consult a lawyer. The value of the right, however, lies in the degree to which it can be enforced. Hence the novelty in the Commission's position on this matter is that, although Recommendation 13 would only sanction directly a failure to give the warning, it would effectively allow the denial of contact with a lawyer to be considered as a contravention of the rules.

RECOMMENDATION

7. Where a suspect makes a spontaneous statement in the presence of a police officer, the police officer shall, at the first reasonable opportunity, give a warning in the form required by Recommendation 6. The police officer shall then reduce the statement to writing as soon as possible in the circumstances.

A spontaneous statement is the purest form of admission. The procedure recommended here is self-explanatory.

RECOMMENDATION

8. Within a reasonable delay, and in any case not later than thirty days after the making of a statement, law-enforcement officers shall deliver to a suspect or his counsel an authentic copy of any written record or taped recording of answers or statements made by that suspect pursuant to [these rules].

No comment is necessary.

Division III — Recording procedures

A. *Field questioning*

RECOMMENDATION

9. Where a suspect is questioned in a place other than a police station or prison, a police officer in attendance shall, as soon as possible and to the fullest extent possible, make a record of all questions put and answers given. The record shall include a minute of the time at which questioning began and concluded, including a note of any interruptions in the questioning, of the place at which the questioning was conducted, of the identity of all persons present during the questioning, and of the time at which the record was made. Upon completion thereof, the officer who prepares the record shall sign it.

B. *Station-house questioning*

(1) Taped questioning

RECOMMENDATIONS

10. Questioning that takes place in a police station or prison shall be electronically recorded wherever feasible, either by audio-taping or by video-taping. At the commencement of such questioning, a police officer in attendance shall inform the suspect that the questioning is being electronically recorded. The police officer shall give a warning to the suspect in the form required by Recommendation 6. The police officer shall also state the time before commencing the questioning.

11. At the conclusion of taped questioning, a police officer in attendance shall state the date and time and then secure the tape in a safe place. The tape shall be accompanied by a certificate, signed by an officer in attendance, stating the identity of all persons present during the questioning and the time at which questioning began and ended.

(2) Questioning not taped

RECOMMENDATION

12. Where a suspect is questioned in a police station or prison, and the questioning is not electronically recorded, a police officer in attendance shall, as soon as possible and to the fullest extent possible, make a record of all questions put and answers given. The record shall include a minute of the time at which questioning began and concluded, as well as a note of any interruptions in the questioning, of the place at which the questioning was conducted, of the identity of all persons present during the questioning, and of the time at which the record was made. Upon completion thereof, the officer who prepares the record shall sign it.

In view of the powerful influence that confessional statements can have upon the course of a trial, and indeed upon the determination of guilt or innocence, it is imperative that the prosecution should present before the court a record that sets forth as completely and as accurately as possible the contents of a statement and the circumstances in which it was taken. At present the evidence adduced at the *voir dire* is often approximative and vague, and too often argument on the *voir dire* proceeds on the basis of assertions that simply cannot be corroborated. The objective of Recommendations 8 through 12 is to provide procedures that will facilitate the reconstruction of an interrogation. Such procedures will not only assist the courts and expedite the *voir dire*, but in large measure it should protect the police against unwarranted allegations of misconduct. One specific benefit of these procedures would be that an accurate record will reduce the number of disputes as to the identity of persons who should be called to testify at the *voir dire*. Similarly, although the incidence of deliberate corruptions of the record cannot be calculated, compliance with our procedures should minimize "verballing" and similar problems.

The procedures advocated in Division III are, admittedly, artifices for introducing an element of publicity, and therefore accountability, into interrogation procedures. The Commission hopes that these measures will dispel some of the suspicion that naturally attaches to investigative practices that are conducted in private. While we would not propose a requirement for corroboration in police interrogation, we believe that greater reliability would flow from compliance with the rules proposed in this part of our recommendations.

Division III incorporates three important distinctions: questioning of persons not suspected and questioning of suspects; field questioning and station-house questioning; taped or non-taped questioning. The axiom of these proposals, and indeed of the entire scheme, is that procedural obligations on the police should become increasingly onerous as one progresses from field questioning of a person not in custody to station-house interrogation of a suspect in custody. Thus, the operation of Division III can be summarized as follows:

- Questioning of persons who are not suspects is subject to the ordinary rules of admissibility, and not to the rules proposed in this Working Paper.
- Questioning of suspects is subject both to the ordinary rules and to the rules proposed in this Working Paper.
- Field questioning is covered by Recommendation 9, which requires the preparation of a thorough record of questions put, statements given and the attending circumstances.
- Station-house questioning ought to be electronically recorded wherever feasible.

Apart from the provisions on tape-recording, which are loosely based upon provisions of the *Model Code of Pre-Arraignment Procedure*, the Recommendations in Division III owe much to the Judges' Rules.

The scheme demonstrates a preference for electronic recording of station-house questioning, but does not require it. The provision of equipment will impose a significant capital burden upon law-enforcement agencies, and for this reason the Commission believes that it would be unreasonable, if not unconstitutional, to insist upon tape-recording. Nevertheless, we have drafted the provisions

in such a way that a judge on a *voir dire* may ask why it was not feasible for an interrogation to be taped, as, indeed, he may inquire into any other apparent non-compliance with the proposed rules. It is important to note in this regard that where statements are not taped the procedure in Recommendation 12 would apply.

The Commission has not investigated the logistical and scientific problems that may derive from tape-recording, and in particular it has not studied recording technology in order to gauge the risk of tampering or malfunction. We would, however, point out that, despite its dangers, tape-recording would mark a distinct improvement over the vagaries of oral testimony.[173] Not only will it enhance the court's ability to assess objectively the accuracy of the testimony and the credibility of witnessess, but it should facilitate the admission of statements in evidence. We foresee no difficulty in the production of a recording in evidence, subject only to satisfactory proof of continuity.

Division IV — Enforcement

RECOMMENDATION

13. The Commission recommends the enforcement of these rules by the following redrafting of clause 64 of Bill S-33:

> **64. (1) A statement, other than one to which paragraph 62(1)(*f*), (*g*), (*h*) or (*i*) applies, that is made by an accused to a person in authority is not admissible at the instance of the prosecution at a trial or preliminary inquiry unless the prosecution, in a *voir dire*, satisfies the court beyond a reasonable doubt that the statement was voluntary.**
>
> **(2) Notwithstanding the requirements for admissibility set forth in subsection (1), a statement taken from a suspect in contravention of [these rules] is not admissible at the instance of the prosecution at a trial or preliminary inquiry unless it is established that the contravention is merely a defect of form or a trifling irregularity of procedure.**

This recommendation consists of two parts. The first proposes that clause 64 of the Bill S-33 be styled as subclause 64(1) and that the burden of proof stipulated by the draft be amended so as to require proof beyond reasonable doubt rather than satisfaction on a balance of probabilities. The second part of the recommendation consists of subclause 64(2), which the Commission proposes as the mechanism for enforcing the scheme advocated in Recommendations 2 through 12.

It is apparent that both the Task Force and the Uniform Law Conference wavered considerably in fixing the standard required of the Crown in proving voluntariness. Indeed, several decisions on the matter were taken by both groups and in the course of their deliberations each had occasion to reverse itself.[174] The Commission has no hesitation in recommending that the burden should be that with which Canadian courts are now quite familiar, proof beyond reasonable doubt, and in doing so we endorse the arguments put forth by the final majority of the Task Force.[175]

Confessional evidence, if it is complete, is the best conceivable evidence in criminal cases, and, even if it consists only of partial admissions, it often raises the strength of the prosecution's case to proof beyond reasonable doubt. While it may be that the quantum of proof required for the admission of confession is exceptional by comparison with other instances where admissibility is in issue, proof of admissibility will generally be followed by proof and conviction on the charge; thus the inherent power of confessional statements justifies the higher standard. Some members of the Task Force opposed proof beyond reasonable doubt on the ground that it allows the courts an exclusionary discretion based solely upon the judge's appreciation of the facts, and they argued that it would invite unwarranted judicial interference with the investigative process.[176] Yet, to the extent that voluntariness is construed by the Supreme Court of Canada as being an absence of promises or threats that induce a statement, it seems obvious to us that a lower threshold of proof would only allow the admission of evidence with a greater measure of doubt. The practical result would be an inclusionary discretion and the reception of markedly less reliable evidence. Indeed, such a revision of the rule would effectively bar the courts from any supervision of the manner in which statements are taken. The Commission believes that diminishing the burden of proof would effectively strip the courts of their ability to preserve the integrity of the judicial process in so

far as judges would be obliged to put less reliable, but very damaging, evidence before the trier of fact. Hence we urge that the Crown's burden to prove voluntariness should remain at proof beyond reasonable doubt.

The Commission proposes a presumption of inadmissibility as the mechanism by which to enforce the rules proposed in Recommendations 2 through 12. As contemplated by the Commission, proof of compliance with these rules would normally suffice for the admission of a statement taken by a police officer when questioning a suspect. Correspondingly, the case against admission would strengthen proportionally with the failure to comply. Before commenting on the proposal for a presumption of inadmissibility, we would like to note briefly why we have adopted exclusion as the device for enforcement.

It is often said that exclusion protects the trier of fact from unreliable evidence, and we agree that statements should be rejected if it would be unsafe to weigh them in assessing the truth of any allegation of fact. But we do not accept that this is the sole purpose of exclusion any more than we believe that the sole purpose of a trial is to discover the truth. Rules for the exclusion of evidence are rules of policy, as was noted by Lord Sumner himself in *Ibrahim*.[177]

As we have said before, endless exegesis of the jurisprudence will not disclose any single, correct policy that justifies the exclusion of certain statements. We know, however, that exclusion is a sanction against the use of unacceptable evidence, whatever the justification may be. The danger of putting unreliable evidence before the trier of fact is only one justification for the sanction. Despite the conclusions of successive majorities in the Supreme Court of Canada, the Commission takes the view that the power to exclude admits of other grounds, and we would agree with Mr. Justice Estey's dissenting opinion in *Rothman* that the power ultimately springs from a judge's responsibility to ensure a fair trial and to protect the integrity of the judicial process.[178] These general terms, of course, have invited, and continue to invite, different and even opposing interpretations, but in our opinion they should afford a general mandate for judicial supervision of the manner in which evidence is obtained. Subsection 24(2) of the *Canadian Charter of Rights and Freedoms* now grants that mandate in constitutional matters, and we see no reason why it should not

apply to other questions involving the acquisition of evidence in the investigation of crime. With respect to confessional statements, this means that the power to exclude must be used where the police have compelled, or have attempted to compel, discovery by a suspect. The authority to exclude evidence under the Charter is directly tied to the exercise of police powers and the practice of police procedures. The Task Force on the Uniform Rules of Evidence argued that misconduct by the police ought to be punished by disciplinary, civil or even criminal process, and not by the exclusion of evidence, because exclusion would allow the accused to go free despite reliable evidence of guilt.[179] The Commission, however, shares the view of the Royal Commission on Criminal Procedure that the power to exclude must serve evidentiary and disciplinary functions at the same time:

> Where certain standards are set for the conduct of criminal investigations, citizens can expect, indeed they have a right, to be treated in accordance with those standards. If they are not so treated, then they should not be put at risk nor should the investigator gain an advantage. The courts have the responsibility for protecting the citizen's rights. The most appropriate way to do so in these circumstances is to remove from the investigator his source of advantage and from the accused the cause of his risk, that is to exclude the evidence. If this principle is applied, exclusion of good evidence irregularly obtained is the price to be paid for securing confidence in the rules of criminal procedure and ensuring that the public sees the system as fair.[180]

What remains, on these principles, is whether exclusion should be automatic or discretionary.

Recommendations 2 through 12 set forth rules for the conduct of police interrogation and, in the aggregate, they represent a code of standards. We believe that these standards should have the force of law and for this reason we have urged that they be included in ordinary legislation. The rules we propose are spare and economical, containing what in our view are only the essential elements of a workable scheme that will regulate the questioning of suspects. By virtue of this economy, the Commission is confident that a presumption of inadmissibility is the most efficacious instrument by which to uphold a code of such standards. We recognize, however, that a rule of automatic exclusion would make bad law if it did not admit of exceptions that fall outside its premises and objectives. Accordingly, statements obtained in

contravention of the proposed rules would be presumed inadmissible unless it was established that the contravention was a trifling irregularity or defect of form. The rule must allow that failure to comply may, upon careful analysis of the circumstances, be insignificant and comparatively harmless. The rules are themselves the criteria for exercising the exception to the presumption of inadmissibility. Careful evasion of the rules or negligent compliance with them will therefore not justify the invocation of this inclusionary exception. The rules seek to ensure a complete record of the circumstances of an interrogation and of any statement given. Non-compliance in small or large measure would subvert their purpose and must, of itself, weaken the case for admissibility. As we have said, however, only those breaches that by their nature and seriousness are substantive should be sanctioned by exclusion. If it be objected that the language of subclause 64(2) is too vague for practical application, we would observe that it is a form of words that would become increasingly familiar to the legal community with the evolution of the rules in the courts. With regard to the criterion of triviality and the burden of proof, the exclusionary rule proposed in Recommendation 13 has analogues in subsection 178.16(3) of the *Criminal Code* and in subsection 24(2) of the Charter respectively. In most instances the burden will fall upon the Crown to justify an exception to the rule of automatic exclusion, but the provision is drafted in such a fashion as would allow a judge to invoke the exception *proprio motu* on the basis of evidence adduced at the *voir dire*.

RECOMMENDATION

14. The Commission also recommends that clause 70 of Bill S-33 be redrafted as follows:

> **70. (1) Where an accused in making a statement was unaware that he was dealing with a person in authority, the statement shall be treated as having been made to a person other than a person in authority.**
>
> **(2) Notwithstanding subsection (1), a statement made to a police officer by a person who is in custody within the meaning of [Recommendation 2(2)] shall be treated as having been made to a**

police officer whether or not he was aware that he was dealing with a police officer.

Clause 70 of Bill S-33 (reproduced above as paragraph 70(1)) codifies the conclusion reached by a majority of the Supreme Court of Canada in *Rothman* v. *The Queen*.[181] The result of their reasoning was that a subjective test should be applied to determine who is a person in authority. The test that they adopted can be phrased in a single question of two parts: at the time of making the statement, did the accused know that the person to whom he was speaking was a person in authority, or might he have reasonably believed that person to be a person in authority? If, upon an assessment of all the circumstances, the judge answers this question in the affirmative, he must then apply the confessions rule to test the admissibility of the statement. In *Rothman* the majority concluded that the statement need not be proved voluntary because the person to whom it was given was not a person in authority according to the subjective test; it was admissible, without special proof, as a statement not made to a person in authority. For practical purposes, the effect of the decision was to condone trickery as an inducement to make a confession.

The Commission is not categorically opposed to the use of agents acting under cover or other artful techniques to advance a criminal investigation, and the rules that we recommend are intended to apply in circumstances where the suspect is questioned by a police officer who is readily identifiable as such. We do, however, object to the exploitation of deceptive practices against persons in custody, especially where such persons have been charged with an offence or have invoked their right to remain silent. A person in custody must be treated openly and fairly by the police, and the use of trickery against him is, in our view, incompatible with the rationale adopted by the Task Force on the Uniform Rules of Evidence, namely that the Crown cannot compel discovery by the accused. Those who do not share our view will object that the position of a person in custody who makes a statement to someone who, by objective standards, is not a person in authority, should be treated at law in the same way as the position of one who, by objective standards, was not speaking to a person in authority; accordingly, they will deny that the more appropriate analogy would be to the position of an accused in the dock. This is plainly a question of policy, a question of choice,[182]

and we adhere to the opinion that once a person is taken into custody all the essential elements of a prosecution are present. In our view, the law must impose measures to ensure that any statement given by a suspect is voluntary in the sense that it was given by conscious choice after a warning of the right to remain silent and with knowledge of the ramifications that may follow.

Division V — Concluding recommendation

15. The Commission recommends that a form be devised for the purpose of recording answers or a written statement. [See Appendix A.]

A comprehensive form must also be manageable. The form proposed here is designed to facilitate the work of the police and the courts, and we believe that it is amenable to all interrogation procedures without undue administrative burdens upon the police. Indeed, a conscientious police officer should have less difficulty in completing this form than in preparing an ordinary report.

Where any portion of an interrogation is electronically recorded, the attending officer or officers would advert to the recording in the body of the form.

PART THREE

Summary of recommendations

I. Introductory recommendation

1. As proposed in Recommendations 2 through 14 inclusive, the Commission advocates the enactment of statutory rules to govern the questioning of suspects.

II. Rules governing the questioning of suspects

Division I — Preliminary provisions

A. *Application*

2. (1) A police officer who has reasonable grounds to believe that a person is implicated in the commission of a criminal offence shall not question that person with respect to that offence or any other offence except in conformity with these rules.

(2) Notwithstanding the generality of the foregoing paragraph, these rules shall apply with respect to questioning of any person under arrest or detention; they shall also apply with respect to any person who is an accused within the meaning of section 448 of the *Criminal Code*, or against whom an information has been laid or an indictment preferred.

3. Except where there is any inconsistency between these rules and the provisions of the *Young Offenders Act*, these rules shall also

apply to questioning by a peace officer of a suspect who is a young person.

4. These rules shall not apply to statements that of themselves constitute the gravamen of an offence.

B. *Interpretation*

5. The following definitions shall apply in the interpretation of these rules:

"suspect"	**means a person in respect of whom these rules apply according to Recommendations 2 and 3;**
"questioning"	**includes any utterance or gesture that is calculated to elicit, or is reasonably likely to elicit, a statement from a person with respect to the investigation of a criminal offence;**
"police officer"	**includes constables, persons appointed as peace officers under the *Customs Act*, the *Excise Act*, the *Fisheries Act* and the *National Defence Act*, or any agent thereof.**

Division II — General rules

6. (1) A police officer who has reasonable grounds to believe that a person is implicated in the commission of a criminal offence shall not question that person with respect to that offence or any other offence under investigation, unless he has given that person a warning in the following terms:

> **You have a right to remain silent. Anything you say may be introduced as evidence in court. If you agree to make a statement or answer questions, you are free to exercise your right to remain silent at any time. Before you make a statement or answer any questions you may contact a lawyer.**

This warning shall be given orally and may also be given in writing.

(2) A warning need not be repeated if a warning has recently been given or in other circumstances where repetition would be self-evidently unnecessary.

7. Where a suspect makes a spontaneous statement in the presence of a police officer, the police officer shall, at the first reasonable opportunity, give a warning in the form required by Recommendation 6. The police officer shall then reduce the statement to writing as soon as possible in the circumstances.

8. Within a reasonable delay, and in any case not later than thirty days after the making of a statement, law-enforcement officers shall deliver to a suspect or his counsel an authentic copy of any written record or taped recording of answers or statements made by that suspect pursuant to [these rules].

Division III — Recording procedures

A. *Field questioning*

9. Where a suspect is questioned in a place other than a police station or prison, a police officer in attendance shall, as soon as possible and to the fullest extent possible, make a record of all questions put and answers given. The record shall include a minute of the time at which questioning began and concluded, including a note of any interruptions in the questioning, of the place at which the questioning was conducted, of the identity of all persons present during the questioning, and of the time at which the record was made. Upon completion thereof, the officer who prepares the record shall sign it.

B. *Station-house questioning*

(1) Taped questioning

10. Questioning that takes place in a police station or prison shall be electronically recorded wherever feasible, either by audio-taping or by video-taping. At the commencement of such questioning, a police officer in attendance shall inform the suspect that the questioning is being electronically recorded. The police officer shall give a warning to the suspect in the form required by Recommendation 6. The police officer shall also state the time before commencing the questioning.

11. At the conclusion of taped questioning, a police officer in attendance shall state the date and time and then secure the tape in a

safe place. The tape shall be accompanied by a certificate, signed by an officer in attendance, stating the identity of all persons present during the questioning and the time at which questioning began and ended.

(2) Questioning not taped

12. Where a suspect is questioned in a police station or prison, and the questioning is not electronically recorded, a police officer in attendance shall, as soon as possible and to the fullest extent possible, make a record of all questions put and answers given. The record shall include a minute of the time at which questioning began and concluded, as well as a note of any interruptions in the questioning, of the place at which the questioning was conducted, of the identity of all persons present during the questioning, and of the time at which the record was made. Upon completion thereof, the officer who prepares the record shall sign it.

Division IV — Enforcement

13. The Commission recommends the enforcement of these rules by the following redrafting of clause 64 of Bill S-33:

> **64. (1) A statement, other than one to which paragraph 62(1)(*f*), (*g*), (*h*) or (*i*) applies, that is made by an accused to a person in authority is not admissible at the instance of the prosecution at a trial or preliminary inquiry unless the prosecution, in a *voir dire*, satisfies the court beyond a reasonable doubt that the statement was voluntary.**
>
> **(2) Notwithstanding the requirements for admissibility set forth in subsection (1), a statement taken from a suspect in contravention of [these rules] is not admissible at the instance of the prosecution at a trial or preliminary inquiry unless it is established that the contravention is merely a defect of form or a trifling irregularity of procedure.**

14. The Commission also recommends that clause 70 of Bill S-33 be redrafted as follows:

> **70. (1) Where an accused in making a statement was unaware that he was dealing with a person in authority, the statement shall be treated as having been made to a person other than a person in authority.**
>
> **(2) Notwithstanding subsection (1), a statement made to a police officer by a person who is in custody within the meaning of [Recommendation 2(2)] shall be treated as having been made to a police officer whether or not he was aware that he was dealing with a police officer.**

Division V — Concluding recommendation

15. The Commission recommends that a form be devised for the purpose of recording answers or a written statement. [See Appendix A.]

Endnotes

Nota: This Working Paper states the matter at 1 September 1983

1. *Rice* v. *Connolly* [1966] 2 Q.B. 414, 419 (C.A.) *per* Lord Parker C.J.:

> It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place; short, of course, of arrest.

See also *R.* v. *Bonnycastle* [1969] 4 C.C.C. 198, 200-201 (B.C. C.A.); *R.* v. *Guthrie* [1982] 5 W.W.R. 385, 388-390 (Alta. C.A.).

2. *Walker* v. *The King* [1939] S.C.R. 214; *Marshall* v. *The Queen* [1961] S.C.R. 123. For further discussion see Henderson, "Statements Compelled By Statute" (1982) 24 Crim. L.Q. 176, 180-184.

The decision of the majority in *Moore* v. *The Queen* [1979] 1 S.C.R. 195 would seem to cast doubt upon the generality of the proposition stated in the text; it also appears to contradict settled jurisprudence. The reasons given by Spence J., speaking for the majority, support the following proposition: by virtue of his status as a peace officer and by virtue of the power granted under subs. 450(2) of the *Criminal Code*, R.S.C. 1970, c. C-34 (as am.), a constable who witnesses the commission of a summary-conviction offence has the power to arrest the offender if such action is necessary to establish his identity, and with this power is a concomitant power to compel identification. The offender's failure to provide identification in the circumstances justifies a conviction for wilful obstruction of a peace officer in the execution of his duties (s. 118, *Criminal Code*). Contrary to established jurisprudence, this conclusion creates a general power of interrogation for purposes of identification, albeit in limited circumstances, and thus a general liability for remaining silent. The power thereby created cannot be called a statutory power, even though it is purportedly inferred from statutory provisions. Accordingly, the decision of the majority effectively

creates a common-law duty of identification in circumstances similar to those in *Moore*. Paradoxically, Spence J. states (*supra*, 204) that the conclusion reached by the majority "in no way opposes or ignores the judgment of the Queen's Bench in *Rice* v. *Connolly* [*supra*, note 1]". How this can be is simply not explained in the judgment. If, indeed, Lord Parker's judgment in *Rice* v. *Connolly* substantiates a general common-law right to remain silent, it surely follows that the decision in *Moore* creates an exception to *Rice*, and therefore to the right, in the form of a power to compel identification in circumstances where a constable on duty witnesses the commission of an offence.

Whether the decision of the majority in *Moore* will have any enduring effect as a precedent remains to be determined. The reasons for that decision are, with respect, quite unclear; moreover, Spence J. stated that his conclusions were confined "to the actual circumstances which occurred" (*supra*, 203).

The minority in *Moore* reiterated the traditional position that is stated in the text: the police cannot compel answers to their questions unless a specific power recognized at law authorizes them to do so.

For further commentary on *Moore*, see Grant, "*Moore* v. *The Queen*: A Substantive, Procedural and Administrative Nightmare" (1979) 17 Osgoode Hall L.J. 459; Ewaschuk, "What's in a Name? The Right Against Self-Incrimination" (1979) 5 C.R. (3d) 307.

3. See *R.* v. *Dedman* (1981) 59 C.C.C. (2d) 97, 108-109 (Ont. C.A.) (appeal pending in the Supreme Court of Canada). Judicial and quasi-judicial officers similarly have no power to order an arrest solely for purposes of interrogation: *Chartier* v. *Attorney General of Québec* [1979] 2 S.C.R. 474.

4. See *Rothman* v. *The Queen* [1981] 1 S.C.R. 640, 653-656 *per* Estey J. (dissenting opinion), 683 *per* Lamer J. (concurring opinion).

5. See *Moore* v. *The Queen*, *supra*, note 2, 205 *per* Dickson J. (dissenting).

6. While a suspect's right to remain silent necessarily includes a right against self-incrimination, the "privilege against self-incrimination" is a term of art that signifies a testimonial right of an accused not to give oral testimony against himself in court. The right to remain silent, therefore, is a larger and inclusive concept, but it is not coterminous with the privilege. See, generally, Ratushny, *Self-*

Incrimination in the Canadian Criminal Process (Toronto: Carswell, 1979).

7. See *Ibrahim* v. *The King* [1914] A.C. 599, 610-614 (P.C.).

8. First introduced in Parliament in the Senate, 18 November 1982: *Debates of the Senate* (Hansard), 1st Sess., 32nd Parl., Vol. 128, No. 249, 5008. References are to the Bill as read for the first time. Relevant extracts from the Bill are reproduced *infra* as Appendix B.

   The Bill met with lively opposition in Committee. After several months of hearings, the Standing Senate Committee on Legal and Constitutional Affairs delivered an interim report in which it recommended reconsideration and further consultation before the Government submitted the Bill anew. At the time of writing, no further action has been taken on the Bill in Parliament. The Interim Report of the Committee, and the brief of the Canadian Bar Association, are published in Senate of Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs* (Hansard), 1st Sess., 32nd Parl., Vol. 128, 28 June 1983 (Issue No. 68).

9. The *Report of the Federal-Provincial Task Force on Uniform Rules of Evidence* was published commercially in 1982 by The Carswell Company Ltd., and references made herein are to pages as set out in that publication.

10. The standard Canadian monographs on the topic are Kaufman, *The Admissibility of Confessions*, 3rd ed. (Toronto: Carswell, 1979), Supplement (1983); Ratushny, *supra*, note 6.

11. *Supra*, note 7.

12. *Ibid.*, 609.

13. (1922) 63 S.C.R. 226.

14. See, *e.g.*, *Sankey* v. *The King* [1927] S.C.R. 436; *Thiffault* v. *The King* [1933] S.C.R. 509; *Gach* v. *The King* [1943] S.C.R. 250; *Boudreau* v. *The King* [1949] S.C.R. 262; *R.* v. *Murakami* [1951] S.C.R. 801; *R.* v. *Fitton* [1956] S.C.R. 958; *Marshall* v. *The Queen*, *supra*, note 2; *DeClercq* v. *The Queen* [1968] S.C.R. 902; *Piché* v. *The Queen* [1971] S.C.R. 23; *R.* v. *Wray* [1971] S.C.R. 272; *John* v. *The Queen* [1971] S.C.R. 781; *Powell* v. *The Queen* [1977] 1 S.C.R. 362; *R.* v. *Gauthier* [1977] 1 S.C.R. 441; *Boulet* v. *The Queen*

[1978] 1 S.C.R. 332; *Alward & Mooney* v. *The Queen* [1978] 1 S.C.R. 559; *Erven* v. *The Queen* [1979] 1 S.C.R. 926; *Horvath* v. *The Queen* [1979] 2 S.C.R. 376; *Ward* v. *The Queen* [1979] 2 S.C.R. 30; *Morris* v. *The Queen* [1979] 2 S.C.R. 1041; *Nagotcha* v. *The Queen* [1980] 1 S.C.R. 714; *Rothman* v. *The Queen*, *supra*, note 4; *Park* v. *The Queen* [1981] 2 S.C.R. 64; *Hobbins* v. *The Queen* [1982] 1 S.C.R. 553; *R.* v. *Turgeon* (1983) 33 C.R. (3d) 200 (S.C.C.).

15. The general rules of admissibility are set out in clause 22 of Bill S-33:

> 22. (1) Relevant evidence is admissible unless it is excluded pursuant to the *Canadian Charter of Rights and Freedoms*, this Act or any other Act or law, and evidence that is not relevant is not admissible.
>
> (2) The court may exclude evidence the admissibility of which is tenuous, the probative force of which is trifling in relation to the main issue and the admission of which would be gravely prejudicial to a party.

Subclause 22(2) is derived verbatim from the reasons given by Martland J. for the majority in *R.* v. *Wray*, *supra*, note 14, 293. See text, *infra*, under "The rationale for the rule".

16. For a general description of the procedure on the *voir dire*, see *Erven* v. *The Queen*, *supra*, note 14, *per* Dickson J.

17. *Criminal Code*, R.S.C. 1970, c. C-34, s. 470. See *R.* v. *Pearson* (1957) 25 C.R. 342 (Alta. S.C., App. Div.); *R.* v. *Sweezey* (1974) 20 C.C.C. (2d) 400 (Ont. C.A.); *R.* v. *Pickett* (1975) 28 C.C.C. (2d) 297 (Ont. C.A.).

18. *R.* v. *Gauthier*, *supra*, note 14. See also *R.* v. *Mulligan* (1955) 20 C.R. 269 (Ont. C.A.).

19. See *Hébert* v. *The Queen* [1955] S.C.R. 120; *Monette* v. *The Queen* [1956] S.C.R. 400. Failure to observe this principle may justify the declaration of a mistrial or provides grounds for appeal: see Kaufman, *supra*, note 10, 25-28, citing *R.* v. *Hamilton* (1978) 42 C.C.C. (2d) 110 (Qué. S.C.); *R.* v. *Armstrong* [1970] 1 C.C.C. 136 (N.S. S.C., App. Div.). See also *R.* v. *Rehn* (1980) 53 C.C.C. (2d) 360 (Alta. C.A.).

Proof of voluntariness at the *voir dire* may suffice for admission of a statement, but the Crown must introduce the statement afresh at the resumption of the principal proceedings (preliminary inquiry or

trial) and prove its voluntariness before the trier of fact: see, *e.g.*, *Reid* v. *The Queen* (1974) 20 C.C.C. (2d) 257 (C.M.A.C.).

20. *Piché* v. *The Queen*, *supra*, note 14. See also *Commissioners of Customs & Excise* v. *Harz & Power* [1967] 1 A.C. 760 (H.L.).

21. Statements made before a validly-constituted judicial or quasi-judicial body, acting within its jurisdiction, are also exempt from the voluntariness rule: *Boulet* v. *The Queen*, *supra*, note 14; *R.* v. *Mazerall* (1946) 86 C.C.C. 321 (Ont. C.A.): but see *R.* v. *Magdish, Bennett & Sweet* (1978) 41 C.C.C. (2d) 449 (Ont. H.C.). On the question of jursidiction, see *R.* v. *Clot (No. 2)* (1982) 69 C.C.C. (2d) 365 (Qué. S.C.); *R.* v. *Paonessa & Paquette* (1982) 66 C.C.C. (2d) 300 (Ont. C.A.). As this Working Paper is concerned solely with extra-judicial statements made in the interrogation of a suspect, judicial confessions are not considered here. For further discussion of the issue, see Kaufman, *supra*, note 10, ch. 15.

22. *Powell* v. *The Queen*, *supra*, note 14, *Erven* v. *The Queen*, *supra*, note 14, *per* Dickson J.; *Morris* v. *The Queen*, *supra*, note 14, *per* Spence J.

23. *Supra*, note 14, approving *R.* v. *Dietrich* (1970) 1 C.C.C. (2d) 49 (Ont. C.A.). Speaking for the Court, Dickson J. expressly refrained (at 75) from deciding whether such a waiver was an admission within the meaning of s. 582 of the *Criminal Code*, R.S.C. 1970, c. C-34, as had been held by the Alberta Court of Appeal in *R.* v. *Dhaliwal* (1980) 53 C.C.C. (2d) 158. His Lordship stated (at 70), however, that he was inclined to share the view advanced in *Dietrich* by Gale C.J.O. (*supra*, 58) that the right of waiver exists quite apart from the Code. In *Korponey* v. *Attorney General of Canada* [1982] 1 S.C.R. 41, 48-50, Lamer J., speaking for the Court, extrapolated from the principle in *Park* a general proposition that an accused can waive any procedural requirement that is enacted for his benefit.

24. *Ibid.*, 73.

25. *Stapleton* v. *The Queen* (1982) 26 C.R. (3d) 361 (Ont. C.A.); *Friesen* v. *The Queen* [1982] 2 W.W.R. 514 (Sask. Q.B.); *Zerebeski* v. *The Queen* (1982) 26 C.R. (3d) 365 (Sask. Q.B.). See also Hill, "Admissibility of Statements without a *Voir Dire*" (1982) 26 C.R. (3d) 368. Statements made at the time of the offence, or in close proximity thereto, may also be exempt from the voluntariness rule by virtue of the doctrine of *res gestae* (see *infra*), although such statements are qualitatively different from the utterances considered here because they do not constitute an offence.

26. See, *e.g.*, *R.* v. *Graham* [1974] S.C.R. 206; *R.* v. *Risby* [1978] 2 S.C.R. 139; *R.* v. *Spencer* (1973) 16 C.C.C. (2d) 29 (N.S. S.C., App. Div.); *R.* v. *Toulany* (1973) 16 C.C.C. (2d) 208 (N.S. S.C., App. Div.); *cf. Erven* v. *The Queen*, *supra*, note 14, *per* Dickson J. The inspiration for allowing such statements to be admitted for testimonial purposes, as well as original evidence, is the decision of the Privy Council in *Ratten* v. *The Queen* [1972] A.C. 378. See also *R.* v. *Mahoney* (1979) 50 C.C.C. (2d) 380, 392 (Ont. C.A.), *aff'd* [1982] 1 S.C.R. 834. Speaking for the Privy Council in *Ratten*, Lord Wilberforce said that statements caught by the doctrine of *res gestae* should be admissible as an exception to the hearsay rule on the basis that the circumstances in which they are made preclude the possibility of fabrication as concoction by the declarant; and that, he said, is the proper test of their admissibility (*supra*, 389).

Subclause 62(2) of Bill S-33 would prevent the defence from leading a "self-serving" statement through cross-examination if it is one that would be caught by para. 62(1)(*i*); the accused must testify. The Report of the Task Force explains this provision as follows (*supra*, note 9, 209-210):

> The Task Force unanimously recommends that an exception to the Hearsay Rule be enacted for contemporaneous statements. To qualify as contemporaneous, the statement must describe or explain the act or event and have been made contemporaneously with it. But a majority of the Task Force feels that the *Graham* and *Risby* cases allow a professional criminal in a possession case, to concoct an explanation of the illicit possession in anticipation of arrest, give it to the investigating police officer on apprehension, and later, at the trial, introduce the explanation through cross-examination of the officer. By this device the accused is able to introduce his explanation without taking the stand. In the Task Force's view, an accused's out-of-court statement in such circumstances is unlikely to be trustworthy, unless the accused testifies under oath and subject to cross-examination, in support of it.

Quaere: if a *res gestae* statement is genuinely reliable because there was no possibility of fabrication or concoction, what supervening criteria justify the disability imposed by subclause 62(2)? As drafted, that provision constitutes a presumption of fabrication, and "self-serving" would appear to embrace any statement of benefit to the accused. Moreover, despite assertions in the Report that would restrict subclause 62(2) to possession cases, the provision is simply not limited in that way. It would apply to any statement caught by para. 62(1)(*i*). See *R.* v. *Schwartz & Schwartz* (1978) 40 C.C.C. (2d) 161, 166-168 (N.S. S.C., App.Div.).

27. The learned author of *Wigmore on Evidence* (Chadbourn rev. 1976) (Toronto: Little, Brown and Company, 1976), Vol. VI, § 1747, took the view that spontaneous declarations were a separate exception to the hearsay rule. This position was denied in Canada (*e.g.*, *R.* v. *Leland* [1951] O.R. 12 (C.A.)) until the decision in *Ratten*, *supra*, note 26, but it is now accepted in Canada. This issue is developed in the Report of the Task Force, *supra*, note 9, 206-208.

28. *Supra*, note 14, 938-939. See also *R.* v. *Klippenstein* (1981) 57 C.C.C. (2d) 393 (Alta. C.A.).

29. The issue has never been faced as squarely in the Supreme Court as it was in the opinion delivered by Dickson J. in *Erven*. Upon a strict analysis of the case, however, these *dicta* by His Lordship cannot be construed as determinative (*contra*, Schrager, "Recent Developments in the Law Relating to Confessions" (1981) 26 McGill L.J. 435, 469-70). Dickson J. wrote for himself and three other members of the bench; Pratte and Beetz JJ. concurred in the result proposed, but did so "on narrower grounds". Ritchie J. and two others dissented. At common law, therefore, *R.* v. *Risby*, *supra*, note 24, and *R.* v. *Graham*, *supra*, note 26, remain operative. Nevertheless, it might be argued that these cases should be confined to instances of possession, thus leaving open the position taken by Dickson J. in *Erven*.

30. This, indeed, is currently the practice at common law: even if a statement that forms part of the *res gestae* need not be proved voluntary, a *voir dire* will first be held to ascertain that the statement does indeed form part of the *res gestae*: see *Ratten* v. *The Queen*, *supra*, note 26; *Erven* v. *The Queen*, *supra*, note 14, *per* Dickson J.

31. This is a general statement of principle that is consistent with the *dicta* of the Supreme Court in *Piché* v. *The Queen*, *supra*, note 14; *Powell* v. *The Queen*, *supra*, note 14; *Erven* v. *The Queen*, *supra*, note 14; *Morris* v. *The Queen*, *supra*, note 14; *Park* v. *The Queen*, *supra*, note 14. It would also appear to be the proper construction of clause 64 of Bill S-33, as there is nothing in that Bill to suggest otherwise.

    It should be noted in passing that the requirement of a *voir dire* does not necessarily imply guaranteed success on appeal from conviction if one is not held: such failure can be excused by a court of appeal through the application of subpara. 613(1)(b)(iii) of the *Criminal Code*, R.S.C. 1970, c. C-34: *Colpitts* v. *The Queen* [1965] S.C.R. 739. For further discussion of this issue, see, *e.g.*, *Powell*,

supra; *Erven*, *supra*; *Morris*, *supra*; *McFall* v. *The Queen* [1980] 1 S.C.R. 321. See also *Hébert* v. *The Queen*, *supra*, note 19. Indeed, it might be argued that as appellate courts enforce a broad requirement for a *voir dire*, they may also be inclined to greater use of this curative provision. See *R.* v. *Clarke* (1979) 48 C.C.C. (2d) 440, 449 (N.S. S.C., App. Div.); *R.* v. *Mota* (1979) 46 C.C.C. (2d) 373 (Ont. C.A.); *R.* v. *Nye* (1978) 24 N.B.R. (2d) 362 (N.B. S.C., App. Div.); *R.* v. *Mayer* (1976) 16 N.S.R. (2d) 404, 427 (N.S. S.C., App. Div.).

32. See *R.* v. *St. Lawrence* (1949) 93 C.C.C. 376 (Ont. H.C.); *R.* v. *Wray*, *supra*, note 14; *R.* v. *Coons* (1980) 51 C.C.C. (2d) 388 (B.C. C.A.).

33. See Report of the Task Force, *supra*, note 9, 164-166. Assertive conduct would therefore embrace the so-called "adoptive admissions" rule, deriving from *R.* v. *Christie* [1914] A.C. 545 (H.L.), in cases where there is evidence of positive or express adoption by the accused of the truth of a statement made in his presence by a person in authority: *Hubin* v. *The King* [1927] S.C.R. 442; *Stein* v. *The King* [1928] S.C.R. 553; *cf. R.* v. *Turvey (No. 2)* (1971) 15 C.R.N.S. 129 (N.S. S.C., App. Div.); *R.* v. *Baron & Wertman* (1976) 31 C.C.C. (2d) 525 (Ont. C.A.); *R.* v. *Pleich* (1980) 16 C.R. (3d) 194 (Ont. C.A.). Where the statement alleged to have been adopted was not made by a person in authority, or some other person deemed to be a person in authority, the voluntariness rule would have no application.

The rationale for receiving an expressly-adopted statement as testimonial evidence is sound, although there may be difficulties in discerning such express adoption as a question of fact. Much greater difficulty arises, however, where it is alleged that the accused's adoption of a statement is established by the silence. Strictly speaking, it is impossible to establish express adoption by mere silence. The admission for testimonial purposes of a statement made by another in the presence of an accused who remains mute is nothing but an imputation or presumption of adoption, and thus it is difficult to distinguish between this use of silence and its use as original evidence in order to demonstrate consciousness of guilt. Only in the first instance, however, would the adoption of the statement be subject to proof of voluntariness.

Whether silence is tendered as evidence of the adoption of a statement or as conduct evincing consciousness of guilt, there is an apparent contradiction between the right of an accused to remain silent and his liability to adverse inferences on the basis of his

silence. As might be suspected, this question has come before the courts on several occasions: see, *e.g.*, *R.* v. *Cripps* [1968] 3 C.C.C. 323 (B.C. C.A.); *R.* v. *Eden* [1970] 3 C.C.C. 280 (Ont. C.A.); *R.* v. *Govedarov, Dzambas, Popovic & Askov* (1974) 25 C.R.N.S. 1 (Ont. C.A.); *R.* v. *Robertson* (1975) 21 C.C.C. (2d) 385 (Ont. C.A.); *R.* v. *Hawke* (1975) 22 C.C.C. (2d) 19 (Ont. C.A.); *Taggart & Taggart* v. *The Queen* (1980) 13 C.R. (3d) 179 (Ont. C.A.); *R.* v. *Allen (No. 3)* (1979) 46 C.C.C. (2d) 553 (Ont. H.C.); *R.* v. *O'Leary & O'Leary* (1982) 1 C.C.C. (3d) 182 (N.B. C.A.). Much turns on the facts of each case and whether it would have been "reasonable" in the circumstances (see *Christie*, *supra*) for the accused to have responded to the statement. Accordingly, arrest or the issuance of a warning has sometimes been seized as a significant factor in this assessment.

For further discussion of this issue, see Ratushny, *supra*, note 10, 121-141.

34. See *R.* v. *Parnerkar (No. 2)* (1974) 17 C.C.C. (2d) 113, 126 (Sask. C.A.) *per* Culliton C.J.S. That the category remains open and flexible according to the facts of each case is now abundantly clear with the adoption of the subjective test in *Rothman* v. *The Queen*, *supra*, note 4. See also Cross, *Evidence*, 5th ed. (London: Butterworths, 1979), 541.

35. *R.* v. *Pettipiece* (1972) 7 C.C.C. (2d) 133 (B.C. C.A.). In *Deokinanan* v. *The Queen* [1969] 1 A.C. 20, 33 (P.C.) Viscount Dilhorne approved the following statement by Bain J. in *R.* v. *Todd* (1901) 4 C.C.C. 514, 526 (Man. K.B. *in banco*):

> A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him.

Although this test is to all appearances objective, the courts have always qualified this approach by taking the view that the accused must at least have been in a position reasonably to believe that his interlocutor was a person in authority. For a very clear statement of the matter, see *R.* v. *Berger* (1975) 27 C.C.C. (2d) 357, 386 (B.C. C.A.) *per* McIntyre J.A. (as he then was).

36. See, *e.g.*, *Phipson on Evidence*, Buzzard, May and Howard, eds., 13th ed. (London: Sweet and Maxwell, 1982), para. 22-18, pp. 427-428.

37. This, indeed, was described by the Task Force as "the better view": *supra*, note 9, 176. Although the Task Force favoured the

narrow test for a person in authority (*ibid.*), there is nothing in the definition proposed in Bill S-33 that would restrict its construction in this way. Nevertheless, it should be noted that, unlike the definition advanced in *Todd* (see note 35, *supra*), the words in clause 63 purport to link, in one person, authority over the accused and authority in the prosecutorial apparatus. It is submitted that this synthesis does not substantively differ from the proposition stated in the text at note 35, *supra*. Accordingly, the definition in the Bill would appear not to exclude, for example, complainants or informants. Note also that the *Young Offenders Act*, S.C. 1980-81-82, c. 110, will almost certainly embrace school principals and the like among persons in authority.

38. *E.g.*, *R.* v. *Thompson* [1893] 2 Q.B. 12 (C.C.R.); *Rimmer* v. *The Queen* (1969) 7 C.R.N.S. 361 (B.C. C.A.).

39. *E.g.*, *R.* v. *Fowler* (1981) 27 C.R. (3d) 232 (Nfld. C.A.); *R.* v. *Postman* (1977) 3 Alta. L.R. (2d) 524 (S.C., App. Div.); *R.* v. *Stewart* (1980) 54 C.C.C. (2d) 93 (Alta. C.A.); *R.* v. *Conkie* (1978) 39 C.C.C. (2d) 408 (Alta. S.C., App. Div.). It should be noted however, that it is comparatively rare for medical personnel to be considered persons in authority: *Perras* v. *The Queen* [1974] S.C.R. 659; *R.* v. *Warren* (1974) 24 C.R.N.S. 349 (N.S. S.C., App. Div.); *Vaillancourt* v. *The Queen* [1976] 1 S.C.R. 13, *aff'g* (1974) 16 C.C.C. (2d) 137 (Ont. C.A.); *R.* v. *Kematch & Campeau* (1979) 9 C.R. (3d) 331 (Sask. C.A.). See Kaufman, *supra*, note 10, 94-102; Schiffer, *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworths, 1978), 36-40.

40. *E.g.*, *R.* v. *Albrecht* [1966] 1 C.C.C. 281 (N.B. S.C., App. Div.); *R.* v. *Botfield* (1976) 32 C.R.N.S. 1 (B.C. C.A.); *cf. Loiselle* v. *The Queen* (1955) 21 C.R. 210 (Qué. Q.B., App. Side); *R.* v. *Wendland* (1970) 1 C.C.C. (2d) 382 (Sask. C.A.).

41. *E.g.*, *Rimmer* v. *The Queen*, *supra*, note 38; *Downey* v. *The Queen* (1976) 32 C.C.C. (2d) 511 (N.S. S.C., App. Div.).

42. There have been suggestions to the contrary: Kaufman, *supra*, note 10, 81; Freedman, "Admissions and Confessions" in Salhany & Carter, *Studies in Canadian Criminal Evidence* (Toronto: Butterworths, 1972), 118. This position would imply that there could be no person in authority without an inducement, and it would surely be erroneous to interpret Messrs. Kaufman and Freedman in this way.

43. It should be noted that a *voir dire* to determine voluntariness must also be held where the statement is made in the presence of a

person in authority but to another person. The person to whom the statement was made may be deemed to be a person in authority in such circumstances and any inducements held out to him may vitiate the admissibility of the statement, either because that person is himself considered a person in authority or because the inducement is imputed to the person in authority who is in attendance: see *R.* v. *Demenoff* [1964] 1 C.C.C. 118 (B.C. C.A.); *R.* v. *Letendre* (1976) 25 C.C.C. (2d) 180 (Man. C.A.).

44. *Supra*, note 4, 664; see Kaufman, *supra*, note 10, 81-82.

45. *Rothman* v. *The Queen*, *supra*, note 4; *R.* v. *Towler* [1969] 2 C.C.C. 335 (B.C. C.A.). See also *R.* v. *Pettipiece*, *supra*, note 35; *R.* v. *Clot (No.1)* (1982) 69 C.C.C. (2d) 349 (Qué. S.C.); *R.* v. *Clot (No.3)* (1982) 69 C.C.C. (2d) 367 (Qué. S.C.).

46. *R.* v. *McAloon* (1959) 124 C.C.C. 182 (Ont. C.A.), approved in *Chan Wei Keung* v. *The Queen* [1967] 2 A.C. 160 (P.C.).

47. This characterization of voluntariness rule is consistent with what can be called the orthodox jurisprudence of the Supreme Court: see, *e.g.*, *Boudreau* v. *The King*, *supra*, note 14; *R.* v. *Fitton*, *supra*, note 14; *DeClercq* v. *The Queen*, *supra*, note 14; *R.* v. *Wray*, *supra*, note 14; *Rothman* v. *The Queen*, *supra*, note 4. Nevertheless, an important line of cases differs from the orthodox view in that it does not view Lord Sumner's criteria of promises or threats as exhaustive. This expansive approach, which would imply, for example, a general criterion of oppression, appeared to find some favour with members of the Supreme Court in *Horvath* v. *The Queen*, *supra*, note 14 and *Ward* v. *The Queen*, *supra*, note 14. Following the Court's decision in *Rothman*, *supra*, note 4, however, it is clear at least at the time of writing that the orthodox test is current law; accordingly, that is the position stated by the Commission in this synopsis of the law. The divergent views of voluntariness clearly represent different philosophical perspectives on the function of the confessions rule and the further consideration of the matter can be found, *infra*, in the second section of this part.

    For an excellent analysis of the two approaches to voluntariness, see Del Buono, "Voluntariness and Confessions: A Question of Fact or Question of Law?" (1976) 19 Crim. L.Q. 100. See also Kaufman, *supra*, note 10, 106-112; Hutchinson & Withington, "*Horvath* v. *The Queen*: Reflections on the Doctrine of Confessions" (1980) 18 Osgoode Hall L.J. 146.

48. Consider the contrast between the notions of voluntariness in the

law of confessions and in the law under Part IV.1 of the *Criminal Code*, R.S.C. 1970, c. C-34, am. by S.C. 1973-74, c. 50 (as am.): *Goldman* v. *The Queen* (1979) 51 C.C.C. (2d) 1, 23-24 *per* McIntyre J., 4 *per* Laskin C.J.C. (dissenting); *Rosen* v. *The Queen* (1979) 51 C.C.C. 65, 75 *per* McIntyre J., 69-70 *per* Laskin C.J.C. (dissenting).

49. Subject, of course, to the caveat that the question of admissibility is itself a question of law or at best one of mixed fact and law: *R.* v. *Murakami*, *supra*, note 14; *cf. Hobbins* v. *The Queen*, *supra*, note 14 and *Hobbins* v. *The Queen* (1980) 54 C.C.C. (2d) 353 (Ont. C.A.); *R.* v. *Turgeon*, *supra*, note 14. See also Del Buono, *supra*, note 47.

50. *Supra*, note 14, 962.

51. See *R.* v. *Albrecht*, *supra*, note 40, 288; *R.* v. *Letendre* (1979) 7 C.R. (3d) 320 (B.C. C.A.).

52. *Cf. Commissioners of Customs & Excise* v. *Harz & Power*, *supra*, note 20; *Deokinanan* v. *The Queen*, *supra*, note 35; *R.* v. *Towler*, *supra*, note 45; *R.* v. *Kalashnikoff* (1981) 21 C.R. (3d) 296 (B.C. C.A.).

53. See *D.P.P.* v. *Ping Lin* [1976] A.C. 574 (H.L.).

54. This issue was canvassed by the Supreme Court in *Horvath* v. *The Queen*, *supra*, note 14 and *Hobbins* v. *The Queen*, *supra*, note 14: see also *R.* v. *Miller & Cockriell* (1975) 24 C.C.C. (2d) 401 (B.C. C.A.), *aff'd* [1977] 2 S.C.R. 680; *R.* v. *Conkie* (1978) 3 C.R. (3d) 7 (Alta. S.C., App. Div.); *R.* v. *Kalashnikoff*, *supra*, note 52.

55. *Hobbins* v. *The Queen*, *supra*, note 14. See also *R.* v. *Draskovic* (1971) 5 C.C.C. (2d) 186 (Ont. C.A.); *R.* v. *Berger*, *supra*, note 35; *R.* v. *Griffin* (1981) 59 C.C.C. (2d) 503 (Ont. H.C.); *Sawchyn* v. *The Queen* [1981] 5 W.W.R. 207 (Alta. C.A.).

56. See, *e.g.*, *R.* v. *Robertson*, *supra*, note 33; *R.* v. *Materi & Cherrille* [1977] 2 W.W.R. 728 (B.C. C.A.); *R.* v. *Puffer, McFall & Kizyma* (1976) 31 C.C.C. (2d) 81 (Man. C.A.).

57. *R.* v. *Wray*, *supra*, note 14; *cf. Hogan* v. *The Queen* [1975] 2 S.C.R. 574. See also *R.* v. *Demers* (1970) 13 C.R.N.S. 338 (Qué. Q.B.); *R.* v. *Letendre*, *supra*, note 43; *R.* v. *Settee* (1975) 29 C.R.N.S. 104 (Sask. C.A.); *R.* v. *Louison* (1975) 26 C.C.C. (2d) 266 (Sask. C.A.); *R.* v. *Turcotte* (1979) 9 C.R. (3d) 354 (Qué. S.C.); *R.* v. *Guérin & Pimparé* (1979) 14 C.R. (3d) 1 (Qué. S.C.); *Cayer* v.

The Queen; *Sullivan* v. *The Queen* (1980) 16 C.R. (3d) 387 (Qué. C.A.); *R.* v. *Morin* (1980) 64 C.C.C. (2d) 90 (Alta. C.A.); *R.* v. *Stefiuk* (1981) 23 C.R. (3d) 389 (Man. Cty. Ct.); *R.* v. *Dinardo* (1981) 61 C.C.C. (2d) 52 (Ont. Cty. Ct.); *R.* v. *Spearman* (1982) 70 C.C.C. (2d) 371 (B.C. C.A.); *R.* v. *Owen* (1983) 4 C.C.C. (3d) 538 (N.S. S.C., App. Div.).

The assertion in the text must admit of some qualification by virtue of s. 24 of the *Canadian Charter of Rights and Freedoms*, Part 1, Schedule B, *Canada Act 1982*, 1982, c.11 (U.K.) (hereinafter referred to as the *Canadian Charter of Rights and Freedoms*). It is appropriate to comment very briefly upon the relationship between the confessions rule and the exclusion of evidence under subs. 24(2) of the Charter. The two exclusionary principles are quite distinct. A finding of involuntariness does not necessarily follow from a constitutional violation; similarly, proof of involuntariness at law does not imply a constitutional violation. The facts of a given case may coincidentally justify exclusion under either authority, just as the rationale for this sanction may to some extent inform both the confessions rule and subs. 24(2) of the Charter. In law, however, they are quite different rules.

58. *Boudreau* v. *The King*, *supra*, note 14, distinguishing *Gach* v. *The King*, *supra*, note 14.

59. *E.g.*, *R.* v. *Robertson*, *supra*, note 31; *R.* v. *McLeod* (1968) 5 C.R.N.S. 101 (Ont. C.A.); *R.* v. *Frank* (1969) 8 C.R.N.S. 108 (B.C. C.A.); *R.* v. *King, Gallipeau & Jariett* (1974) 27 C.R.N.S. 303 (Ont. C.A.); *R.* v. *Allen (No. 3)* (1979) 46 C.C.C. (2d) 553 (Ont. H.C.); *Alward & Mooney* v. *The Queen*, *supra*, note 14.

60. See, *e.g.*, *R.* v. *Yensen* (1961) 36 C.R. 339 (Ont. H.C.); *R.* v. *Wilson* (1970) 11 C.R.N.S. 11 (B.C. C.A.); *R.* v. *R. (No. 1)* (1972) 9 C.C.C. (2d) 274 (Ont. Prov. Ct.); *R.* v. *M.* (1975) 22 C.C.C. (2d) 344 (Ont. H.C.). For further discussion, see Kaufman, *supra*, note 10, ch. 11. It should be noted that the interrogation of young persons will in the future be regulated in large measure by the *Young Offenders Act*, S.C. 1980-81-82, c. 110.

61. *Helpard* v. *The Queen* (1979) 10 C.R. (3d) 76 (N.S. App. Div.); *R.* v. *Turcotte*, *supra*, note 57.

62. *E.g.*, *R.* v. *Koszulap* (1974) 20 C.C.C. (2d) 193 (Ont. C.A.); *R.* v. *Precourt* (1977) 36 C.R.N.S. 150 (Ont. C.A.).

63. See *R.* v. *Demenoff*, *supra*, note 43; *R.* v. *Letendre*, *supra*, note 43.

64. The British Columbia Court of Appeal emphasized the requirement of a causal link between the inducement and the statement in *R.* v. *Jackson* (1977) 34 C.C.C. (2d) 35, where the alleged inducement by the police was an undertaking not to charge a possible co-accused. While the statement of principle is clear in *Jackson*, the Court found no offence to the concept of voluntariness, thus revealing the signal importance of the facts in each case.

65. See generally Kaufman, *supra*, note 10, ch. 8.

66. *Walker* v. *The King*, *supra*, note 2; *Marshall* v. *The Queen*, *supra*, note 2.

67. See, *e.g.*, *R.* v. *Fex* (1973) 14 C.C.C. (2d) 188 (Ont. C.A.); *R.* v. *Slopek* (1974) 21 C.C.C. (2d) 362 (Ont. C.A.); *contra*, *R.* v. *Smith* (1973) 15 C.C.C. (2d) 113 (Alta. S.C., App. Div.). See also Henderson, *supra*, note 2. Judicial compulsion is quite a different matter: see note 2, *supra*.

68. See Report of the Task Force, *supra*, note 9, 180.

69. *Ward* v. *The Queen*, *supra*, note 14, 40. See also the gloss on *Ward* set out in *Nagotcha* v. *The Queen*, *supra*, note 14, *per* Laskin C.J.C.

70. *R.* v. *Santinon* (1973) 11 C.C.C. (2d) 121 (B.C. C.A.), approved in *Nagotcha* v. *The Queen*, *supra*, note 14; *R.* v. *Richard* (1980) 56 C.C.C (2d) 129 (B.C. C.A.). For further discussion of this matter, see Henderson, "Mental Incapacity and the Admissibility of Statements" (1980) 23 Crim. L.Q. 62.

71. This was the position apparently taken by the Court in *Ward* v. *The Queen*, *supra*, note 14; *Nagotcha* v. *The Queen*, *supra*, note 14; *Rothman* v. *The Queen*, *supra*, note 4, 674-675. See also, *e.g.*, *R.* v. *Herodoutou & Boulangouris* (1978) 40 C.C.C. (2d) 470 (Ont. Cty. Ct.).

72. See *R.* v. *Santinon*, *supra*, note 70; *R.* v. *Schwartz* (1973) 13 C.C.C. (2d) 41 (Ont. C.A.); *R.* v. *Muise* (1974) 22 C.C.C. (2d) 487 (N.S. S.C., App. Div.).

73. See *McKenna* v. *The Queen* [1961] S.C.R. 660. The analogy with *non est factum* was invoked in the Québec Superior Court in circumstances where the accused was incompetent to understand the language of the interrogation: see *R.* v. *Hatzopoulos* (1980) 27 C.R. (3d) 56; *R.* v. *Torres* (1980) 27 C.R. (3d) 60.

74. See note 71, *supra*. See also, *e.g.*, *R.* v. *Deslauriers* (1979) 50 C.C.C. (2d) 572 (B.C. S.C.).

75. Having done so, the burden to prove voluntariness, and admissibility, would remain with the Crown.

The text of subclause 69(2) is this:

> (2) The prosecution is not required to establish that a statement referred to in subsection (1) should be considered to be that of the accused unless the accused has discharged an evidential burden with respect to his physical or mental condition when he made the statement.

76. Following the decision in *Horvath* v. *The Queen*, *supra*, note 14, it appeared that the Court had construed oppression as an independent element of the voluntariness rule but subsequent cases, especially *Rothman*, suggest that the Court intended no such expansion. The issue still appears to be alive, however, after *Hobbins* v. *The Queen*, *supra*, note 14, decided after *Rothman*.

Oppression is, of course, expressly recognized in England: Judges' Rules (Home Office Circular No. 89/1978), principle 1(e)). See *R.* v. *Fennell* (1881) 7 Q.B.D. 147; *Callis* v. *Gunn* [1964] 1 Q.B. 495; *R.* v. *Priestley* (1966) 50 Cr. App. R. 183 (C.C.A.); *R.* v. *Prager* [1972] 1 All E.R. 1114 (C.A.).

77. *E.g.*, *R.* v. *Demers*, *supra*, note 57; *R.* v. *Eaton* (1978) 39 C.C.C. (2d) 455 (Man. C.A.).

78. *E.g.*, *R.* v. *Koszulap*, *supra*, note 62.

79. See Report of the Task Force, *supra*, note 9, 180-183.

80. See *R.* v. *Thompson*, *supra*, note 38; *Monnette* v. *The Queen*, *supra*, note 19.

81. *Thiffault* v. *The King* [1933] S.C.R. 509. The rule is not restricted to persons in authority: *R.* v. *Wert* (1980) 12 C.R. (3d) 254 (B.C. C.A.). See also *R.* v. *Bloomfield, Cormier & Ettinger* (1973) 10 C.C.C. (2d) 398 (N.B. S.C., App. Div.); *R.* v. *Kacherowski* (1977) 37 C.C.C. (2d) 257 (Alta. S.C., App. Div.); *R.* v. *Precourt*, *supra*, note 62; *R.* v. *Conkie*, *supra*, note 39.

82. See *R.* v. *Chow, Tai & Limerick* (1979) 43 C.C.C. (2d) 215, 224 (B.C. C.A.); *R.* v. *Garfield* (1974) 21 C.C.C. (2d) 449 (C.M.A.C.). See also *R.* v. *Kacherowski*, *supra*, note 81.

83. See *R.* v. *Botfield*, *supra*, note 40; *R.* v. *Woodward* (1975) 23 C.C.C. (2d) 509 (Ont. C.A.).

84. See *R.* v. *Settee*, *supra*, note 57.

85. See Kaufman, *supra*, note 10, 38-41.

86. *E.g.*, *Mentenko* v. *The King* (1951) 12 C.R. 228 (Qué. K.B., App. Side); *R.* v. *Albrecht*, *supra*, note 38; *R.* v. *Pickett*, *supra*, note 16; *R.* v. *Precourt*, *supra*, note 62; *Ward* v. *The Queen*, *supra*, note 14; *Erven* v. *The Queen*, *supra*, note 14; *R.* v. *Hape* (1980) 61 C.C.C. (2d) 182 (Ont. C.A.); *R.* v. *Clow* (1982) 65 C.C.C. (2d) 407 (P.E.I. S.C., App. Div.).

87. This was the standard consolidated in *R.* v. *Thompson*, *supra*, note 80 and affirmed in *Ibrahim* v. *The King*, *supra*, note 7. Upon reading these cases, however, it is scarcely credible that the learned judges sitting on those appeals could have intended affirmative or satisfactory proof to be equated to mere proof upon probabilities. Even if they did, it would only make sense if this concept were accompanied by a broad exculsionary discretion.

88. In view of the traditional doctrine that an uncorroborated confession can suffice for conviction, this distinction is of capital importance. Indeed, without the higher standard, it would be theoretically possible to have a conviction upon probabilities. This result would be contrary to one of the fundamental rules in Anglo-Canadian criminal jurisprudence. It might, of course, be argued that with the lower burden a judge would exact a higher standard in cases where the statement provided all or most of the evidence. This surely is contrary to the need for certainty and exactitude in this area of the law. Moreover, it only affirms that the lower standard is tantamount to an inclusionary discretion, and one that is predicated upon fluctuating concepts of policy entertained by individual judges.

89. *Supra*, note 14.

90. *Supra*, note 4.

91. (1783) 1 Leach 263, 168 E.R. 234.

92. *Ibid.*

93. *Ibid.*, 263-264 (Leach), 234-235 (E.R.).

94. *Ibid.*, 264 (Leach), 235 (E.R.).

95. *Supra*, note 14.

96. *Supra*, note 32.

97. *Supra*, note 14, 287, quoting [1955] A.C. 197, 203 (P.C.).

98. *Noor Mohamed* v. *The King* [1949] A.C. 182 (P.C.).

99. *Supra*, note 14, 295.

100. *Ibid.*, 288.

101. *Supra*, note 32, 391.

102. *Supra*, note 14.

103. *Supra*, note 14, 279.

104. *Ibid.*, 280, quoting *R.* v. *Mazerall*, *supra*, note 21.

105. *Supra*, note 4, 660-661, submitted before the Ontario Court of Appeal and reproduced in the opinion of Martland J.

106. *Ibid.*, 661.

107. (1978) 42 C.C.C. (2d) 377, 386.

108. *Ibid.*, 385.

109. *Supra*, note 7, 614.

110. *Ibid.*, 610.

111. *Supra*, note 107, 384.

112. *Ibid.*, 385.

113. *Ibid.*, 389-390.

114. *Ibid.*, 386, quoting Freedman, *supra*, note 42.

115. *Supra*, note 4, 666.

116. *Ibid.*

117. *Ibid.*

118. *Supra*, note 14.

119. *Ibid.*, 400.

120. *Ibid.*, 408.

121. *Supra*, note 14.

122. *Ibid.*, 40.

123. *Ibid.*

124. *Supra*, note 4, 671-672.

125. The latter appears to be the position taken by the Court in *Nagotcha* v. *The Queen*, *supra*, note 14.

126. *Supra*, note 14.

127. (1976) 32 C.C.C. (2d) 416, 432 (N.B. S.C., App. Div.), quoted in the Supreme Court by Spence J., *supra*, note 14, 562.

128. *Supra*, note 14.

129. *Supra*, note 14.

130. *Supra*, note 4, 651.

131. *Supra*, note 14, 963.

132. *Ward*, *supra*, note 14, 40.

133. *Supra*, note 4, 646-647.

134. *Ibid.*, 649.

135. *Ibid.*, 650-651.

136. *Ibid.*, 652.

137. *Ibid.*, 653.

138. *Ibid.*, 654.

139. *Ibid.*, 696.

140. Law Reform Commission of Canada, *Evidence* (Ottawa: Information Canada, 1975). Mr. Justice Lamer was Vice-Chairman of the Commission when its Report on Evidence was published.

141. *Marcoux & Solomon* v. *The Queen* [1976] 1 S.C.R. 763.

142. *Supra*, note 4, 684.

143. R.S.C. 1970, c. C-34, subs. 178.16(3) (as am.).

144. S.C. 1980-81-82, c. 110, subs. 56(2).

145. *Supra*, note 7.

146. Law-reform agencies in Australia, England and the United States have endorsed this position.

Australia: Law Reform Commission (Commonwealth), *Criminal Investigation* (1975). The Commission's recommendations were substantially incorporated in the *Criminal Investigation Bill, 1977*, which was tabled but later died on the order paper. A similar bill, the *Criminal Investigation Bill, 1981*, was introduced in Parliament but it too died with the dissolution of Parliament before the recent election.

England: Royal Commission on Criminal Procedure, *Report*, Cmnd 8092 (1981). As a result of this Report, the Home Office released *Draft codes of practice for the treatment, questioning and identification of persons suspected of crime* (November, 1982). Codes of this kind would be promulgated by the Home Secretary under statutory authority, and they would thus not be instruments of ordinary legislation. Nevertheless, a comprehensive bill that covers many aspects of police powers and procedures, entitled the *Police and Criminal Evidence Bill*, was introduced in Parliament on 17 November 1982. At the time of writing, this bill had not been passed.

United States: American Law Institute, *Model Code of Pre-arraignment Procedure* (Washington, 1975). No state has yet adopted this code.

147. See *Criminal Code*, R.S.C. 1970, c. C-34, s. 448 (as am.).

148. See *Rothman* v. *The Queen*, *supra*, note 4, 654, *per* Estey J.; see also Ratushny, *supra*, note 10, 97.

149. R.S.C. 1970, c. C-34.

> 469. (1) When the evidence of the witnesses called on the part of the prosecution has been taken down and, where required by this Part, has been read, the justice shall address the accused as follows or to the like effect:
>
> Having heard the evidence, do you wish to say anything in answer to the charge? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour and nothing to fear from any threat that may have been held out to you to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you at your trial notwithstanding the promise or threat.

It should be noted, however, that the Government proposes the repeal of s. 469 by clause 200 of Bill S-33.

150. See Ratushny, *supra*, note 10, 191-254.

151. Committee on Corrections, *Report: Toward Unity, Criminal Justice and Corrections* (Ottawa: Information Canada, 1969).

152. Ontario, Royal Commission into Metropolitan Toronto Police Practices, *Report* (Toronto, 1976).

153. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law*, Second Report (Ottawa: Ministry of Supply and Services, 1981).

154. *Supra*, note 146.

155. *Supra*, note 14.

156. *Supra*, note 32.

157. *Supra*, note 9, 175.

158. R.S.C. 1970, c. C-34 (as am.).

159. *Supra*, note 9, 514 (Appendix 1).

160. [1970] S.C.R. 46.

161. [1980] 1 S.C.R. 471.

162. See *R.* v. *Biron* [1976] 2 S.C.R. 56, 77 *per* de Grandpré J., concurring.

163. In *R.* v. *Dedman*, *supra*, note 3, the Ontario Court of Appeal ruled that voluntary submission to the signals of a peace officer obviates any issue of compulsion, and that in such circumstances the question of detention does not arise. The case is, at the time of writing, on appeal before the Supreme Court of Canada.

164. This analysis, which was developed in preliminary versions of this Working Paper, was recently endorsed by Mr. Justice Tallis for a majority of the Saskatchewan Court of Appeal in *R.* v. *Therens* (1983) 33 C.R. (3d) 204, 222 (on appeal to the Supreme Court of Canada).

165. S.C. 1980-81-82, c.110.

166. See *infra*.

167. See text at note 25 and cases cited therein.

168. 384 U.S. 436 (1966).

169. 446 U.S. 291, 300-301 (1980) (footnotes omitted).

170. *Supra*, note 14.

171. *Supra*, note 14.

172. *Supra*, note 14.

173. For further discussion, see Williams, "The Authentication of Statements to the Police" [1979] Crim. L.R. 6; Great Britain, Home Office, Royal Commission on Criminal Procedure, *Police Interrogation: Tape Recording*, Research Study No. 8 (London: H.M.S.O., 1980).

174. *Supra*, note 9, 89-191; see also p. 513, paras. (x) and (y).

175. *Ibid.*, 190-191.

176. *Ibid.*

177. *Supra*, note 7, 610-611. See also subs. 178.16(2) of the *Criminal Code*, R.S.C. 1970, c. C-34 (as. am.).

178. *Supra*, note 4, 643-659, esp. 658-659.

179. *Supra*, note 9, 231.

180. *Supra*, note 146, para. 4.130, p. 115. In this passage the Commission summarizes arguments advanced by A. J. Ashworth in "Excluding Evidence as Protecting Rights" [1977] Crim. L.R. 723.

181. *Supra*, note 4.

182. See *ibid.*, 657 per Estey J., dissenting (Laskin C.J.C. concurring therein).

Appendix A

[See Recommendation 15]

RECORD OF STATEMENT

Name .....

Address .....

1. a) At the time of making this statement, was the person named above detained or in custody? .....(Yes/No)
   b) If yes, for what reason? .....
   .....

2. a) At the time of making this statement, was the person named above charged with the commission of a criminal offence? .....(Yes/No)
   b) If yes, specify offence, date and time of charge .....
   .....
   .....

3. If the person named above was not charged with a criminal offence or in custody, specify the reason for which that person was questioned .....
   .....

4. a) Did the person named above request the assistance of counsel? .....(Yes/No)
   b) Was counsel present at the time of questioning?
   .....(Yes/No)

Page .....

Statement of .....

Date .....

Page .....

Statement of .....

Date .....

Endorsement by peace officer(s)

Place(s) where questioning occurred .....
Time questioning began .....
Time questioning concluded .....
Interruptions in questioning .....
Officer(s) present .....
.....
.....
Lawyer present .....
Others present .....
Date .....

Signature(s) .....
.....
.....

Appendix B

The following clauses in Bill S-33 are relevant to the discussion in this Working Paper. All are extracted from Part III of the Bill, entitled "Rules of Admissibility".

I. The general rule

> **22.**(1) Relevant evidence is admissible unless it is excluded pursuant to the *Canadian Charter of Rights and Freedoms*, this Act or any other Act or law, and evidence that is not relevant is not admissible.
>
> (2) The court may exclude evidence the admissibility of which is tenuous, the probative force of which is trifling in relation to the main issue and the admission of which would be gravely prejudicial to a party.

II. Hearsay

A. *Exceptions where availability of declarant or testimony is immaterial*

> **62.**(1) The following statements are admissible to prove the truth of the matter asserted:
>
> [paras. (*a*) - (*e*) omitted]

(*f*) a statement as to the physical condition of the declarant at the time the statement was made, including a statement as to the duration but not as to the cause of that condition;

(*g*) a statement, made prior to the occurrence of a fact in issue, as to the state of mind or emotion of the declarant at the time the statement was made;

(*h*) a spontaneous statement made in direct reaction to a startling event perceived or apprehended by the declarant;

(*i*) a statement describing or explaining an event observed or an act performed by the declarant, made spontaneously at the time the event or act occurred;

[paras. (*j*) and (*k*) omitted]

B. *Statements of accused*

63. In this section and sections 64 to 70,

"person in authority" means a person having authority over the accused in relation to a criminal proceeding or a person who the accused could reasonably have believed had that authority;

"voluntary", in relation to a statement, means that the statement was not obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority.

64. A statement, other than one to which paragraph 62(1)(*f*), (*g*), (*h*) or (*i*) applies, that is made by an accused to a person in authority is not admis-

sible at the instance of the prosecution at a trial or preliminary inquiry unless the prosecution, in a *voir dire*, satisfies the court on a balance of probabilities that the statement was voluntary.

65. In a *voir dire* held under section 64, the accused shall not be questioned as to the truth of his statement by the court or any adverse party.

66. The fact that a statement was required to be made under compulsion of statute shall not be considered in the determination of whether the statement was voluntary.

67. In determining whether a statement was voluntary, the court may consider the contents of the statement.

68. The accused may make an admission that his statement was voluntary for the purpose of dispensing with a *voir dire*.

69.(1) A statement otherwise admissible under section 64 shall not be received in evidence where the physical or mental condition of the accused when he made the statement was such that it should not be considered to be his statement.

(2) The prosecution is not required to establish that a statement referred to in subsection (1) should be considered to be that of the accused unless the accused has discharged an evidential burden with respect to his physical or mental condition when he made the statement.

70. Where an accused in making a statement was unaware that he was dealing with a person in authority, the

statement shall be treated as having been made to a person other than a person in authority.

71. Where a statement is admitted in evidence at a preliminary inquiry, the evidence adduced by the prosecution at the *voir dire* on the admissibility of the statement shall, without further proof, form part of the evidence in the preliminary inquiry.

72. A statement ruled inadmissible under section 64 is not rendered admissible in whole or in part by the subsequent finding of confirmatory real evidence within the meaning of section 160, but evidence is admissible to show that the real evidence was found as a result of the statement or that the accused knew of the nature, location or condition of the real evidence.